The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 16 June 2015

Session 4

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JUSTICE COMMITTEE
21st Meeting 2015, Session 4

CONVENER

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

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*Jayne Baxter (Mid Scotland and Fife) (Lab)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*Gil Paterson (Clydebank and Milngavie) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Rhoda Grant (Highlands and Islands) (Lab)
Jenny Marra (North East Scotland) (Lab)
Michael Matheson (Cabinet Secretary for Justice)
Christina McKelvie (Hamilton, Larkhall and Stonehouse) (SNP)
Paul Wheelhouse (Minister for Community Safety and Legal Affairs)
Professor Craig White (Scottish Government)

CLERK TO THE COMMITTEE

Joanne Clinton

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Committee

Tuesday 16 June 2015

[The Convener opened the meeting at 09:31]

Apologies (Scotland) Bill: Stage 1

The Convener (Christine Grahame): Good morning. I welcome everyone to the Justice Committee's 21st meeting in 2015 and ask everyone to switch off mobile phones and other electronic devices, as they interfere with broadcasting even when they are switched to silent. No apologies have been received.

Item 1 is our second evidence session on the Apologies (Scotland) Bill, which is a member's bill that has been introduced by Margaret Mitchell. Standing orders prevent Margaret from being involved as a committee member in the scrutiny of her bill, but she can of course participate in evidence sessions as an ordinary member; that is why she has moved seats.

I welcome to the meeting the Minister for Community Safety and Legal Affairs, Paul Wheelhouse, and Scottish Government officials Professor Craig White, divisional clinical lead, healthcare quality and strategy directorate; Ria Phillips, civil law and legal system division; and Kathryn MacGregor, directorate for legal services. Good morning.

I understand that the minister would like to make a very short opening statement.

The Minister for Community Safety and Legal Affairs (Paul Wheelhouse): Just a short one. Thank you, convener. I thank the committee for inviting me to give evidence on the Apologies (Scotland) Bill.

The Scottish Government supports the aim of promoting and encouraging the giving of apologies by private and public bodies to achieve a better outcome for victims. However, a fine balance needs to be struck between promoting the general use of apologies in the public interest and protecting individuals' access to justice. We are concerned that the bill, as drafted, does not strike that balance.

Our concerns are detailed in the Government memorandum and have been raised directly with Ms Mitchell. In the main, they relate to the definition of "apology" and the application of the legislation, if enacted. In my view, evidential problems could arise if an apology is defined as including an admission of fault and fact. That concern appears to be shared by a number of key stakeholders, who have questioned whether "apology" should be defined in legislation at all and, if so, whether the proposed definition is too wide in scope. In considering how apologies could be put on a statutory footing, many consider section 2 of the Compensation Act 2006 to be a favourable alternative approach.

We also have concerns about the intended application to all civil proceedings with the exception of fatal accident inquiries and defamation actions. Our view is that, if the bill is to be progressed in its current form, consideration should be given to removing public inquiries, tribunals and arbitration proceedings from its scope.

The interaction between the provisions on the duty of candour in the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill and the Apologies (Scotland) Bill is relevant. Although it does not prevent an apology from being admissible in court, the intention of the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill is that any apology or other step that is taken in accordance with the duty of candour procedure cannot be taken by itself to be an admission of negligence or a breach of statutory duty. The Apologies (Scotland) Bill risks substantially undermining the duty of candour provisions. Moreover, in the health context, there is provision in legislation and guidance that encourages cultural changes to the giving of an apology.

All that raises a question about the policy justification for an apologies bill. We would, of course, welcome a change in culture that supports the effective giving of apologies but, due to the lack of relevant empirical evidence, we remain unconvinced that legislation of the kind that Margaret Mitchell proposes would deliver that outcome without creating inadvertent injustice.

Margaret Mitchell suggests that the bill will provide legal certainty. That is an admirable aim, but it should not be done at the cost of restricting access to justice for potential pursuers in actions for damages. There appears to be merit in putting the common law on a statutory footing similar to that in section 2 of the 2006 act, as that would raise awareness of the common-law position that an apology cannot in itself be used to prove liability, which may in turn encourage more apologies to be made.

I am grateful to the committee for providing me with an opportunity to give evidence on the bill. I hope that my statement has been helpful. I would be very happy to follow up the session with a written summary of the Scottish Government's concerns about the bill, if that would assist the committee.

The Convener: We will find out, minister. I invite questions from committee members.

Roderick Campbell (North East Fife) (SNP): Good morning, minister. That was a fairly comprehensive opening statement, but there is one matter that I do not think you touched on: the Scottish Human Rights Commission's argument that the apologies legislation might be important in relation to historical child abuse. Do you wish to comment on that?

Paul Wheelhouse: That is certainly a very important issue. I have discussed it with Margaret Mitchell, and we both agree that we wish to tackle historical child abuse and to help its survivors. The concern is that, in the absence of other forms of evidence, an apology or admission of wrongdoing on the part of an organisation will potentially be the only evidence other than the person's own testimony that might be relied on to prove what happened.

As has already been raised in evidence to the committee, some organisations have felt prevented from giving an apology in the past because of the role of the insurers, who might previously have said that giving an apology might constitute an admission of liability. That undermines the ability of organisations—which I will not name, for obvious reasons—that feel genuinely apologetic about what has happened on their watch and which wish to say so to those who have been affected. There might be a risk that they are not able to do that. There is still some uncertainty, which the committee may well pick up on, about the role of the legislation in relation to the insurance industry.

Roderick Campbell: On the issue of cultural change, Mr Adamson of the Scottish Human Rights Commission said that he did not think that the bill would be a panacea, although he suggested that it would be of assistance in helping to change the culture. Is there anything further that you can say on the eventual legislation impacting on cultural change?

Paul Wheelhouse: I reiterate a point that I made in my opening statement. I am very sympathetic to the aim that Margaret Mitchell is trying to achieve of effecting a cultural change. In public services, things go wrong in all sorts of aspects, and we have to admit that. It would be good if there was a culture in which people could genuinely apologise. Often, that is the only thing that people are looking for. They are not looking for compensation or anything else—they just want it to be recognised that wrong was done to them, and they want an apology.

We have a concern about the potential that, in giving an apology, we may remove access to justice for some individuals. The apology might be the only evidence or the key piece of evidence that might be admissible in court under the provisions of the 2006 act. It is still possible to use that evidence in a court case. Not having that ability could take away an important plank of a case for compensation that an individual could take up.

That could have an impact on those involved with historical child abuse, given the length of time that we are talking about in many cases. That abuse goes back to periods when the people concerned were very young. There will clearly be evidential difficulties for those affected by historical child abuse, and there is therefore a question as to whether the rights of the individual who is giving the apology are in a sense trumping the right for evidence to be provided and used in the courts on behalf of the person who has survived historical child abuse.

I hope that I have correctly picked up the point that Mr Campbell is making.

Roderick Campbell: Yes.

The Convener: He seems content.

Roderick Campbell: I am content. Thank you, minister.

The Convener: It is a good start to the day for us if Roddy Campbell is content.

Paul Wheelhouse: It is always a good test.

Elaine Murray (Dumfriesshire) (Lab): In your opening statement, you mentioned the Compensation Act 2006 and the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill, which I think was introduced just last week, with its proposed duty of candour. I presume that that would apply only to the health service, whereas the Apologies (Scotland) Bill has a wider application. Am I correct about that?

Paul Wheelhouse: That is correct. My understanding is that the duty of candour provisions would relate only to the healthcare sector.

Elaine Murray: You indicated that you have some concerns about the bill as it is drafted. Do you think that it is possible for the bill to be amended to take on board the points that you made? If so, how do you think that it should be amended? Would it be a case of amending the definition or of transposing some of the provisions of the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill into a more general bill?

Paul Wheelhouse: That is a good point. Professor White is here to deal with the detail of the duty of candour provisions but, in principle, they are based broadly on what is in the Compensation Act 2006. Therefore, a similar approach is being taken to tackling the issue of liability and how giving an apology will impact on

the liability or otherwise of individuals. I guess that it will be left to the courts to determine, taking into account all the evidence and the apology that has been given, whether the health professionals concerned are liable.

As I said, the approach to giving an apology under the duty of candour is aligned with that of the 2006 act, in that an apology that is given or another step that is taken in accordance with the duty of candour procedure cannot itself be used to prove liability but can be admissible in court. Given that we understand that one of the main reasons for the Apologies (Scotland) Bill is to enable apologies to be made more freely in the health sector, that suggests that a similar approach could be adopted here. That supports the view that legislation similar to section 2 of the 2006 act but going beyond health and covering other aspects of public services might be a more effective means of delivering the aims of the bill, which are entirely laudable and of which I am not in any way critical.

If the definition of "apology" that is provided in the bill remains as it is, we are of the view that apologies that are given in the context of the duty of candour should be excluded from the bill. If it is the Parliament's will that the bill should proceed to stage 2, we believe that one important change that should be made is that apologies that are given under the duty of candour in a health sector context should be removed from the scope of the bill.

Elaine Murray: If the bill were amended in the way that you suggest, do you feel that the same exceptions should apply? What do you think about the fact that the bill will not apply to fatal accident inquiries?

Paul Wheelhouse: We certainly believe that the exceptions should include public inquiries that are held under the Inquiries Act 2005, arbitration and tribunals. There is an issue as regards the potential impact on reserved tribunals, particularly if they go to appeal in the Court of Session. In that situation, they could fall under the remit of the bill, which we think would be unhelpful.

There are a number of issues with the coverage of the bill and the exceptions for which it provides, as well as some drafting issues, which we have already raised with Margaret Mitchell. I believe that those concerns have been shared, but we can come back to the committee in more detail if that would be helpful. A number of things could be done to the bill that would mean that we could support it, but we would have difficulty with it as it is drafted.

Elaine Murray: Do you have an issue with how the bill would interact with the General Medical Council's professional rules?

Paul Wheelhouse: I will bring in Professor White, because he is more of an expert on that issue.

Professor Craig White (Scottish Government): I understand that, at the committee's previous evidence session, concerns were expressed that information that was provided under the bill might be used as part of the GMC's regulatory and investigatory process. We considered that in relation to the drafting of the duty of candour procedure, in the context of not only disciplinary and regulatory processes but employment practice. There are issues that would need to be considered in the context of the legislation on the regulation of health professions, which, as you know, is a United Kingdom matter, but I understand that the GMC would be content to discuss addressing such issues through guidance for its members and its processes.

The Convener: Would that guidance apply to the Apologies (Scotland) Bill, as it will apply to the duty of candour in the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill?

Professor White: Yes.

Christian Allard (North East Scotland) (SNP): Good morning, minister.

On the point that has just been made, does that mean that, when we talk about regulators such as the GMC, we would not have a problem with reserved issues if the bill were enacted?

Paul Wheelhouse: That would be partly down to the drafting of the bill. The Compensation Act 2006 already applies in England and Wales. If a similar approach to defining and dealing with an apology were adopted in the bill, whereby, in effect, the common law would be put on a statutory footing, there would be no change in the legal position, but the legal position would be formalised and people would be given greater clarity on what was and what was not possible in relation to giving an apology. That might be helpful in providing a level playing field.

There are particular issues with reserved powers in relation to reserved tribunals. Although I am sure that Margaret Mitchell has done her best to take account of those, we do have a concern about the appeals that might go to the Court of Session. I do not know whether I have confused matters with my response to Mr Allard's question. Perhaps Professor White can come in on the issue, with the GMC in mind.

09:45

Professor White: The proposed duty of candour procedure relates to organisations providing health and social care in Scotland. It is clear that the focus is on the organisation,

although in reviewing an unintended or unexpected incident that results in harm, matters relating to individuals may be raised or reviewed. The proposals have been drafted very much in recognition of the fact that someone may wish to pursue a compensation claim; it will be explained to them that there is a regulatory procedure if they have concerns about the practice of a nurse or a doctor and they will be signposted to separate legal processes if they wish to seek compensation. The duty of candour procedure has been drafted with that in mind. It is an organisational duty, but in the course of dialogue, individuals who are affected by the harm outcomes that are defined might benefit from signposting to other established procedures, some of which would include those GMC, Nursing and Midwifery Council and other legal processes.

Christian Allard: That would address the point that insurance law is reserved. Is that the same with the GMC?

Paul Wheelhouse: Mr Allard is absolutely correct that we have concerns about insurance. I guess that there are different regulators and it is a different situation, but financial services are still reserved to the UK Government. We are not sure that the bill will alter the position whereby insurers have clauses in the insurance policies that people sign requiring that they do not give an apology. Therefore it would not necessarily put people in any better a position than they are in currently. They might have the impression that, because an apologies bill is coming in, it is okay to give an apology but then find that they will invalidate their insurance by giving an apology. That is a genuine concern. I am sure that it is not the intention of the bill, but we are concerned that the effect of the bill might be to create an expectation among the public that, for example, if a driver has an accident and gives an apology, that is okay, when in fact they might have invalidated their insurance by doing so. Our concern is about reserved and devolved issues, but it is also about whether the bill will have the desired effect. It could remove access to justice and make it more difficult for people, who might find that they are unable to pay the cost to the person with whom they had the accident because their insurance has been invalidated.

The Convener: Except that the evidence that we have had is that people say that they are sorry all the time. They might not even be at fault—they are just sorry that the accident happened. I do not know whether that makes much difference to what happens after motor accidents.

Paul Wheelhouse: I take that point.

The Convener: I want to raise with you another point about the definition of an apology. Under section 3(b), the apology can also contain a statement of fact. I do not know whether you addressed that in your very comprehensive statement. The statement of fact in relation to the act could be, “I’m sorry. I’m Genghis Khan,” or, “I hit the wife and killed her.” I think that that was the example that we had. Obviously, that would be a criminal matter anyway, but it could not be used. Another example would be, “I’m sorry. I didn’t stop at the traffic lights and ran into the back of the car.” That is more than just saying that you are sorry. Is there an issue there? Would it be helpful if that provision was taken out?

Paul Wheelhouse: It is certainly an area about which we have expressed some concern to Margaret Mitchell in the conversations that we have had. I have no doubt that Margaret has taken that on board. We are concerned about statements of fact being included as part of a protected statement, which creates a different situation. We believe that a potential injustice could arise in cases, such as cases of historical child abuse, where a statement of fact is the only means of demonstrating liability for the harm caused. That statement is protected and cannot be led in evidence as it is part of a statutory apology. If no other evidence of liability is available, a pursuer would be unable to succeed in an action for damages, which we contend cannot be a fair outcome.

In a case of historical child abuse, a survivor or a bereaved person might decide to seek damages in court for the harm that was the subject of the apology. They cannot rely on that apology and would have to find other evidence to support their claim. That might be extremely difficult, especially with the passage of time. We are concerned that survivors of historical abuse, who already face significant evidential hurdles when seeking to progress a court action, could inadvertently be prevented from taking forward a civil action. It is about removing that potential problem from the bill.

The Convener: And not only for historical abuse—cases such as that exist across the spectrum.

Paul Wheelhouse: Absolutely, and your other example about an accident was perfectly good.

The Convener: I am content now. Margaret, would you like to round up the questions?

Margaret Mitchell (Central Scotland) (Con): Good morning minister. I will press you a little more on the duty of candour, which will include an apology that is admissible. Have you sought directly the view of the Association of British Insurers on that proposal?

Paul Wheelhouse: Perhaps I can bring in Professor White, as he has such knowledge of the bill.

Professor White: I do not recall the ABI being one of the stakeholders that we consulted specifically, although we have consulted similar organisations. I will check and let the committee know.

Margaret Mitchell: Perhaps I can help you out; I have been in direct contact with the ABI. It is content not to comment on the Apologies (Scotland) Bill, which suggests that it is satisfied with it as it is. It has said that it reserves the right to comment on other legislation, and I thought that it was considering the duty of candour. Given the prescriptive nature of that duty, it may be that the apology and the cover that the Government seems to think it has introduced by incorporating section 2 of the Compensation Act 2006 might not cover the concerns of insurers. Under what circumstances do you envisage the bill complementing what the Government is trying to achieve with the duty of candour?

Paul Wheelhouse: I would be keen to consider what the insurance industry has said; we will obviously hear its view. A firm commitment that the bill will not damage the interests of people who are insured would be helpful to our deliberations when coming to a formal position on the bill. We are still waiting to interact with Margaret Mitchell on some of the detail before we take a firm stance on that issue. Any show of willingness on the part of the insurance industry not to invalidate insurance on the basis of the bill would be helpful. Until I have seen the detail, it is difficult to comment further, but I would welcome the engagement of the insurance industry.

The Convener: It may be that Professor White wants to comment on that, cabinet secretary.

Paul Wheelhouse: Certainly.

Professor White: Many elements of the duty of candour reflect the current approach of a number of NHS boards on disclosure, apology, review, learning and improvement. To my knowledge, there have been no negative consequences on insurance arrangements, where that approach has been applied within the NHS. Not only are there apologies; often, statements of fact are made about significant adverse event reviews that have been undertaken. In some cases, statements of fault are made as a result of that existing process.

Margaret Mitchell: That point is pretty fundamental and will shape opinions on the bill and the duty of candour provision. Section 2 of the Compensation Act 2006 states that

"An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty".

That allows an expression of regret; in other words, it allows for a partial apology. The evidence very clearly suggests that a partial apology does not satisfy persons who are seeking an apology and that a partial apology can, in fact, do more harm than good. It seems to me, particularly with regard to historical abuse victims who want not only an apology but, crucially, an acknowledgement of the wrong that has been done, that that would not be possible under the Compensation Act 2006, because it would be equivalent to an admission of fault.

If the Government is not minded to support the inclusion of admission of fault—that is, a full apology—that will not help and will not provide the restitution that survivors and, I imagine, the Government are seeking. Will you comment on that?

Paul Wheelhouse: I share Margaret Mitchell's concern for survivors of historical child abuse, and we want to help them to get what they need from the process. I acknowledge that some of the child sex abuse survivors with whom I have discussed the issue want apologies and an explanation for what happened to them.

However, although I understand Margaret Mitchell's point, we do not want the inclusion in an apology of details of what happened to mean that it is no longer admissible as evidence. I realise that that would be an unintended consequence, but we believe that such an approach could harm access to justice for those individuals where that is, apart from their own testimony, their only evidence for making the case that they have been abused. As I said, I very much share Margaret Mitchell's concern that people should receive the quality of apology that they are looking for, but the question is whether inclusion of the detail that she mentioned would mean that the apology could not be presented as evidence in court. It is not that we disagree with the need for people to receive good-quality apologies; rather, we are concerned that an apology would no longer be admissible as evidence and that the individual's case for civil damages, if that was what they were seeking, would be undermined.

Margaret Mitchell: I will take things a step further by suggesting that without the protection of admission of fault there is likely to be either no apology or an apology that is so inadequate that it will aggravate the situation. Have you spoken to Professor Miller about his views on the bill and the Government's proposal to restrict the provisions? I understand that he feels that the inclusion of admission of fault will be absolutely essential to ensuring that survivors receive the acknowledgement and recognition that they seek above all else.

Paul Wheelhouse: As I suggested in my previous response, I certainly recognise the need for a good-quality apology and share Professor Miller's concerns that people get the quality of

apology—or, at least, the explanation and the apology—that they are looking for. Our concern is with how the bill as it stands would impact on the admissibility of that further detail. If there was a lengthy apology that brought in lots of facts—

The Convener: I think that we have covered that.

Paul Wheelhouse: —it is likely that people would face an access to justice issue and that they might not be able to use that as evidence.

As I said earlier, this is all about striking a balance between the right of the individual who is seeking damages in, say, a historical child sex abuse case to get an apology, which I am sure they would want, and ensuring that their right to take their case to the civil courts and to seek damages, if that is what they want and need to do, is not taken away from them. As I am sure Margaret Mitchell is aware, many of the individuals involved will have significant health and other needs, and might be seeking damages in order to cover the costs of meeting those needs.

Margaret Mitchell: Perhaps I can tease this out a little bit more. Are you prepared to look at the inclusion of admission of fault, which provides that crucial acknowledgement and recognition of the wrong that has been done, and to indicate at stage 2 some movement on the statement of fact provision, which might allay some of the access to justice fears that you have expressed this morning?

10:00

Paul Wheelhouse: I am certainly more than willing to engage with Margaret Mitchell on amendments that could be drafted that would accommodate both interests and deal with the issue that she raises. We are not seeking to stop the bill according to any fundamental principle. We agree with the principle behind the bill, which is to create the ability to make an apology where that would help the public service provider and the individual.

Margaret Mitchell: Are you aware that one of the greatest obstacles to the medical profession is the fear that an apology is an admission of liability and, in fact, of negligence? There is quite a misunderstanding, even among some lawyers, about what actually constitutes liability leading to negligence. Given those circumstances, would a definition of "apology" and the ability to give a full apology help to solve that problem?

Paul Wheelhouse: I will bring in Professor White in a second. In principle, I identify with Margaret Mitchell's point. A number of my constituents have had concerns and have felt that there was a culture in which it was difficult to get recognition of what had happened to them. I very much accept the principle. I am sure that health professionals would like to be able to apologise when they believe that something unsatisfactory has happened. However, they are uncertain. That is why the bill, with which Professor White is involved, is trying to provide a better platform from which such apologies can be given. I will bring in Professor White to finish that point.

Margaret Mitchell: We have concentrated on the medical sector, but the bill would have a huge relevance for public services more generally, when people just want acknowledgement that something has gone wrong and that the issue will be looked at to ensure that it never happens again. It is worth making that point, because the discussion has very much been in the direction of the medical sector.

Paul Wheelhouse: That is certainly true. I accept that the bill is not focused entirely on medical cases. Indeed, we have discussed a good range of cases, including insurance cases, as the convener mentioned.

There seems to be a wealth of research on the positive effect that apologies can have, which we accept. We have no doubt that apologies are a good thing and should be promoted as such. However, research on the effects of apologies legislation in achieving that aim is less convincing. The majority of research in other jurisdictions seems to focus on healthcare settings, which is perhaps why the debate has centred on them. It is very difficult to draw meaningful conclusions from experiences elsewhere regarding the impact that the bill might have in Scotland. I believe that the convener made that point in last week's meeting: it would be like comparing apples with pears.

I accept that we want to create a culture in which people believe that they will get an apology if there is a deficiency in a service. All that people are looking for in many cases is recognition that things could have been better and that problems will be addressed. I accept and support the principle of what Margaret Mitchell is trying to achieve; it is the detail on which we have to find agreement.

Margaret Mitchell: Since you have brought up empirical evidence, I will turn the question around: is there any evidence that previous apologies bills have caused any harm? I am not aware of any. That is an important thing to look at.

Paul Wheelhouse: We have some concerns about what the bill, as drafted, might do. We do not want to road test the bill—

The Convener: That is an apposite term.

Paul Wheelhouse: It was inadvertent.

We do not want to put the bill to the test if we think it could have inadvertent implications that could harm those who require to put forward evidence. There is potential for us to work on the detail, which I am happy to do with Margaret Mitchell.

The Convener: The Scottish Children's Reporter Administration has said that certain proceedings under the Children's Hearings (Scotland) Act 2011 should be added to the list of excluded actions. Do you agree, minister? You are back to being a minister. I have demoted you. If only you were cabinet secretary.

Paul Wheelhouse: I am quite happy with my current role, convener.

I am happy to come back to the committee on the implications for children's hearings.

The Convener: I am sorry, Margaret. I thought that I should raise that because it had not been raised.

Margaret Mitchell: I think that Professor White wants to come in.

The Convener: It is up to the minister. Does Professor White want to add anything?

Paul Wheelhouse: If Professor White has knowledge on that issue I will happily bring him in.

Professor White: The minister said, in his response to Ms Mitchell, that it may be helpful if I add some comments on her question about medical professionals' fear of apologising. I will make two points in that regard.

First, all medical practitioners—in fact, all registered health professionals—have a professional duty of candour and should be apologising where there have been unintended consequences or harm. Secondly, in recognition that there is a culture in which, at times, there is a fear of apologising, the duty of candour provisions have been drafted so that there are not only provisions around procedures, but requirements on organisations that will come within the scope of the duty to provide training and support to staff. Part of that training and support will involve an understanding that there are separate tests around liability and causation. Indeed, the duty of candour procedure is very much focused on learning and improvement rather than on fear and blame.

Margaret Mitchell: I accept all that, but despite the training and all the other things, there is still a culture of fear. That is where the Apologies (Scotland) Bill spells out exactly what a person would be admitting to—that if they admit fault, that would not be equivalent to admitting liability, let alone negligence. That would go a considerable way towards providing reassurance and encouraging apologies. I ask that the minister reflect on that.

Paul Wheelhouse: I certainly will, but I reiterate that we are using the Compensation Act 2006 as the basis for the duty of candour. We think that the provision would work in the context of the Apologies (Scotland) Bill.

The Convener: We have exhausted the questioning. Thank you very much, minister. We shall have a short break while everyone settles down and gets their papers ready for the next agenda item.

10:06

Meeting suspended.

10:10

On resuming—

Human Trafficking and Exploitation (Scotland) Bill: Stage 2

The Convener: We move to item 2. I remind everyone to switch all electronic devices and mobile phones off completely, as they interfere with the broadcasting system even when they are switched to silent mode.

Item 2 is stage 2 of the Human Trafficking and Exploitation (Scotland) Bill. I welcome Michael Matheson, the Cabinet Secretary for Justice, and his officials. Members should have copies of the bill, the marshalled list of amendments and the groupings of amendments for today's consideration. We will try to get through this today. If I see anybody wearying halfway through, we might have another little break—we will see how it goes.

Section 1—Offence of human trafficking

The Convener: Amendment 13, in the name of the cabinet secretary, is grouped with amendments 14 to 18, 40, 19, 20 and 33.

The Cabinet Secretary for Justice (Michael Matheson): Good morning, convener. We considered carefully the comments that were made in stage 1 evidence on the definition of the offence of human trafficking in section 1. Those comments related to two issues. The first was a concern that the use of the word "travel" in the definition suggests that the offence requires a cross-border element. The second was a wider concern that the emphasis on travel in the definition does not align with our international obligations, including those in the European Union trafficking directive, which do not have a similar emphasis.

The committee reflected those views in its stage 1 report and recommended that the Scottish Government look again at section 1 to establish whether it could be better aligned with our international obligations without decriminalising conduct that is currently criminal. The committee also recommended that we consider further the definition's wording, especially the emphasis on travel.

As I stated in my evidence to the committee, the definition that has been provided goes wider than our international obligations. It mirrors the offences in the Modern Slavery Act 2015 and the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015. As it stands, the bill does not require any cross-border element to establish the offence. However, we accept that many people think that the emphasis on travel is unhelpful and serves to unduly narrow the new offence's scope.

We are also aware that there have been recent moves to decouple movement from human trafficking. That is set out specifically in United Nations factsheet 36, "Human Rights and Human Trafficking", which was published last year and which states clearly in chapter 1B:

"Trafficking does not always require movement."

After careful consideration, we now believe that the focus on travel is unhelpful and unnecessary in this context. Therefore, amendments 13 to 17 will amend the definition in section 1 by removing the need to establish that a victim's travel has been arranged or facilitated and, instead, reframing the offence to criminalise certain defined and listed relevant actions, including the arranging or facilitating of those actions. As before, the relevant actions must be undertaken with a view to another person being exploited.

Amendment 13 lists the relevant actions, which are similar to those that are listed in section 1(1)(a). They are

"the recruitment of another person, ... the transportation or transfer of another person, ... the harbouring or receiving of another person"

and

"the exchange or transfer of control over another person".

Amendment 13 also clarifies that any person who is involved in arranging or facilitating any of those actions is committing an offence. Some of those actions might involve travel, but not all of them will, so there is no longer any suggestion that travel is a prerequisite.

Amendments 14 to 17 make consequential changes by removing references to travel in the remainder of sections 1 and 2 and replacing them with references to the relevant actions. Amendments 18 to 20 make similar consequential changes to section 2 to ensure that provisions on the territorial application of the offence operate properly in respect of relevant action. Amendment 33 removes the definition of travel in section 36, as it is no longer necessary.

10:15

The Scottish Government believes that amendment 40, in the name of Elaine Murray, is unnecessary. Section 2(3) as introduced and as amended by amendments 19 and 20 will capture any person who is temporarily in the United Kingdom when they carry out any of the conduct that constitutes the offence. As amended, it will go further, as it will capture non-UK nationals by

applying the offence even when an individual is not in the UK, provided that some part of the relevant action was in the UK. I hope that amendments 19 and 20 provide some comfort to Dr Murray, and I ask her not to move her amendment.

The Scottish Government is satisfied that the new definition covers all the conduct that is currently criminalised as trafficking here and elsewhere in the UK. Further, the removal of travel from the definition and the listing of the relevant actions in it will show a clear alignment with our obligations under the EU directive and give the maximum flexibility for the offence to deal with all instances of human trafficking, whether or not they involve movement.

I move amendment 13.

The Convener: Before I call Elaine Murray, I welcome Christina McKelvie, Rhoda Grant and Jenny Marra to the meeting, which I omitted to do before. I understand that they will be moving amendments later.

Elaine Murray: I very much welcome the amendments in the cabinet secretary's name. They take on board the concerns that were raised with and by the committee at stage 1 about references to travel and the need for the definition to be more aligned to that of the Council of Europe Convention on Action against Trafficking in Human Beings while not excluding offences that are currently criminal in Scotland. I think that we made a recommendation on that in our stage 1 report, so the amendments are welcome.

Amendment 40 reflects comments that were made at stage 1 evidence sessions that I do not think that we explored with you at the time, cabinet secretary. You covered the issue in your statement about your amendments. I am keen for people who are temporarily resident in Scotland not to be excluded from prosecution under the bill purely because they are not habitually resident here or are not UK nationals. As you have given the assurance that the amendments that you have lodged will prevent such exclusion, I will be happy not to move amendment 40.

Alison McInnes (North East Scotland) (LD): I welcome the cabinet secretary's amendments, as the emphasis on travel seemed to be at odds with international obligations. I will support his amendments.

Margaret Mitchell: Likewise, I very much welcome the Government amendments, which leave no dubiety about what could constitute the offence of trafficking.

The Convener: I add my voice to that. I am glad that the cabinet secretary listened to the committee. I think that we were all as one about the original definition.

I invite the cabinet secretary to wind up, please.

Michael Matheson: I will only say, on the point that Elaine Murray raised, that amendments 19 and 20 capture the person who is temporarily in the UK and does anything that constitutes one of the offences that the bill covers.

Amendment 13 agreed to.

Amendments 14 to 17 moved—[Michael Matheson]—and agreed to.

Section 1, as amended, agreed to.

Section 2—Application of offence to conduct in United Kingdom and elsewhere

Amendment 18 moved—[Michael Matheson]—and agreed to.

Amendment 40 not moved.

Amendments 19 and 20 moved—[Michael Matheson]—and agreed to.

Section 2, as amended, agreed to.

Section 3—Exploitation for purposes of offence of human trafficking

The Convener: Amendment 1, in the name of Rhoda Grant, is grouped with amendments 2 to 11.

Rhoda Grant (Highlands and Islands) (Lab): The purpose of amendments 1 to 11 is to introduce a new offence of purchasing sexual services, while decriminalising the sale of sex, and to require support services to be provided for those who wish to leave prostitution. Apart from amendments 2, 4 and 5, which are the three key amendments, the remainder of the amendments are consequential.

The market for prostitution in Scotland leads to people being trafficked to Scotland for sexual exploitation. That was recognised by the European Parliament in a resolution passed in February 2015, which

"Stresses that there are several links between prostitution and trafficking, and recognises that prostitution—both globally and across Europe—feeds the trafficking of vulnerable women and under-age females".

The Scottish Government's violence against women strategy, equally safe, recognises that commercial sexual exploitation, including prostitution, is violence against women. However, our laws penalise the victim rather than the perpetrator. That needs to be rectified.

Prostitution is often portrayed as a choice for women, but the vast majority of people in prostitution are poor and homeless, and they are

often drug addicts. They have already suffered violence, abuse and neglect. For those in prostitution, it is often a means of survival rather than a choice. The amendments challenge the perception that prostitution is a choice. They also challenge the perception that men have a right to sex.

Although the committee has not taken evidence on the amendments, many organisations gave supporting evidence to the committee at stage 1. Those supportive organisations came from a wide range of perspectives, including a group of 15 academics, the Scottish Trades Union Congress, the Women's Support Project, church groups and a collective of formerly prostituted women, as well as the trafficking awareness-raising alliance—TARA—which is the lead organisation on trafficking in Scotland.

Northern Ireland has recently passed similar legislation as part of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015. I therefore believe that the amendments fall within the scope of the bill. Reducing the demand for paid sexual services, whether or not the person involved is trafficked, is an entirely legitimate aim for the bill and is in keeping with the bill's full title—the Human Trafficking and Exploitation (Scotland) Bill.

Amendments 1, 2, 3, 6, 7 and 11 would make the purchasing of sexual services a criminal offence with sanctions. That is vital to challenging the demand for sexual exploitation. The amendments would ensure that those who create the demand are held to account for their actions.

Amendment 2, which would add section 4A, would make it an offence to pay, promise to pay or have a third party pay for sexual services. It would define a payment as "any financial advantage" and ensure that there was a public education programme before the offence came into force.

Amendment 3 would add section 4B, to provide a review of the operation of section 4A. Amendments 1, 6, 7 and 11 are consequential.

Amendments 4 and 9 would decriminalise the individual providing the sexual service by repealing section 46 of the Civic Government (Scotland) Act 1982. Along with proposed section 4A(5), that would decriminalise victims of the offence. The amendments together would decriminalise victims.

Our laws are perverse—they penalise victims and ignore the perpetrators. Too often, those who have been sexually exploited are the ones who are criminalised. Having a criminal record stigmatises victims and makes it harder for them to exit. That needs to change. It is also important that victims know that they are not committing any offence, which enables them to access services and empowers them to have a positive relationship with the police and the wider public services that provide them with support. Amendment 9 is consequential to amendment 4.

The final amendments in the group are 5, 8 and 10. Amendment 5 would add section 8A, which would place a duty on the Scottish Government to provide exiting services for victims of sexual exploitation. It would also ensure that support and assistance were never conditional on co-operation with a criminal investigation. We need to ensure that victims of sexual exploitation are able to exit. Most individuals get involved in prostitution in order to survive. It is vital that we do not abandon victims without alternatives.

Academic evidence has shown that a large percentage of women would like to leave prostitution if they could. Creating support programmes to help people to exit prostitution is also part of the resolution from the European Parliament, which I will quote again. It

"Recognises that a vast majority of persons in prostitution would like to stop but feel unable to do so; stresses that these persons need appropriate support, particularly psychological and social assistance, to escape the sexual exploitation networks and the dependencies frequently associated with these; suggests, therefore, that the competent authorities put in place programmes to help persons escape prostitution, in close cooperation with the stakeholders".

Victims often need extensive support to rebuild their lives, as evidence shows that they suffer wide-ranging physical and mental conditions because of their exploitation. The issues that tend to lead them into prostitution in the first place must also be dealt with. Amendments 8 and 10 are consequential to amendment 5.

I move amendment 1.

The Convener: Do other members have comments? John Finnie will be first, followed by Roddy Campbell and Gil Paterson. Margaret, was that an indication of intent?

Margaret Mitchell: Yes.

The Convener: Right. We will start with John Finnie.

John Finnie (Highlands and Islands) (Ind): Thank you, Presiding Officer.

The Convener: Presiding Officer? [*Laughter*.] Everybody is being promoted this morning.

John Finnie: I beg your pardon. That was a premonition, perhaps.

In our stage 1 report, we talked about the bill not being the correct vehicle for the proposal, and I hold to that position. I have no wish to comment on many of the sweeping statements that Rhoda Grant made, but I would like to comment on

personal safety and exiting, which have been referred to. They are covered by amendment 4.

The briefing that SCOT-PEP has circulated to members says that

"The criminalisation of soliciting puts street-based sex workers in danger as they have to work in dark, isolated spots in attempt to avoid arrest, and means they are unwilling to approach the police or other services if they are attacked."

It then gives a series of statistics, which I will pass over. It goes on to say:

"The soliciting law is a barrier to women being able to 'exit' sex work"—

the proposer of the amendments alluded to exiting—

"as an arrest, prosecution or conviction is a hugely stigmatising thing to have on a person's record, and can prevent them from being able to find other employment."

I support amendment 4 but not the other amendments in the group.

Roderick Campbell: The committee considered the issue in general terms in drawing up its stage 1 report. I will make a couple of points. First, Rhoda Grant mentioned the Northern Ireland experience, but it is important to remember that the provisions were included in the Northern Ireland bill at stage 1, so there was an opportunity to take evidence on them. We have not had such an opportunity.

Secondly, I remind people of the following comment from Siobhan Reardon of Amnesty International:

"prostitution does not always equal human trafficking. Our concern is that, by conflating the two within the bill, we will not address either of those complex issues adequately."—[*Official Report, Justice Committee*, 24 March 2015; c 7.]

That is true. These are complex issues that require further attention. I welcome the cabinet secretary's comment on the need for appropriate research into the area and to consider it further, but we should not do that within the parameters of the bill.

Gil Paterson (Clydebank and Milngavie) (SNP): I have a similar view. The committee has not taken evidence on the matter, so proceeding would worry me. The two issues are important in their own right and I would be uncomfortable with joining them together. Most of what Rhoda Grant said was about prostitution and not about trafficking, which we are discussing and which we have taken evidence on. It is clear from looking at other jurisdictions that the incidence of prostitution has come down, but it has not stopped. That means that trafficking is still taking place.

My principal view is on the slowest ship in the convoy. If we took the proactive action that is proposed on the prostitution side, the very people we want to reach out to find would be driven away from protection. In particular, certain ethnic groups, for example Caucasians, will never be able to enter certain groups to find people or even to participate, because access will be restricted to the particular ethnic group.

What the amendments propose would drive people underground and it would be difficult to find a way to protect the people who are most seriously involved and who need to be sought, found and rescued. I am making two points. The principal one is to question whether what the amendments propose would work. I do not know whether that would work and I would like to seek evidence on it. My second point is that the committee has not taken evidence on the issue.

10:30

Margaret Mitchell: I sympathise with the intent behind Rhoda Grant's amendments, but the key point is that the committee has not taken evidence on the matter. I think that it must be looked at in detail and properly scrutinised to ensure that what is proposed would have no unintended consequences. Later on in this parliamentary session, there might be a legislative opportunity—perhaps in domestic abuse legislation—that would allow us to look at the issue in some detail. I would certainly welcome that.

Christian Allard: I agree with what other members of the committee have said. In particular, we are clear that what Rhoda Grant proposes is not fit for the bill that is before us. We noted in our committee report that the cabinet secretary intends to meet stakeholders on both sides of the debate to inform his decision on the matter. Perhaps he could give us some indication of how we could take the matter forward in another bill.

Elaine Murray: I am very sympathetic to the intention behind Rhoda Grant's amendments and I fail to see how decriminalising prostitution would drive prostitution underground. I just do not understand that argument, because I think that decriminalising prostitution would make it easier for women, who are often involved in prostitution because they are victims, to come forward.

I think that proof is available. We said at stage 1 that we felt that we had not taken any evidence on the issue, but there is quite a lot of evidence outwith this committee's studies, not least the evidence for two bills that were introduced previously, which include Rhoda Grant's bill. There is therefore evidence out there.

In principle, those who create the demand—predominantly men—and believe that they can purchase the use of someone's body should be the people to whom the blame attaches, not the

women who are forced to sell themselves. I am very sympathetic to that view.

I disagree that the proposal would not fit in the bill before us because it was part of other bills. It is maybe a pity that the proposal was not in the bill from stage 1, as that would have allowed us to take evidence properly on it. However, I do not think that the proposal is inappropriate for the bill: it refers to sex work and we know that that is the reason why many women are trafficked. Prostitution and other forms of sex work are very much implicated in human trafficking, so the proposal could have fitted quite nicely in the bill. Nonetheless, the issue was not in the bill at stage 1, so the committee has been a bit more anxious about considering it at stage 2.

However, I am very much in favour of amendments 1 to 11. If the bill is not the place to take forward the proposal, I certainly hope that it will be taken forward elsewhere in due course, because for some time there has been the desire in Parliament to legislate in the way that the amendments propose without our having taken any further action on it. I hope that action will be taken.

Alison McInnes: As Elaine Murray said, Rhoda Grant tested her view on the matter earlier in the session with her member's bill, which fell because of a lack of support. I believe that the criminalisation of the purchase of sex will make women more vulnerable, not safer. I recognise that amendment 4 seeks to decriminalise the women, and that is a position that I would like to achieve. However, regardless of our differing views on the issue, I think that the whole committee agreed at stage 1 that the bill was not the vehicle with which to try to bring about the significant change that the amendments propose without consultation. I think that it is totally inappropriate to try to do that through the bill.

The Convener: Amendment 2 is substantial, and the committee has not taken evidence on any of the amendments. All of us in the Parliament are aware that unintended consequences are possible when we do not test provisions in a bill almost to death. It is all very well saying that the evidence is out there, but the committee has not tested it to find out whether there are any unintended consequences.

Notwithstanding anyone's views on the appropriateness or the purpose of the amendments, on which I make no comment, I simply point out that, as far as the process of examining the legislation is concerned, we made it clear in our stage 1 report that what has been proposed could not be included in the bill. Indeed, I wonder whether it would distort the purpose of the bill itself, which is about

"human trafficking and slavery, servitude and forced or compulsory labour, including provision about offences and sentencing".

Although prostitution is obviously a part of human trafficking, there are other issues to take into account, and its inclusion might have tipped the balance. Perhaps standalone legislation will be required in due course. I am sympathetic to the purpose of the amendments and I make no comment on whether I agree with the ends that are sought or whether the purchase of sex should be criminalised, but I simply cannot see how the committee could possibly have dealt with even amendment 2, which would insert proposed new section 4A.

I ask the cabinet secretary to comment before Rhoda Grant winds up.

Michael Matheson: I welcome the opportunity to set out the Scottish Government's position on amendments 1 to 11 in the name of Rhoda Grant.

Prostitution is clearly a substantive and complex issue, with strongly held views on both sides of the debate. I therefore consider it appropriate and correct that, in my evidence at stage 1, I committed to hearing the views of people on both sides of the debate and to consider those views before coming to a position on how the Scottish Government would respond. I have also been mindful of both the clear recommendation in the Justice Committee's stage 1 report that the bill is "not the correct vehicle" for making the purchase of sex a criminal offence and the views that were offered in the stage 1 debate.

The Scottish Government very much respects the strongly held views of those who support and oppose criminalisation. Those supporting Rhoda Grant's amendments have claimed that such a move will drive down demand and thus reduce or eliminate prostitution in Scotland, and I am aware that people also consider that criminalising the sale of sex will assist those who are being exploited by their involvement in prostitution and will encourage the use of appropriate support and services to ensure that they can exit prostitution safely. On the other hand, opponents of the amendments consider that the proposal will make sex workers more vulnerable by requiring the people involved—that is, the seller and the purchaser of sex—to hide from law enforcement. They are also concerned that the trade will become hidden from those who provide support, which will leave sex workers more open to abuse and potential exploitation. Nevertheless, it is right that we explore this substantive and complex issue, and Rhoda Grant's amendments give us an opportunity to do that.

Both supporters and opponents of the proposal cite specific research to back up their views, but when I listened to members during the stage 1

debate, it became apparent to me that some members were concerned about the reliability of the available evidence and how it applied to Scotland in allowing them to make an informed decision. The Scottish Government therefore takes the view that there is clearly a lack of consensus on the strength of the evidence base underpinning the debate on whether the law should be changed to criminalise paying for sexual services. I believe that any consideration of calls to criminalise the purchase of sex needs to fit within the wider set of Scottish Government policies that are designed to address violence against and exploitation of women.

That is why in its response to the Justice Committee's stage 1 report, the Scottish Government stated that it would

"commission independent academic research to review the evidence on the impacts of"

a policy of

"criminalisation of the purchase of sex".

That research will also include an assessment of the wider impact on Scottish Government policy to address violence against women and will

"gather evidence on the sex work industry in Scotland."

That is an appropriate way to deal with such an emotive issue, on which there are strongly held opposing views. When the independent research becomes available early in 2016, it will allow the Scottish Government and the Parliament to debate this substantive issue on the basis of Scottish evidence and to come to a decision on the best approach to take.

Any action in the area should be evidence based and should not be rushed through at stage 2 of the bill, not least because of the implications that it may have in areas beyond the scope of the bill. On that basis, the Scottish Government does not support Rhoda Grant's amendments 1 to 11, and I invite the committee not to agree to them.

Rhoda Grant: I have listened to what the committee has said and want to make a few points.

A number of people have talked about trafficking and sexual exploitation perhaps not being closely linked, but it is very clear that they are very closely linked. We have seen that the two have been linked in Northern Ireland, and we have also seen information that makes that link from the EU and other international organisations. Therefore, I believe that they are linked. However, I accept that the issue was not in the bill as introduced.

There have been comments about the amendments driving prostitution underground or making it hidden. However, it is already largely hidden. Unless you work with people who are involved in prostitution, you will not be aware of the harms that happen. However, prostitution has to be visible to the purchaser, and if it is visible to the purchaser, it must also be visible to the authorities—if they make the effort to find it.

I heard what the cabinet secretary said and recognise and welcome the fact that he has not ruled out introducing such legislation in the future. However, given the clear statement in "Equally Safe" that commercial sexual exploitation, including prostitution and human trafficking, is a form of violence against women, why is it only now that research is being commissioned? I fear that the answer is so that we can avoid taking action at this stage.

Evidence of the harmful effects of prostitution in Scotland already exists. I do not believe that prostitution in Scotland is somehow different from prostitution elsewhere, particularly other western developed countries. The issue has been consulted on twice. Alison McInnes said that the arguments have been tested, but they have never been tested in the chamber. Indeed, all the evidence that has come back from those consultations overwhelmingly supports taking action.

As well as evidence from Scotland, very reliable information is available from countries that have operated a similar law for a long time. I very much hope that the cabinet secretary will consider the evidence from Sweden and Norway and that he will visit the relevant Swedish enforcement authorities. He will be aware that most of the academic research that opposes the approach that I am putting forward also opposes the Scottish Government's stance that prostitution is violence against women. I very much hope that the new research will come from the basis of the Government's acceptance of the gendered approach to violence against women.

Whatever the research discovers, it will not change the ultimate question that must asked. That question is whether it is acceptable in modern Scotland for a citizen to exploit the vulnerability of another for their personal sexual gratification. I believe that it is not. Our national strategy on violence against women says that it is not, and our law needs to catch up.

I have a number of concerns about the practicalities that are proposed for the research, and I will seek a meeting with the cabinet secretary to discuss those further prior to stage 3. However, having listened to what he and members of the committee have said, I will seek to withdraw amendment 1 and will not move the other amendments in the group, although I reserve my position for stage 3.

John Finnie: On a point of clarification, is amendment 4 being moved? If it is not moved, does that mean that we cannot have a vote on it?

The Convener: We are dealing only with amendment 1 just now.

Amendment 1, by agreement, withdrawn.

The Convener: Amendment 49, in the name of Jenny Marra, is grouped with amendments 21, 50 and 32. If amendment 21 is agreed to, I cannot call amendment 50, as it will be pre-empted.

10:45

Jenny Marra (North East Scotland) (Lab): My amendments 49 and 50 seek to strengthen the section 3 definition of exploitation in relation to children.

The international definition of trafficking included in article 2.5 of the EU anti-trafficking directive clearly states that, where the victim is a child, there is no requirement for there to be any use of coercion, threats or force in the carrying out of acts or exploitation for an offence to be punishable. Section 3(8) seeks to establish that principle in the bill, but I am sad to say that it does not do so effectively.

I welcome the cabinet secretary's amendment 21, which clarifies that section 3(8) deals with children under the age of 18. The amendment is very helpful. I hope that it will enable more successful prosecutions of those who commit such offences against children and vulnerable adults. However, a further aspect of section 3(8) remains a barrier to prosecution, because it requires the victim not only to be a child or a vulnerable adult, but to be specifically "chosen" for exploitation because they are a child or a vulnerable adult. That creates an additional burden of proof for the prosecution in obtaining a conviction. It is not easy to satisfy; it does not take into account the nature of long trafficking chains involving a number of people; and it does not reflect international definitions.

In its evidence to the committee, the Legal Services Agency stated that the term "chosen" is the wrong terminology, as it

"does not reflect how a person's experiences are disclosed and therefore would be difficult to prove."

In its evidence, the anti-trafficking monitoring group highlighted:

"It is also very difficult to prove that a person has been 'chosen' as a result of a vulnerability factor."

Many people can be involved in the trafficking and exploitation of a child—I know that the cabinet secretary appreciates that—but not all of them will be identified, investigated and prosecuted. Proving the motivations of any of them in relation to a victim can be difficult; proving that they chose to exploit a child because they were a child rather than for some other reason would be extremely difficult.

For example, let us say that a person receives and harbours a child victim knowing that another person is using them to obtain benefit. That offender is clearly involved in trafficking under the international definition, which the Government's amendment 13 makes clear. However, they may not have chosen the child themselves; they may have been following instructions, having been told that they would get financial benefit by holding the child. It should be possible to punish the individual for that offence, but that would appear to be impossible under the burden of proof in section 3(8).

I have welcomed the cabinet secretary's amendments to the definition of the human trafficking offence to reflect international understanding. I urge him to do the same in respect of offences against children. There is no requirement in the international definition for the offender to have chosen a victim because of the victim's characteristics. Moreover, international law clearly states that an offence against a child should be prosecuted without the need for there to have been any use of force, threats or coercion, and it does not require an assessment of whether an adult would have refused to allow themselves to be exploited in that way.

Introducing a further test will create a false comparison between a child and an adult. Children are more generally dependent on others, they are more easily manipulated, they are physically smaller and weaker, and they are often culturally conditioned to obey the instructions of and to trust adults. International law assumes that distinction and responds by providing special protection for child victims. It is entirely unnecessary to require the court to consider whether an adult would have refused to allow the exploitation. Under the directive, it is sufficient that the exploitation was of a child. Amendment 50 addresses that by removing the test.

I have taken note of the conflict between amendment 50 and amendment 21, which I support in all other respects. I will be content to withdraw amendment 50, but I very much hope that the cabinet secretary will consider lodging at stage 3 an amendment to paragraph (b) as inserted by his amendment 21.

I move amendment 49.

The Convener: On amendment 50, I remind you that you cannot withdraw anything until you have decided whether to move or not move it.

Jenny Marra: Okay.

Michael Matheson: I will first cover the Government's amendments in the group, and will then respond to Ms Marra and her amendments.

We carefully considered the comments that were made in stage 1 evidence regarding section 3(8). Those comments fell into two categories, one specific and one general.

The specific concern related to the reference to a person being "young" as a vulnerable characteristic. In particular, there was some suggestion during stage 1 that the age at which a person could be considered to be sufficiently young for that to be a relevant factor was unclear. The stage 1 report reflected those views, recommending that the references in section 3(8) to "young" and "youth" be replaced by references to a person being a child, with "child" defined as a person under 18.

Amendment 21 takes the opportunity to make it clear the Scottish Government's policy intention is that a person who is under 18 is always to be regarded as vulnerable for the purposes of section 3(8), by removing the references to "young" and "youth" and replacing them with references to "child".

Amendment 32 introduces a general definition of "child" into section 36 for the purposes of that section and others. A "child" is defined as

"a person under 18 years of age".

On the vulnerability of adults, there was a more general concern that the other vulnerability factors in section 3(8) represented too narrow a list and did not properly reflect the variety of ways in which vulnerability can manifest itself in respect of trafficking victims. Amendment 21 addresses that issue by introducing the concept of a "vulnerable adult" being a person

"whose ability to refuse to be used for"

an exploitative

"purpose within subsection (7) ... is impaired through mental or physical illness, disability, old age or any other reason".

That creates significant flexibility for law enforcement and the courts to consider both the listed factors and other, unlisted factors as relevant to the question whether exploitation exists, provided that those factors were sufficient to impair a victim's ability to refuse to be exploited.

We believe that our amendments will provide some welcome clarification on those issues, that they will address stakeholders' concerns and that they will meet the Justice Committee's recommended change to part 1.

I turn to Jenny Marra's amendments 49 and 50. First, those amendments would not cover the issues that have been raised by the committee and which the Government's amendments seek to address, because they limit vulnerability to the narrow range of factors in section 3(8), which I have described.

Secondly, the amendments turn the entire purpose of section 3(8) into something that we do not believe is acceptable. The purpose of section 3(8) is to ensure that any person defined as "vulnerable" cannot be used for the purposes of paragraphs (a), (b) and (c) of subsection (7), due to the nature of their vulnerability. That means that if a person has used the vulnerability of another to do anything that is covered by paragraphs (a), (b) or (c) of subsection (7), there is no need to prove that it was by means of threat, deception or force. If their being vulnerable was a factor in their being chosen, that is enough to prove that they were exploited.

However, Ms Marra's amendment 50 removes any reference to vulnerability being the reason for that person being chosen—indeed, the amendment removes the reference to the test that a person without vulnerability would not have acted similarly to the victim. In practice, that would mean that, for example, anyone asking a family member to provide any sort of service, or recruiting a person with a mental or physical illness, even without coercion of any kind, would be committing an offence. That is clearly unreasonable, and it is surely not Ms Marra's intention.

I therefore ask the committee to support amendments 21 and 32 in my name, and to reject amendments 49 and 50 in the name of Jenny Marra.

Elaine Murray: I want to ask the cabinet secretary about the effect of amendment 49 in conjunction with amendments 21 and 32. That would remove the issue that somebody would have to prove that they had been chosen but, at the same time, there would be the definition of their vulnerability in relation to age and their status as a vulnerable adult. I wonder whether amendments 49, 21 and 32 would work together as a set of amendments.

Michael Matheson: As I have outlined, amendments 49 and 50 would remove the vulnerability aspect—

Elaine Murray: I am sorry—I have not made myself clear. If amendment 21 was agreed to, the vulnerability aspect—whether the person was a child or a vulnerable adult—would still be included.

Michael Matheson: I am not entirely sure that those amendments would work together sufficiently well for the purposes of the bill.

Jenny Marra: Elaine Murray raises a good point. There is clearly some conflict between

amendments 21 and 50, and, as I said in my opening remarks, I am content to withdraw amendment 50 on the proviso that the cabinet secretary will consider lodging at stage 3 an amendment to paragraph (b) as inserted by his amendment 21. Given his exchange with Elaine Murray and the fact that there is some uncertainty on his part, I hope that he can give that undertaking so that we can revisit the issue at stage 3.

Michael Matheson: At this stage, I am not persuaded that there is any need for a further amendment. That is why I have asked the committee to support our amendments 21 and 32 and to reject the amendments in your name.

Jenny Marra: I thought that you indicated to Elaine Murray that you were not sure about the effect of those amendments when taken together.

Michael Matheson: I am not certain that they would deliver what Elaine Murray thinks they would deliver.

Jenny Marra: Okay. I will withdraw amendment 50—

The Convener: We have not got to amendment 50 yet. You cannot withdraw it, because you have not moved it. I want to know what you will do with amendment 49. Will you press or withdraw it?

Jenny Marra: I will withdraw amendments 49 and 50 just now.

The Convener: You seek leave to withdraw amendment 49.

Amendment 49, by agreement, withdrawn.

Amendment 21 moved—[Michael Matheson].

The Convener: I remind members that, if amendment 21 is agreed to, I will not be able to call amendment 50, because it will have been pre-empted.

Amendment 21 agreed to.

Section 3, as amended, agreed to.

Section 4—Slavery, servitude and forced or compulsory labour

The Convener: Amendment 22, in the name of the cabinet secretary, is grouped with amendments 28, 28A and 30.

Michael Matheson: I am aware of the views that were expressed in stage 1 written and oral evidence by some stakeholders, including the Lord Advocate and the Police Service of Scotland, on the issue of a victim's consent in respect of a section 4 offence. Specifically, there appears to be a concern that a victim's apparent consent to section 4 conduct may preclude a section 4 prosecution taking place. It is important to note that the policy intention behind the bill's silence on the issue of consent is not to provide that the victim can consent to being held in slavery or servitude or to being required to perform forced or compulsory labour—that would presuppose an understanding on the victim's part of the nature of their circumstances and an element of choice, and we think that it could be difficult to sustain the argument that a person can give free and informed consent to being held in slavery.

It is also important to note that consent is not irrelevant in relation to section 4. For example, a refusal to consent would be relevant in the determination of whether a section 4 offence had been committed. That said, the Government is happy to accept that the position could be made clearer to avoid any misreading of the silence on consent in section 4, particularly compared with the treatment of the issue of consent in relation to the offence of trafficking.

Amendment 22 amends section 4 so that

"The consent of a person to any of the acts alleged to constitute holding the person in slavery or servitude or requiring the person to perform forced or compulsory labour, does not preclude a determination that the person is being held in slavery or servitude or required to perform forced or compulsory labour."

Importantly, that does not mean that consent is irrelevant under section 4, which might make it more difficult to establish a charge; it simply ensures that the victim's consent is not an absolute defence for the accused.

11:00

Amendment 28 allows for regulations to provide support and assistance to victims of an offence under section 4. That power is modelled on the framework for support for victims of trafficking under section 8. It will ensure that the system of identification, support and assistance, which is similar to that which is provided to support victims of trafficking, is extended to adults who are victims of an offence under section 4. Amendment 30 makes a consequential change to section 31 on the trafficking and exploitation strategy, and clarifies that the support and assistance mentioned in the strategy can include that which is provided by the power in amendment 28.

Amendment 28A, which was lodged by Alison McInnes, seeks to ensure that a victim of a section 4 offence would receive support or assistance for at least 90 days. Whether or not we agree that that length of time is appropriate, why is it specified for a victim of a section 4 offence but not a section 1 offence? We believe that that provision is not appropriate to be included in the bill. Leaving the detail of the support to be determined in regulations provides more flexibility to change the minimum or maximum period for which support

and assistance should be provided. That will allow the system of support that is provided by the regulations to fit better with other support, such as that which is given to victims of trafficking. I therefore ask the committee to support amendments 22, 28 and 30, and to reject amendment 28A.

I move amendment 22.

Alison McInnes: Without wishing to get ahead of ourselves, I expect that there will be discussion at stage 2 about the length of time for which victims of trafficking should be entitled to support and assistance. I felt that it would be helpful for the committee to discuss the duration of the support services available to victims of section 4 offences, which includes those who are subjected to slavery, servitude and forced or compulsory labour.

Amendment 28 is welcome and states that the Scottish Government may by regulations make provision about the period of support. As the cabinet secretary said, my amendment would entitle those victims to 90 days of support and assistance. I drew on the views of Amnesty International for that, in line with the reflection and recovery provision that it notes is recommended by UN agencies for victims of human trafficking. It strikes me that there will be many similarities in the support that victims of human trafficking and exploitation will require.

I listened to what the cabinet secretary said about the provision not being appropriate for inclusion in the bill, and there is some sense to including flexibility to moderate the minimum and maximum period of support. On that basis, I do not intend to press my amendment.

Roderick Campbell: I welcome the fact that amendment 22 takes on board the evidence that we heard from the Lord Advocate and the police at stage 1, and I think that amendment 28 provides the required flexibility.

Amendment 22 agreed to.

Section 4, as amended, agreed to.

After section 4

Amendments 2 and 3 not moved.

Section 5 agreed to.

After section 5

The Convener: Amendment 51, in the name of Alison McInnes, is in a group on its own.

Alison McInnes: My amendment 51 seeks to introduce a statutory aggravation relating to the vulnerability of children. It would be in addition to the general aggravation and it would, in the words of Barnardo's,

"recognise the vulnerability of child victims of trafficking and the seriousness of a trafficking offence against a child, at the stage of sentencing."

In his written evidence to us, Scotland's Commissioner for Children and Young People said that he supports calls for the inclusion of such a statutory aggravation. I believe that the specific rights, vulnerabilities and requirements of children should be taken into account at the sentencing stage. Children are at greater risk than adults of being trafficked and Barnardo's tells us that the long-term impact of that on them will be greater. The trauma that is caused by being trafficked at such a formative age can, understandably, be much more severe.

The recent Northern Irish legislation lists the fact that the offence was committed against a child as an aggravating factor, which means that it must be considered by the court. I see no reason why the bill cannot specifically recognise children's unique vulnerability.

I move amendment 51.

Margaret Mitchell: I have some sympathy with the amendment, but I look forward to hearing what the cabinet secretary has to say.

The Convener: Well, there we are. We are all waiting in anticipation, cabinet secretary. You might persuade Margaret. Let us see.

Michael Matheson: I will try not to let you down.

Alison McInnes's amendment 51 seeks to amend the bill to add an aggravation for the offence of human trafficking involving a child. The bill already includes provision for a statutory aggravator, which will apply in cases where an accused person commits an offence other than the offence under section 1 that is connected with human trafficking involving either a child or an adult victim. If it is satisfied of the connection to human trafficking, the court must take the aggravation into account when determining the appropriate sentence within the maximum for that crime.

However, I recognise that Alison McInnes's amendment is about the offence of trafficking itself being aggravated because of it being committed against a child. An important point to make is that the main offence of human trafficking under section 1 will carry a maximum penalty of life imprisonment whether it is against an adult or a child.

It is also worth noting that the bill as it currently stands allows for the full context of any offending to be narrated to the court. Where that includes trafficking of a child, that will be narrated to the court and can be taken into consideration for sentencing purposes. Prosecutors will ensure that,

wherever available and relevant, that information is provided to the courts.

However, I also take into account the fact that an addition to the bill that recognises at the stage of sentencing the vulnerability of child victims of trafficking, and the seriousness of trafficking offences against a child, is something that many people would find appropriate. Although human trafficking is a vile offence no matter who is the victim, it is particularly abhorrent when those victims are children.

Clearly, we all want the best outcomes for all victims of human trafficking. Having listened carefully to the case that has been presented for the inclusion of an aggravation for the offence of human trafficking involving a child, I am of the view that a provision on the face of the bill would, on balance, have a positive impact. On that basis, I am happy to support amendment 51 and would ask the committee to do so.

The Convener: You have made Alison McInnes smile, but have you made Margaret Mitchell smile?

Margaret Mitchell: Absolutely.

The Convener: There we are then. Alison, do you wish to wind up?

Alison McInnes: I thank the cabinet secretary for his support and his recognition of the case that has been made.

Amendment 51 agreed to.

Section 6 agreed to.

Section 7—Lord Advocate's guidelines on prosecution of victims of offences

The Convener: Amendment 23, in the name of the cabinet secretary, is grouped with amendments 24, 41, 42, 52 and 25. If amendment 52 is agreed to, I cannot call amendment 25, which will be pre-empted.

Michael Matheson: Section 7 requires the Lord Advocate to make and publish guidelines about the prosecution of victims of trafficking or exploitation. The committee will recall that in his stage 1 evidence the Lord Advocate took the view that the duty under section 7 should instead be to issue instructions. He said:

"instructions would be much better than guidelines. The point was made that guidelines are guidelines; they are not instructions that somebody has to do something. It seems to me that, in this field, it would be much better to have instructions."—[*Official Report*, *Justice Committee*, 24 March 2015; c 34.]

I agree that the proposed change would give further clarity and force to the requirement in section 7. Amendments 23 to 25 will amend section 7 to require instructions to be issued, rather than guidelines. We believe that the amendments will strengthen the bill and respond to the Lord Advocate's commitment and the Justice Committee's requests regarding section 7.

Elaine Murray's amendments 41 and 42 seek to introduce into statute a duty on the Lord Advocate to provide separate instructions for child victims of trafficking. I am aware that the Lord Advocate's draft instructions have been circulated to a number of stakeholders and provided to the Justice Committee. The instructions acknowledge the specific issues and vulnerabilities around child victims of human trafficking and provide for a separate test for children that does not include a requirement to establish that a child was compelled by her status as a trafficking victim to commit an offence in order for the instructions to apply. Work is on-going within the Crown Office and Procurator Fiscal Service to consider the responses to the consultation and to redraft the instructions so as to ensure that the full range of opinions are taken into account.

Elaine Murray's proposals are well intentioned in emphasising that there should be a separate instruction for dealing with child victims to those that are currently contained in the instructions, and we do not oppose that in principle. However, as I have noted, the existing draft instructions already make clear the distinction between child and adult victims.

I am concerned about the change from "directly attributable" to "attributable" in relation to the test for adults. The "directly attributable" component is important in ensuring that any presumption against prosecution does not cover those who try to use the protection offered to victims of human trafficking and exploitation when it is not appropriate.

Jenny Marra's amendment 52 relates to on-going review of the Lord Advocate's instructions. The Lord Advocate has consulted a wide range of stakeholders on the instructions and may revise them from time to time as appropriate; the bill already provides for that. Part of that process will, of course, be consultation with relevant parties. Amendment 52 proposes a three-year rolling review period and would place on the Lord Advocate a statutory duty to take steps to ensure that the strategy prepared by ministers would take account of the instructions. We do not agree that placing such a requirement on the Lord Advocate in statute is necessary or appropriate.

Amendment 52's proposal to impose on the Lord Advocate a statutory duty regarding who must be consulted is inappropriate. It raises a number of issues, given the positions in the criminal justice system that are held by some of the group. For example, the Lord President is the head of the judiciary, who ultimately may make

any decision about legal reviews of the instructions and any cases prosecuted or discontinued under them by prosecutors. The police will be instructed by prosecutors in relation to investigations being undertaken into human trafficking and exploitation cases. The Faculty of Advocates and the Law Society represent defence solicitors and advocates who will represent those accused of offences in a criminal court.

I am not saying that information taken from those sources and lessons learned from cases that are on-going or have been concluded will not be taken into account when considering the terms of the instructions, but to put the relationship between those parties into statute would raise some constitutional issues. A broader, more flexible approach should be favoured, as per the bill as it stands. On that basis I urge the committee to reject amendments 41, 42 and 52 and support amendments 23 to 25.

I move amendment 23.

11:15

Elaine Murray: I welcome amendments 23, 24 and 25. When I asked the Lord Advocate specifically whether he would prefer to issue guidelines or instructions, he said in his oral evidence that he would wish to issue instructions. I am pleased that the wording of the bill will make it clear that that will be the case.

Amendments 41 and 42 seek to reflect concerns that were expressed by a number of witnesses, and which have already been referred to, that evidence of compulsion should not be required in cases where the trafficking victim is a child. The Faculty of Advocates pointed out in its written submission:

"Article 2.5 of Directive 2011/36/EU and Article 4 of the Trafficking Convention make it clear that where a child is concerned, it is not necessary that threat, force, abduction, deception etc have occurred in order for that child to have been trafficked for exploitation"

and argued:

"Provision in relation to the prosecution of children should make clear that it is not necessary that a child have been compelled by any of those means in order to access protection against prosecution."

My amendments seek to make clear that although the Lord Advocate's instructions should exempt an adult from prosecution for a crime that they have been compelled to commit, compulsion should not be required to be demonstrated in the case of a child. I note the cabinet secretary's reassurance that in the instructions that the Lord Advocate has drafted there will be separate provisions for children and adults.

I had not picked up on the fact that the word "directly" had been missed out of proposed subsection 2A in amendment 42, which says that "the compulsion is attributable" rather than "the compulsion is directly attributable". Given that the amendment contains such a drafting error, I will obviously not move it.

Jenny Marra: I am satisfied with the cabinet secretary's remarks on amendment 52, so I do not intend to move it.

The Convener: Do you wish to say anything, cabinet secretary?

Michael Matheson: I have nothing to add, convener.

Amendment 23 agreed to.

Amendment 24 moved—[Michael Matheson]—and agreed to.

Amendments 41, 42 and 52 not moved.

Amendment 25 moved—[Michael Matheson]—and agreed to.

Section 7, as amended, agreed to.

After section 7

Amendment 4 moved—[John Finnie].

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

Members: No.

The Convener: There will be a division.

Against

Allard, Christian (North East Scotland) (SNP)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Paterson, Gil (Clydebank and Milngavie) (SNP)

Abstentions

Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)

The Convener: The result of the division is: For 0, Against 7, Abstentions 2.

Amendment 4 disagreed to.

The Convener: I should say to John Finnie that if he wants to move someone else's amendment, he should just shout "Move" as fast as he can before we move on.

John Finnie: I am learning every day, convener.

The Convener: Amendment 43, in the name of Elaine Murray, is grouped with amendment 48.

Elaine Murray: Amendments 43 and 48 seek to introduce for human trafficking victims the statutory defence that was discussed at stage 1.

Recommendation 56 in the committee's stage 1 report states:

"The Committee considers that the Lord Advocate's argument in favour of prosecutorial guidelines was persuasive and indeed that the view of the Dean of the Faculty of Advocates and others in favour of including a statutory defence in the Bill was also persuasive. Given that the Cabinet Secretary has confirmed that prosecutorial guidelines and a statutory defence are not mutually exclusive, the Committee asks the Cabinet Secretary to consider the position further."

In its evidence, the Faculty of Advocates observed that

"the availability of a statutory defence would provide a significant additional protection to victims of trafficking"

and that

"If an individual is not recognised by the Crown as being, or appearing to be, a victim of trafficking, or the Crown does not accept that there is a link between the offending behaviour and status as a victim, the individual may have difficulty in challenging effectively a decision to prosecute."

WithScotland stated that one of its key concerns is that a non-prosecution principle and a statutory defence should be included in the bill. Committee members who have received a briefing from CARE will be aware that it, too, supports the amendments, and argues that

"A statutory defence provides additional opportunities for preventing or halting the prosecution of a victim"

which would

"enhance the victim-centred approach."

Amendment 43 would introduce a new section entitled, "Defence for victims", and comprises a defence for a trafficked adult if they have been compelled to commit an offence. It mirrors amendment 42 in not requiring that compulsion be demonstrated in the case of a child victim. During stage 1, we heard that similar provisions in the equivalent United Kingdom and Northern Ireland acts enabled serious offences to be removed from the statutory defence. Clearly, there are some offences that use violence—sexual assaults for example—and in respect of which it would be extremely undesirable that a statutory defence apply. Subsection (7) of the proposed new section in amendment 43 would empower Scottish ministers to specify exemptions by regulation. That would allow flexibility, should ministers wish to introduce additional exemptions at a later date. Amendment 48 specifies that those regulations will be made under affirmative procedure, which would allow scrutiny of exempted offences.

Yesterday evening, we received a letter from the Lord Advocate, who objects to amendments 43 and 48. He said:

"For example if the route taken in England and Wales or Northern Ireland were to be followed there would be a large number of offences where the special defence would simply not apply. If this were the case my Instructions would also have to be limited in their scope, as any decision by a Prosecutor to discontinue a case which Government had stated should not be subject to the protection could rightly be challenged."

I would not have thought that the prosecutorial guidelines would include offences such as rape or murder in exemptions from prosecution. The cabinet secretary may have had more discussion with the Lord Advocate about the matter, but I do not really understand why there is such a problem, since I imagine that guidance—or instructions, now—would be issued by the Lord Advocate that would apply to prosecution of extremely serious offences, including rape and murder.

I move amendment 43.

Margaret Mitchell: I am minded to support amendment 43. I am interested to hear what the cabinet secretary will say, but it seems to me that without the amendment's inclusion there will be less protection in Scotland than exists elsewhere in the UK. During evidence, we heard that the Lord Advocate's guidance—now instructions—and the statutory defence are not mutually exclusive and that we could, therefore, have both provisions. That seems to me to be the best way forward.

John Finnie: I have found this to be one of the more interesting aspects of the debate, in which we have heard competing arguments for and against. My view is reinforced by the Lord Advocate's letter of 15 June. The Lord Advocate's argument that support is being lent by the prosecution and that it takes the onus away from individuals is very compelling. He acknowledges that that in itself is not sufficient when he says:

"There is work which will be required to support the Instructions and I will undertake to work with the relevant stakeholders within the criminal justice and third sector communities to raise the profile of human trafficking".

I favour the Lord Advocate's position, but I understand why others think otherwise.

Alison McInnes: I suppose that my starting point is that I want the earliest intervention and the most support to be available. We have wrestled with the issue as the bill has gone through committee. We had thought that the instructions and the statutory defence were not contradictory, and that the statutory defence would perhaps be a safety net for anyone who was not picked up by the procedure. We heard from Aberlour Child Care Trust in particular that some young victims of trafficking had been prosecuted. However, I am persuaded by the Lord Advocate's letter, in which he says that

"if a statutory defence was introduced in legislation this would result in a two tier system for potential victims of trafficking as my instructions would only apply post conclusion of criminal proceedings".

He says clearly that the statutory defence would be the choice of Parliament in transposing the human trafficking directive into law. I have to rely on that and therefore have to accept that the two things are not mutually exclusive.

Roderick Campbell: Much of what I was going to say has already been said. We have moved on from whether the two things are mutually exclusive to consideration of the extent to which a statutory defence would be governed and influenced by the instructions. Alison McInnes did not mention the penultimate sentence in the Lord Advocate's letter, which says:

"My instructions could in the circumstances only apply when the statutory defence was not available."

I am persuaded by the Lord Advocate's argument.

Christian Allard: I am also persuaded by the Lord Advocate's argument, particularly given that we heard Margaret Mitchell repeating that the two things are not mutually exclusive. They may not be, but the problem is how they would be implemented. The Lord Advocate makes the case that implementation would cause a lot of problems, as Alison McInnes pointed out.

Gil Paterson: Before the Lord Advocate intervened with his evidence, the committee was going along the line of having the statutory defence. However, I think that even at that time the evidence was quite compelling, and it is reinforced by the Lord Advocate's letter. For the record, I will quote a few sentences from it.

"A statutory defence would not only usually require the victim to raise it, it would also usually require them to raise it in sufficient time so that the Court was properly notified of their intention to rely on it and would require their defence to be supported by evidence which would be admissible under Scots law."

The Lord Advocate also stated:

"I believe that my Instructions provide the best protection for vulnerable individuals who are forced to commit criminal offences as a result of having been trafficked or exploited. By its very nature this type of offending operates in the shadows and given the circumstances victims find themselves in it is unnecessarily onerous to add further burden to them in order to ensure their rights are protected."

Those are powerful arguments. I go along with the evidence that the Lord Advocate has produced.

Michael Matheson: I welcome the opportunity to set out the Government's position regarding Elaine Murray's amendments 43 and 48.

The Government gave the issue serious consideration before introducing the bill. In framing the bill, our aim was to ensure that victims are protected from prosecution at the earliest possible stage. We have carefully considered the views that were expressed during the stage 1 evidence and debate and the committee's comments in its stage 1 report. Although we agree with many stakeholders that, legally, a statutory defence and the Lord Advocate's instructions are not mutually exclusive, the Lord Advocate has made it clear that a statutory defence would govern and influence any instructions that were produced.

As the committee is aware, our main argument against a statutory defence is that it would place a burden on the victim to raise a defence, and that such a defence would, in general terms, need to be lodged before the trial commenced and would need to meet a specific evidential threshold. Prosecutorial guidelines would provide flexibility not only to ensure that prosecutions do not proceed in the first place, but to allow the prosecution to abandon, or the Crown to apply to set aside, a conviction based on credible evidence or intelligence that is provided at any time.

The Lord Advocate argued strongly and clearly against a statutory defence in his evidence to the committee. Members will recall that he stated:

"We need a much more flexible approach, in which the Lord Advocate issues not guidance but instructions to our prosecutors and to the police ... That will be far more productive and lead to fewer injustices than a rigid statutory defence in the bill would."—[*Official Report, Justice Committee*, 24 March 2015; c 33.]

Following the stage 1 debate, there has been on-going engagement with my officials and Crown Office and Procurator Fiscal Service officials regarding a statutory defence. The Lord Advocate remains strongly opposed to the proposal, and I am aware that the committee received a letter from him yesterday that reiterates his view on instructions, which are required under section 7 of the bill, and the proposal for a statutory defence for victims.

11:30

Another concern is that a statutory defence as defined in the Modern Slavery Act 2015 has significant exclusions and caveats, and there are a large number of exceptions to it—well over 100 are listed in schedule 4 of that act. As Ms Thomson of the Legal Services Agency told the committee during stage 1, the extent of those exclusions will make a defence difficult to implement in practice. Elaine Murray has not tried to replicate the provisions of that act in her amendment but has left the listing of offences to be done through regulations, which would be subject to affirmative procedure, that may be made by Scottish ministers under amendment 48. I suspect that Elaine Murray would want that list to be developed prior to commencement of the section but, as worded, there is no requirement for that to be the case.

Convener, as you said in the stage 1 debate, there are compelling arguments on both sides of

the case. However, I believe that the case has not been made that adding a statutory defence would provide any further benefit to the victims in such cases. I remain concerned that were amendment 43 to be agreed to it would have a detrimental effect on victims by placing an unnecessary burden on them. It would also create a requirement—as was noted by the Lord Advocate—that prosecutorial instructions take account of the different landscape that would exist if a defence were on the statute book. For example, a victim's failure to plead the defence or establish it during the trial might become a relevant factor to take into account in considering the future exercise of prosecutorial discretion in respect of both that trial and that victim.

Prosecutorial instructions will allow for an early intelligence-led assessment to be made of a person's victim status, taking into account the views of a range of organisations. The EU directive on human trafficking requires that prosecutors have discretion not to prosecute alleged victims of trafficking who may have been exploited such that they participate in a form of criminality. The flexibility that is offered by placing the duty on the Lord Advocate to produce and review instructions to prosecutors therefore remains the Scottish Government's preferred option, given its victim-centred approach to the issue.

I urge the committee to reject amendments 43 and 48.

Elaine Murray: It was never my intention to make it a question of instructions versus a statutory defence—I do not think that that is part of the argument. The statutory defence was intended to be an additional measure.

As I said, I did not see the Lord Advocate's letter until about 6 o'clock last night, so I have not had an opportunity to consult witnesses who argued in favour of including a statutory defence in the bill. Therefore, I am prepared to seek to withdraw amendment 43 and not to move amendment 48—particularly given that the bill will not enter stage 3 until after the summer recess, which means that there will be time for bodies that argued in favour of a statutory defence to get back to us, having read the letter in greater detail than I was able to do last night.

Amendment 43, by agreement, withdrawn.

The Convener: That is a convenient point at which to suspend the meeting until 11.40 to give us a little break. Everybody needs it.

11:33

Meeting suspended.

11:40

On resuming—

The Convener: Amendment 53, in the name of Jenny Marra, is grouped with amendments 54 to 56, 44, 26, 27 and 34.

Jenny Marra: Amendments 53 to 55 seek to strengthen the section 8 provision of support to victims of trafficking. I fully support section 8, which is a good example of the victim-centred approach that the bill takes, which we can rightly be proud of. I am concerned, though, about there being limitations to that approach because section 8 requires that victims be recipients of a positive reasonable grounds decision under the national referral mechanism in order to access support.

A number of groups that gave evidence to the Justice Committee at stage 1 expressed their concern about access to support and assistance being tied to the national referral mechanism. It might not be ideal, but I am willing to accept the general tenor of the committee report's response to concerns about section 8, which is that there needs to be some criteria for determining whether a person is eligible to receive assistance and that the NRM is the only system we have for that.

I welcome amendment 27, in the name of the cabinet secretary, which will allow the Scottish ministers in the future to set out new criteria on what will constitute a reasonable grounds decision and a conclusive determination, but I do not believe that that justifies the restriction of support until after a reasonable grounds decision has been made. I believe that we should ensure that assistance is provided to someone from the moment they are identified as a potential victim.

I recognise that there is a discretionary power in section 8(3)(a) to provide support during the period before a reasonable grounds decision is made, but I believe that the discretionary nature of that power makes it inadequate; it is not clear on what grounds support would be provided, but it is exactly at that moment that the victim most needs support. Leaving early stage provision to discretion could place the burden on the victim not only to provide the information necessary for an NRM referral but to prove that they are needy enough to receive interim support.

Several organisations that gave evidence to the Justice Committee suggested that support should be available even when there is not a referral to the NRM, because some victims are unable to provide informed consent because of their level of vulnerability. Amendment 53 and the consequential amendment 55 would remove the

uncertainty associated with the discretionary power in section 8(3)(a) and ensure that all individuals referred to the NRM are immediately provided with assistance pending the reasonable grounds decision. That is in line with the approach taken in the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 and the recommendations of a number of organisations that gave evidence to the Justice Committee, including Police Scotland and NHS Greater Glasgow and Clyde trauma services. As the latter group suggested, I believe that it is better for the bill to start from the presumption that the victim should be provided with support and assistance.

On amendments 54 and 55, a key motivating factor for me in launching a consultation on my proposed human trafficking (Scotland) bill was to ensure that our laws and our practice comprehensively implemented our international obligations, particularly the 2005 Council of Europe Convention on Action against Trafficking in Human Beings and the 2011 EU directive on preventing and combating trafficking in human beings and protecting its victims. Providing support to victims of trafficking is a fundamental aspect of both the 2005 convention and the 2011 directive, and I am pleased that such support will now be set firmly at the centre of our law, ensuring that the needs of victims are a priority and giving victims confidence that they will receive help if they come forward.

I welcome amendment 34, in the name of the cabinet secretary, which will ensure that regulations to set out the "relevant period" will be made by affirmative resolution, as the Justice Committee recommended. However, that does not go far enough to reassure victims that the Government will meet the current provision tied in with the NRM of a minimum of 45 days for reflection and recovery.

Obviously we must already provide at least 30 days, as required by article 13 of the Council of Europe Convention on Action against Trafficking in Human Beings. I hope that the minimum period will be 45 days, as it is now, but section 8 does not make that clear. I can understand why the Government might want to give itself the ability to extend the support that it gives to victims in the future, which I would greatly support, so I welcome the regulatory power. However, the Scottish Parliament should clearly state what the minimum amount of support should be. Amendment 54 and consequential amendment 55 would guarantee the existing 45 days of support. They would also allow the possibility of a longer basic period of support and a discretionary extension.

11:45

Amendment 56 clarifies the criteria for providing assistance on a discretionary basis to victims following receipt of a conclusive grounds decision. It makes clear that that support should be provided not only to enable a victim to assist with criminal investigations and court proceedings but to facilitate the victim's "fullest possible recovery".

I move amendment 53.

Jayne Baxter (Mid Scotland and Fife) (Lab): Amendment 44 simply seeks clarity on the word "accommodation" by inserting the phrase "appropriate and secure". I think that that is the very least we should expect accommodation to be.

Michael Matheson: I will cover the Government's amendments and then respond to those lodged by Jenny Marra and Jayne Baxter.

Amendment 26 amends section 8(4)(c) to make clear that "medical advice and treatment" includes "psychological assessment and treatment". This approach retains the reference to counselling in section 8(4)(e), as we think that that kind of non-medical emotional support is an important part of the package of assistance that should be available to trafficking victims. It is important to emphasise that the list of types of support and assistance in section 8(4) is not exhaustive. Further, that illustrative list provides for access to medical advice and treatment that would cover both physical and mental health needs as well as non-medical counselling.

We consider that section 8 already allows for the provision of psychological assistance. However, given the doubts raised about the issue, particularly by practitioners in the field, we are happy to clarify the position to avoid any future contention.

Amendment 27 provides a power for the Scottish ministers to make regulations that set out the method and procedures by which it is to be determined that there are reasonable and conclusive grounds to consider that a person may be a victim of trafficking, for the purposes of provision of support and assistance under section 8. It further permits ministers to make provision about the procedure to be followed and the criteria to be applied in making those determinations and about who may make those determinations.

Those amendments have two purposes. The first is to build flexibility into the arrangements for support and assistance under section 8, in particular by allowing any changes to the existing national referral mechanism for identifying victims to be reflected in the legislative provisions that underpin support and assistance for victims. The aim is to ensure that those changes, if they occur on the back of the UK Government's review of the

existing system, for example, do not make the operation of section 8 in Scotland problematic.

The second purpose is to permit aspects of any reform to the national referral mechanism to be placed on a statutory basis, if that is considered appropriate.

Amendment 34 amends section 37 on the procedure for subordinate legislation under the bill. The effect of the amendment is that regulations made under the power in amendments 27 and 28 will be subject to affirmative procedure. Amendment 34 also implements my commitment to the committee to amend the bill such that any change to the specified period under section 8(2)(b)(i) is subject to affirmative rather than negative procedure. The amendment also provides that the regulation-making power in amendment 29 on the presumption of age, which is still to be debated, is subject to the affirmative procedure.

Amendments 53 to 55, in the name of Jenny Marra, aim to make the date on which compulsory support and assistance is available earlier and to include people who have been, or are about to be, referred to a competent authority for a reasonable grounds determination.

The amendments go against Government amendment 27, which aims to provide flexibility to allow the issues to be considered and changed through regulations. We are concerned that the amendments are extremely wide in scope, especially in relation to the question of when a reference is to be made. We do not see how that would work in practice.

On the ending of the period of compulsory support and assistance, amendment 54 seeks to ensure that a victim of a section 1 offence would receive support or assistance for at least 45 days. That is similar to amendment 28A, in the name of Alison McInnes. Our response is similar. Whether we agree that that is an appropriate time or ask why it is half the time that Alison McInnes suggests is required for victims of section 4 offences, it is not appropriate for the period to be in the bill. Allowing the period to be determined in regulations provides more flexibility to change the minimum or the maximum period during which support and assistance should be provided. That will allow any changes as the result of any review to be dealt with more easily.

We have concerns about the practicality of amendment 56, which seeks to ensure continued support for victims until their "fullest possible recovery". It is not clear how the person's recovery is to be measured nor by whom. In addition, section 8(3) provides the Scottish ministers with the necessary additional flexibility to provide support and assistance beyond the end of the specified period or the making of a conclusive grounds decision. It is an open-ended power, not tied to any particular objective or outcome. Amendment 56 might limit the scope of that by specifying the purpose for which support is to be given, so removing the flexibility that section 8(3) seeks to provide.

Section 8(3)(c) will allow ministers to provide support and assistance

"for such period as they think appropriate after the conclusive determination."

That power would be limited by amendment 54 to the recovery of the person or their involvement in the criminal justice system.

Amendment 44, in the name of Jayne Baxter, seeks to ensure that the accommodation provided for under section 8 is "appropriate and secure". Although I sympathise with the aim of the amendment, it is not necessary. Section 8(1) requires Scottish ministers to provide such support as is necessary "given the adult's needs". It is not conceivable that that could include accommodation that is not appropriate. If the accommodation were not appropriate, the duty would not be met. Our concern about the term "secure accommodation" is that it has connotations relating to confinement or the restriction of liberty. Therefore, amendment 44 is unnecessary and may cause confusion.

More generally, we recognise that victims of the vile crime of human trafficking and exploitation need time to recover and to be able to reflect on their experience. In doing so, they have the right to expect immediate support and assistance based on their individual needs. Having considered the issues raised at stage 1, and carefully reflected on the views expressed during the stage 1 debate, we think that the Government amendments strike the right balance in addressing stakeholders' concerns and make necessary and appropriate adjustments that will strengthen the bill and build in the necessary flexibility as work on the NRM review proceeds.

We will continue to work with stakeholders to determine whether any further measures for the support and the assistance of human trafficking and exploitation victims are required. Therefore, I ask that the committee supports amendments 26, 27 and 34, in my name, and rejects amendments 53 to 56, in the name of Jenny Marra, and amendment 44, in the name of Jayne Baxter.

Christian Allard: I agree with the cabinet secretary about flexibility. We heard about the limitations of the national referral mechanism, which is going to be reviewed. We must keep that flexibility, and I am encouraged by the measure. I did not realise that the third word in Jayne Baxter's amendment, "secure", was being added to

"accommodation"; that makes it difficult for me to support the amendment.

Jenny Marra: I am happy to accept the cabinet secretary's comments on amendment 56, but I might consider the issue again at stage 3. I was interested when he said that victims have a right to expect immediate support and assistance. Is that once they have been identified as a victim through a bureaucratic process, or when it becomes apparent that someone is a potential victim to those who work with victims day in, day out and can identify them? The amendments seek to support victims as soon as organisations such as TARA and those who work with victims every day identify someone as a potential victim of trafficking and start the process of support and recovery. I welcome the flexibility that amendment 27 introduces, but I do not think that it justifies the restriction of support until after the bureaucratic process of making a reasonable grounds decision has been completed.

The Convener: I will let the cabinet secretary say when he means that support and identification will take place if that would be helpful.

Michael Matheson: There are two stages to the process. An individual might be the subject of trafficking and exploitation and in need of support and assistance. A process would be undertaken to confirm whether that is the case, and that would then introduce further rights for that individual. Our approach is that support and assistance should be provided in a flexible way prior to that process. Once a person has been confirmed as having been trafficked or exploited, they will receive further rights as a result. This is not about someone getting nothing until their status has been confirmed; it is about working with people who may have been subject to trafficking and exploitation, prior to that being determined. They should be given the right support at that point, and they will receive additional rights once their status has been confirmed, as provided for in the legislation.

Jenny Marra: I accept what the cabinet secretary says, but amendments 53 to 55 simply place in statute a person's right to the support that he expects victims to receive before a conclusive grounds decision is made. He seems to be nervous about the conferral of rights that would come with that process. Could we perhaps consider the wording of this provision at stage 3?

The Convener: We are not having a debate about the measure; you are supposed to be summing up the debate. Do you wish to press or withdraw your amendment?

Jenny Marra: I will press amendment 53.

The Convener: The question is, that amendment 53 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 53 disagreed to.

Amendment 54 moved—[Jenny Marra].

The Convener: The question is, that amendment 54 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 54 disagreed to.

Amendment 55 moved—[Jenny Marra].

12:00

The Convener: The question is, that amendment 55 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McInnes, Alison (North East Scotland) (LD)

Mitchell, Margaret (Central Scotland) (Con)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 55 disagreed to.

Amendments 56 and 44 not moved.

Amendments 26 and 27 moved—[Michael Matheson]—and agreed to.

Section 8, as amended, agreed to.

After section 8

Amendment 28 moved—[Michael Matheson.]

Amendment 28A not moved.

Amendment 28 agreed to.

The Convener: Amendment 12, in the name of Christina McKelvie, is grouped with amendments 12A, 12B, 12C, 12D, 12E, 12F, 12G, 12H and 12I. That is your lot. I call Christina McKelvie to move amendment 12 and speak to all the amendments in the group.

Christina McKelvie (Hamilton, Larkhall and Stonehouse) (SNP): Thank you very much, convener. I was sure that you were going to give us the whole alphabet there. I am glad that you stopped at the letter I.

My amendments are designed to strengthen the bill's provisions on the support that is afforded to child victims of trafficking. I have been pressing Parliament on the issue of child victims of trafficking for eight years, with the support of my colleague Alison McInnes. I very much welcome the bill, but we must address some gaps in it that would leave children inadequately protected. I thank Barnardo's Scotland, Aberlour Child Care Trust and members of the cross-party group on human trafficking, who have helped me to understand some of the issue's impacts and to articulate on paper what I want in my heart to say. I am grateful for that.

Amendment 12 would place independent child trafficking guardians on a statutory footing. It would leave it to the Scottish ministers to make arrangements for guardianship when there are reasonable grounds to believe that a child may be a victim of human trafficking and when there is no person in the United Kingdom with parental rights or responsibilities in relation to said child. It would ensure that all children who are suspected of being victims of human trafficking offences were brought to the attention of an independent guardian, who would provide the intensive support that is needed to build a relationship with the child and the required expertise to help them to navigate the complex legal processes.

Independent child trafficking guardians would work closely in partnership with the existing child protection framework to improve outcomes for trafficked children. The evidence that I have seen is that children do not disclose their experiences easily. Having someone whom they can trust is exactly what they need.

The need for independent child trafficking guardians is clear, because of trafficked children's specific vulnerabilities. I urge the cabinet secretary to give due regard to children who are defined as unaccompanied in the system, perhaps at stage 3.

The committee has heard evidence on the inconsistent accommodation, provision and support in Scotland for under-16s and 16 and 17-year-olds. Independent guardians would work with other child protection professionals and agencies to ensure that appropriate support and care are given to all children.

Scotland is obliged to comply with the EU directive on trafficking in human beings—I have taken a keen interest in that because of my role as the convener of the European and External Relations Committee—and to provide responses that recognise children's specific vulnerabilities. Introducing independent child trafficking guardians would help to ensure that Scotland meets its obligations under the directive.

I move amendment 12.

Alison McInnes: I welcome Christina McKelvie's amendment 12 and I acknowledge the sterling work that she has done in the area and the Government's willingness to reflect on the debate about placing on a statutory footing guardians for child victims of trafficking.

My amendments 12A, 12F, 12G and 12I are intended to reflect the fact that local authorities are not necessarily the first point of contact for a trafficked child. It may be a health board, Police Scotland, the UK visas and immigration agency or the Crown Office that is first alerted to the possibility that a child could have been trafficked. There is therefore merit in those organisations having the capacity to refer a child to an independent guardian as soon as is reasonably practical after they have been given grounds to consider that the child may be a trafficking victim.

As the children's charity ECPAT UK notes, it is not enough to rely on local authorities alone to make a referral to the guardianship service. If members consider it appropriate for other organisations in addition to the ones that I have mentioned to be added to the list, we can reflect on that at stage 3.

Amendment 12B seeks to extend the provision of guardianship and to flag up the vulnerability of unaccompanied children who claim asylum. It

would enable an authority also to refer a child to an independent guardian if

"the child's circumstances suggest that there is a risk that the child may be a victim of an offence of human trafficking".

It is designed to create a presumption that a child who is travelling alone and who seeks asylum might have been trafficked.

If we want all children who have been trafficked to be referred to the guardianship service, we must surely acknowledge that many separated children who present in the first instance as asylum seekers will subsequently be identified as having been trafficked. Those most vulnerable young people will present with a cover story. They might not even understand that they have been trafficked, and they deserve the earliest possible intervention.

We are talking about a small number of children who, as I said, might not realise that they have been trafficked. Without amendment 12B, there will be an increased risk that a child could be retrafficked before they have been identified. I hope that members will feel able to support it.

I move amendment 12A.

The Convener: I invite Jenny Marra to speak to amendment 12C and the other amendments in the group.

Jenny Marra: I start by moving amendment—

The Convener: No—you do not move it at this point; you just speak to it.

Jenny Marra: Okay.

I welcome Christina McKelvie's amendment 12 and Alison McInnes's amendments to it. Christina McKelvie said that she hoped that the cabinet secretary would look at the case of unaccompanied children. My amendment 12C seeks to make the civilised assumption that, if a child arrives on our shores unaccompanied, they are in an extremely vulnerable position. It is possible to assume that they would be vulnerable to trafficking and that they therefore deserve the protection of the Scottish state and the protection of a child guardian.

The Convener: Do other members wish to comment? I see that Elaine Murray and Margaret Mitchell wish to. John, are you making a signal or are you just waving your pencil in a random fashion?

John Finnie: I will come in now that you—

The Convener: Ha! That serves me right.

Elaine Murray: I very much welcome amendment 12 and the amendments to it. We heard, not only in committee but on the visits that we went on, extensive evidence on the need for such an amendment. I am in favour of not only amendment 12 but all the amendments to it, because they seek to protect children who come into this country unaccompanied, which is extremely important.

Margaret Mitchell: I am very supportive of Christina McKelvie's amendment 12 and the amendments to it, which would provide extra clarification and protection for the children concerned.

John Finnie: When we went on our visits, we heard compelling stories from the young people we spoke to. Even the terminology "guardian" is highly appropriate. Therefore, I am very supportive of the amendments.

The Convener: You are not obliged to comment, Christian, but you may. I am mindful of the time.

Christian Allard: I disagree with what other members have said about the amendments to amendment 12. I am happy to vote for amendment 12, but I am not so sure about the subsequent amendments. The issues that they deal with would sit much better in the strategy than in the bill. Let us not forget that the act of trafficking could change over time, so it is important that we maintain flexibility. It would be better to deal with such issues in the strategy.

The Convener: Let us hear what the cabinet secretary has to say.

Michael Matheson: The provision of child guardians was raised throughout stage 1. We have reflected on the various points that were made and have continued to work with stakeholders on the issue. We are happy to support Christina McKelvie's amendment 12, as we think that it would provide appropriate statutory provision.

Some details, such as the guardian's specific functions and the particular circumstances in which the guardian's appointment can end or continue beyond the age of 18, are to be left for ministers to address in regulations. It is appropriate for ministers to take forward that detail, and we will continue to work with stakeholders as we develop the regulations.

Amendments 12A, 12F, 12G and 12I, in the name of Alison McInnes, seek to widen to organisations other than local authorities the duties to determine eligibility for referral and to refer a child to a person appointed as guardian, as required by amendment 12. On balance, we consider that the duty should remain with the local authority because, although other first responders or bodies such as the national health service and the police might come into contact with a trafficked

child first, the local authority would be the most appropriate body to determine eligibility for and referral to a guardian service. That reflects the existing approach, in which such first responders would in the first instance contact a social worker once a vulnerable child presented to them. The approach also recognises social workers' expertise in supporting and assessing the needs of vulnerable children and seeks to achieve a consistent approach to eligibility and referral.

I am grateful to Alison McInnes for amendments 12B and 12D and to Jenny Marra for amendments 12C and 12E. The Scottish Government has reflected on the common issues that they raise, which are about widening the criteria for children who are to be appointed a guardian to those at risk of becoming a victim of trafficking as well as those whom we might reasonably believe to have been trafficked. The Government notes the intention behind the amendments, but they might substantially broaden the scope of eligibility and increase the number of children who might require to be appointed a guardian. We believe that there is further work to be done on the matter. We want to continue to work with stakeholders to get a better understanding of whether those children's needs are best met through the bill or some other mechanism. Accordingly, we urge the members not to move the amendments at this stage. We are happy to work with them ahead of stage 3 to explore the issues further, find an appropriate response and consider whether further amendments might be required at stage 3.

Amendment 12H seeks to require regulations to be made under subsection (7) in amendment 12. The Scottish ministers fully intend to exercise their power under the proposed new section to make the regulations. The preference in legislation is to use the word "may" in relation to regulation-making powers, because the exercise of the power is ultimately and properly a matter for the Scottish Parliament, and using the word "must" would not necessarily ensure that any order made by ministers became law. It would still be for Parliament to decide whether to pass any secondary legislation that the Government made, so I consider the amendment to be unnecessary. As I said, we will continue to work with stakeholders on developing the regulations.

I fully support amendment 12, which seeks to provide a consistent service to unaccompanied children who appear to have been trafficked while recognising their complex and specific needs and will have the intended effect of improving the outcomes of that vulnerable group. I do not support the other amendments and ask that amendment 12A be withdrawn and the others not moved, with a view to matters being considered further prior to stage 3 and further amendments possibly being lodged at that stage.

Christina McKelvie: I thank the cabinet secretary for his comments. I know that a lot of thoughtful work has been put into legal guardians, and I—and, I am sure, all the organisations involved—very much welcome his support.

As for the other amendments in the group, I acknowledge the cabinet secretary's comment that further work needs to be done before stage 3, and I urge him to do that. I also urge him to look at some of the case studies that the Scottish Refugee Council has provided on young unaccompanied asylum seekers, because he will find that many of them have, indeed, been trafficked. That might be a starting point for some of the work that we will do before we reach stage 3.

12:15

Alison McInnes: On amendment 12A, I hear what the cabinet secretary said, but I think that there would be benefit in other authorities being able to respond and to refer children to the guardianship service. On that basis, I will press amendment 12A.

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

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 12A agreed to.

The Convener: I call amendment 12B, in the name of Alison McInnes, which was debated with amendment 12.

Alison McInnes: I have listened to what the cabinet secretary said, and I welcome the fact that he is sympathetic to the intention behind amendment 12B. Given his comment that there is further work to be done, I will not move the amendment in the hope that we can discuss the matter further, but I reserve the right to come back at stage 3.

The Convener: Of course. I hear you.

Amendments 12B to 12E not moved.

Amendment 12F moved—[Alison McInnes].

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

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 12F agreed to.

Amendment 12G moved—[Alison McInnes].

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

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 12G agreed to.

Amendment 12H not moved.

Amendment 12I moved—[Alison McInnes].

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

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 12I agreed to.

The Convener: Does Christina McKelvie wish to press or withdraw amendment 12?

Christina McKelvie: I will press it, convener, with honour and delight.

Amendment 12, as amended, agreed to.

The Convener: Amendment 29, in the name of the cabinet secretary, is grouped with amendment 29A.

Michael Matheson: As I indicated in my response to the committee's stage 1 report, we have carefully considered the inclusion of a presumption of age clause in the bill. Amendment 29 seeks to require local authorities and health boards to assume that a person whom they have reasonable grounds for believing might be both a victim of trafficking and a child, but whose age is uncertain, is a child. Under amendment 32, which was debated earlier, a child is defined in the bill as a person under 18.

The assumption would be made for the purpose of a series of support and assistance functions under specified children's legislation, including the duty to provide accommodation under the Children (Scotland) Act 1995 and the duties to provide a named person service and a child's plan under the Children and Young People (Scotland) Act 2014. The operation of the assumption will mean that support and assistance under those functions will require to be provided to victims whose age is uncertain but only where, despite the uncertainty as to their precise age, there are reasonable grounds for believing that the victim is under 18. The presumption is to be made for that purpose until such time as an age assessment has been carried out by a local authority to verify the person's age or their age has been determined by some other means.

Although the duty would apply only to local authorities and health boards in the first instance, subsection (5) in amendment 29 provides ministers with a regulation-making power to apply the duty in respect of other authorities and other support functions should the need for such provision become evident through practical experience. If amendment 34 is accepted, that power would be subject to the affirmative procedure. We think that the flexibility of a power

is necessary to identify the appropriate forms of child support.

It is clear that we want the best outcomes for all children who are victims of human trafficking. Amendment 29 will ensure that child victims are provided with age-appropriate support and services that will meet their individual needs and help to keep them safe from harm. That is in line with our getting it right for every child approach and child protection framework. Ultimately, amendment 29 aims to increase the support and protection that are available to the most vulnerable groups of children.

I am further satisfied that the requirement for the relevant authority to have reasonable grounds to believe that a person is under 18 will allow authorities to exercise their judgment appropriately in order to reject any fraudulent claims in respect of a person's age.

I ask the committee to support amendment 29.

Amendment 29A seeks to list the chief constable of Police Scotland, the Crown Office and Procurator Fiscal Service and UK visas and immigration as authorities to whom the duty to make the assumption would apply. However, as I mentioned, the assumption is relevant only for the purposes of a series of support and assistance functions under specified children's legislation. The authorities that are mentioned in amendment 29A have no function under that legislation, so if the amendment were agreed to, it would likely cause confusion and would ultimately have no practical effect. There are also technical issues in relation to the reference to the Crown Office and Procurator Fiscal Service and UKVI, as neither is a legal person.

That said, I understand the concerns behind amendment 29A, which seeks to ensure that the list of relevant authorities to which the presumption would apply is not drawn too narrowly. Given local authorities' and health boards' primary role in child protection, we consider that conferring the duty on them is a more effective approach. We are alive to the issue, but we consider that the best response to ensure appropriate flexibility is the regulation-making power in subsections (4) and (5) in amendment 29, which will allow the Scottish ministers to apply the duty in respect of other authorities and other support functions should that be deemed necessary at some point in the future.

For those reasons, I ask the committee to reject amendment 29A.

I move amendment 29.

Alison McInnes: The committee has heard that the absence of a presumption of age clause could compromise the ability of every child to access appropriate services. I welcome the fact that the cabinet secretary has listened to the concerns of the committee, witnesses and the Lord Advocate and has opted to introduce a presumption of age clause.

I thought that my amendment 29A was similar to amendment 12I, in that it queries why the list of relevant authorities that may have reasonable grounds to consider whether a victim of human trafficking is a child is limited to health boards and local authorities. The minister has made his case well. I accept the points that he has made and will not move amendment 29A.

The Convener: I think that we have to—

Alison McInnes: Do I have to move amendment 29A and then withdraw it?

The Convener: I think that you have to do that so that options are left open.

Amendment 29A moved—[Alison McInnes].

The Convener: As no other member wants to speak, does the cabinet secretary want to wind up on amendment 29?

Michael Matheson: I have nothing to add.

Amendment 29A, by agreement, withdrawn.

Amendment 29 agreed to.

The Convener: Amendment 45, in the name of Jayne Baxter, is grouped with amendments 46, 57, 58, 47 and 59.

Jayne Baxter: Amendment 45 is intended to clarify what the cabinet secretary referred to in his previous evidence as

"provisions that we have in Scotland under various bits of child protection legislation"

that

"provide a range of protections".—[*Official Report*, *Justice Committee*, 31 March 2015; c 3.]

Amendment 45 sets out in more detail what guidance will be issued and amendments 46 and 47 say how that will be monitored and reported on. Monitoring and reporting are very important if we are to understand and make improvements to the system and the services that are available to child victims of trafficking.

I move amendment 45.

Christina McKelvie: Amendment 57 would require Scottish ministers to prepare an annual report on the support and assistance that they have put in place for child victims of human trafficking. An issue that has arisen over many years is the need for proper empirical evidence of what has happened, where and when. The details to be provided would include:

"the number of child victims who received support and assistance ... the type and levels of support and assistance

... the number of child victims who required a child's plan under Part 5 of the Children and Young People (Scotland) Act 2014 ... the number of child victims who received support and assistance under section 22 of the Children (Scotland) Act 1995 ... the number of child victims who were accommodated under section 25 of the Children (Scotland) Act 1995"

and

"the number of child victims who received support and assistance under section 29 of the Children (Scotland) Act 1995."

In Scotland, depending on the legal context, a child can be defined as someone who is under the age of 16 rather than under the age of 18, and I welcomed the previous amendments that provided some clarification of that. A child at 16 can be treated as an adult. A 16-year-old can be prosecuted in the adult criminal justice system rather than the children's hearings system and can leave home without their parents' permission. Although local authorities are obligated under the 1995 act to provide support to children in need of protection up to the age of 18, in practice the nature of the support can look very different depending on whether the child is over or under 16.

The existing legislation, mainly the 1995, 2011 and 2014 acts, and the national child protection guidance allows for the provision of good practice to meet obligations. However, it is not necessarily clear for trafficked children, especially those aged 16 and 17. The evidence suggests that things are not working consistently across the country to protect child trafficking victims and that their risks and needs are not being approached in the same way as those of other abused children, even though the needs of trafficked victims do not differ significantly from those of other exploited children.

By introducing direct reporting by ministers on the support that is provided to child victims of human trafficking, amendment 57 would allow the Scottish Parliament to monitor the protection that is afforded to those victims and ensure that it is consistent across Scotland.

I turn to amendment 58. The policy memorandum accompanying the bill states:

"The existing children's legislation, therefore, provides for services to be provided to potentially trafficked children: this applies to children under the age of 18. It is, therefore, a priority to ensure that existing legislation with reference to children, including elements of the CYPA"—

the Children and Young People (Scotland) Act 2014—

"when commenced, is applied appropriately. However, this is a matter for effective engagement and good practice rather than further legislation."

However, the committee has heard a number of child protection professionals and agencies such as Barnardo's Scotland and the Aberlour Child Care Trust argue that there should be an explicit link between the bill and the existing statutory provision, through which children will, according to the policy memorandum, be able to "access support and assistance". Amendment 58 provides an example of how that could be achieved, by explicitly linking the bill to the child's plan provisions in the 2014 act and ensuring that all trafficked children will have in place a child's plan.

Amendment 58 is intended to be a probing amendment—I hope that I am probing deep enough. I would like to hear from the cabinet secretary how the Scottish Government will ensure that children who are trafficked will have their needs met with regard to

"accommodation ... day to day living ... medical advice and treatment (including psychological assessment and treatment) ... language translation and interpretation ... Counselling .... legal advice ... information about other services available to the child"

and

"repatriation",

if required.

If I receive sufficient assurances on those points, I would be happy not to move amendment 58. I hope that the fact that the amendment has been lodged and considered at stage 2 will ensure that the underlying issues will be addressed in the strategy in due course.

Amendment 59 would require Scottish ministers to include in their trafficking and exploitation strategy details of the aftercare support that is available to child victims of trafficking.

The Convener: Do any other members want to speak? No.

Cabinet secretary, have you been sufficiently probed?

12:30

Michael Matheson: Time will tell. Amendment 45, in the name of Jayne Baxter, would require the publication of statutory guidance setting out the type of support and assistance that may be available to child victims of trafficking. Amendment 47, which is related, requires section 31, on the trafficking and exploitation strategy, to be amended to reference amendment 45.

Amendment 58, in the name of Christina McKelvie, seeks to amend the Children and Young People (Scotland) Act 2014 to expressly specify that child victims of trafficking are eligible for a child's plan. It also seeks to specify the type of support that trafficked children may expect within their plan.

I understand the intention behind the amendments, which is to provide clarity around

the services that may be provided to trafficked children. I also acknowledge the concerns that were raised at stage 1 about the inconsistency of service provision across Scotland. However, I believe that a legislative solution is unwarranted. This is not a legislative issue but an operational issue about local authorities fulfilling their existing statutory obligations to vulnerable children.

I reiterate that the necessary support for children is already enshrined in legislation that provides for all vulnerable children: the Children (Scotland) Act 1995 and the Children and Young People (Scotland) Act 2014. I believe that we can ensure that the existing legislative requirements are applied appropriately through effective engagement with our partners and the development of good practice.

The human trafficking and exploitation strategy, which is statutory and is provided for in section 31, will be developed with our statutory and non-statutory partners. That will set out the assistance and support required for child victims of trafficking.

Further, we do not believe that there is a need for additional statutory guidance to that which is currently being developed for the implementation of the 2014 act. That guidance will provide a framework within which each individual child victim of trafficking will be provided with support and assistance to meet their specific wellbeing needs.

Given that the majority of, if not all, trafficked children will have experienced trauma and are likely to have multiple and complex needs, we would expect all trafficked children to have a child's plan under the 2014 act. We do not believe that it is necessary to legislate in this bill to require all such children to have a plan, as that will flow from the provisions that are set out in the 2014 act.

We also do not want to be prescriptive about what a targeted intervention in a child's plan might look like. There is a concern that amendment 58, although undoubtedly well intentioned, could undermine Scotland's holistic approach to addressing the wellbeing needs of a child victim by suggesting a list of interventions and supports rather than being child centred.

I turn to amendment 46 in the name of Jayne Baxter and amendment 57, in the name of Christina McKelvie. The effect of those amendments would be to produce an annual or biannual report setting out the support and assistance that has been provided to child victims of human trafficking under certain provisions of the 1995 act and the 2014 act. We believe that we will effect change by working collaboratively with our local authority partners rather than requiring them to collect and publish additional and unnecessary information.

Further, when part 3 of the 2014 act is commenced, there will be a requirement on local authorities and health boards to publish a children's services plan for each three-year period. There will also be a specific requirement for a report to be published each year on compliance with the plan. We believe that services for child victims of trafficking will fall within the scope of those plans and reports and that to add another reporting requirement risks unnecessary duplication.

Amendment 59, in the name of Christina McKelvie, aims to amend section 31 on the strategy in order to reference sections 25 and 29 of the 1995 act. Section 31(3)(c) requires the strategy to make reference to the support and assistance available to adults and children who are, or appear to be, victims of trafficking. It references support that will be available under the bill and support that is otherwise available to make the point that there is no inference that the support that is included in the strategy is to be only the new types of support that will be available under the bill. Specific reference to support that is available under other statutes does not fit with that drafting approach and may have the unintended consequence of limiting the consideration of additional support by focusing on sections 25 and 29 to the exclusion of other statutory provisions that may be relevant.

There has been much discussion of support and assistance for child victims of human trafficking. We all agree that those very vulnerable children must receive the necessary support and assistance to enable them to recover from the trauma of their experience. However, our view remains that the issue of support and assistance for child victims of human trafficking would be best addressed in the human trafficking and exploitation strategy. Developing the strategy will provide us with the opportunity to engage actively with our partners across a range of sectors to address the issues that are raised in the amendments.

We do not support any of the amendments in the group and I invite the committee to reject them.

Jayne Baxter: It is important to have these things on the face of the bill, so I press amendment 45.

The Convener: The question is, that amendment 45 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
McInnes, Alison (North East Scotland) (LD)

Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 45 disagreed to.

Amendment 46 moved—[Jayne Baxter].

The Convener: The question is, that amendment 46 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baxter, Jayne (Mid Scotland and Fife) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 46 disagreed to.

Amendments 57, 58 and 5 not moved.

Sections 9 and 10 agreed to.

Section 11—Proceeds of Crime Act 2002: lifestyle offences

Amendment 6 not moved.

Section 11 agreed to.

Section 12—Relevant trafficking or exploitation offence

Amendment 7 not moved.

Section 12 agreed to.

Sections 13 to 30 agreed to.

Section 31—Trafficking and exploitation strategy

Amendment 30 moved—[Michael Matheson]—and agreed to.

Amendments 47, 59 and 8 not moved.

Section 31, as amended, agreed to.

Section 32—Review and publication of strategy

The Convener: Amendment 60, in the name of Alison McInnes, is in a group on its own.

Alison McInnes: Section 31 states:

"Ministers must prepare a trafficking and exploitation strategy."

Amendment 60 would require the Scottish Government to publish that strategy within a year of the main parts of the bill—parts 1 and 2—coming into force. At present, the publication date is not set in section 31 or section 32—the latter simply states that the strategy must be reviewed or reported on at least every three years after its initial publication. The strategy was a key part of Jenny Marra's member's bill proposal.

In our stage 1 report, we sought clarification of the timetable for the publication of the first strategy, and in his response the cabinet secretary indicated that his officials had been involved in dialogue on that, noting that

"The aim is to have a first Strategy available for formal consultation shortly after the legislation is in place".

I welcome the fact that the work to prepare the strategy is already under way. In that context, I see no reason why the Scottish Government should not be compelled to introduce the strategy within a year of the implementation of parts 1 and 2, in order to provide greater certainty for Parliament, and to those who are tasked with representing and providing support services to victims.

I move amendment 60.

Michael Matheson: Alison McInnes's amendment would place on Scottish ministers a requirement to publish a strategy within one year of both part 1 and part 2 coming into force. I am generally happy to commit to publishing the strategy within a suitable timeframe after the commencement of certain key provisions in the bill. I am also happy to agree that one year would be an appropriate timeframe.

My concern is that linking the requirement to publish the strategy to the full commencement of all of parts 1 and 2 might actually delay its publication. For example, we have had discussions today regarding a statutory offence that would be added to either part 1 or part 2, whether at this stage or at stage 3. If that happened, it would be reasonable to expect that significant further work and discussion with stakeholders would be required before the relevant provisions could be commenced. In those circumstances, the amendment could ultimately require ministers to delay publication of the strategy, which is not what it seeks to achieve.

The Scottish Government aims to have a first strategy available for formal consultation soon after the bill is passed, should Parliament pass it. Exact timings will, of course, depend on the progress of the bill.

Although I am sympathetic to the aims behind the amendment, and the Scottish Government is committed to taking forward work on the strategy as expeditiously as possible, there is a risk that the amendment could undermine progress in this area. Therefore, I ask Alison McInnes to withdraw her amendment. I undertake to work with her to produce an alternative amendment at stage 3 that will clearly meet her aims.

The Convener: Has that dealt a body blow to your amendment, Alison?

Alison McInnes: Absolutely. I thank the cabinet secretary for his comments and for the commitment that he has made. Unintended consequences are the last thing that I want. I do not want to delay the strategy, so I seek leave to withdraw amendment 60.

Amendment 60, by agreement, withdrawn.

Sections 32 and 33 agreed to.

Section 34—Duty to notify and provide information about victims

Amendment 9 not moved.

The Convener: Amendment 31, in the name of the cabinet secretary, is grouped with amendment 61.

Michael Matheson: Amendment 31 performs two primary functions. The first is to place a duty on the Police Service to transmit a notification that it receives under section 34(1) to a specified person. The second is to give Scottish ministers the power to specify in regulations to whom those notifications must be given.

Amendment 31 has been drafted in a similar way to the approach that is taken at section 34(2) of the bill, which makes it clear that information should not be provided that either identifies a person or enables them to be identified without their consent.

It is worth bearing in mind that there are significant challenges in establishing credible information about levels of human trafficking and numbers of victims. The original policy intent underpinning section 34 was to allow the collation and processing of wider information about trafficking activity in Scotland that is not currently collected through the national referral mechanism or the criminal justice processes, ultimately creating a more accurate picture of the scale and scope of trafficking, and a clearer basis for the requirement for and provision of support services for victims.

When we drafted amendment 31, which seeks to amend section 34, we were mindful of the concerns that were raised by the Law Society of Scotland and the Information Commissioner's Office. It might be helpful to provide a quick recap of the issues that were raised by the Information Commissioner's Office. It was concerned that victims of trafficking might be incapable of giving consent due to their vulnerability. In particular, stakeholders note that the victims might have little understanding of English or of the Scottish legal system. Although it is true that many victims will be in that position, we do not consider that all victims of trafficking will be incapable of giving consent. Victims from within the UK, for example, may understand well what is being asked of them. The public authorities that will work under the duty must assess whether a victim is capable of consenting to the inclusion of identifying information, and we think that it is right that victims should be empowered to give that consent if they are capable of doing so.

12:45

We are grateful for the offer from the Information Commissioner's Office to work with us on the drafting of any regulations that are made under the bill to ensure that specific individuals cannot be identified from what may be unique circumstances. I confirm that my officials will be in touch with the ICO when they are drafting the regulations and developing the guidance that will set out the notification arrangements and procedures that will apply. My officials will also continue to liaise with Police Scotland, which is comfortable with the drafting of amendment 31, and with other stakeholders in developing the guidance and the regulations.

I am sympathetic to amendment 61, which is in the name of Alison McInnes. In my view, the amendment could help the smooth and proper disclosure of information by Scottish public authorities. However, the impact of amendment 31—if it is agreed to—would be that the change to section 34 proposed by Alison McInnes would not be applied in respect of the duty on Police Scotland to pass information to other authorities. We would have to consider that in framing the parameters of the regulation-making powers.

As I suggested earlier, my officials will meet stakeholders ahead of stage 3 to consider the formulation of any regulations that are made under section 34 and the development of guidance that will set out the notification arrangements and procedures, with a view to considering whether any amendments will be required at stage 3. I give members an assurance that the issues of data

protection, disclosure of information, confidentiality and consent will all be at the heart of our approach as we develop regulations, guidance and—if appropriate—amendments to the bill in that area.

I invite the committee to support amendment 31 and ask Alison McInnes not to move amendment 61, on the basis that the amendment takes no account of the regulation-making power in subsection (4) that will be introduced by amendment 31 and on the understanding that we commit to reflect further on the issues before stage 3. I would be happy to engage further with her on that important issue prior to stage 3, to update her on the progress that has been made.

I move amendment 31.

Alison McInnes: The intention behind amendment 61 is to ensure that the duty in section 34 to notify the chief constable and provide them with information about victims would not have the effect of disapplying the Data Protection Act 1998. The amendment is backed by the Law Society of Scotland.

The cabinet secretary has stated that section 34(2) makes it clear that there would be no disapplication of data protection laws, but I do not believe that that provision provides the level of clarity that he suggests.

Members will recall that section 34(2) provides that notification must not include information that

"identifies the adult, or ... enables the adult to be identified".

That is virtually identical to section 52 of the Modern Slavery Act 2015. However, the UK Parliament did not deem further clarification to be unnecessary or surplus to requirements—it approved further provisions that are virtually identical to those in my amendment 61, ensuring that the Data Protection Act 1998 is upheld.

As the cabinet secretary has said, the Information Commissioner's Office has also queried why section 34(2) currently provides for the situation in which an adult victim might consent to the provision of such information.

Nevertheless, in the light of the offer of engagement before stage 3, I am happy not to move amendment 61.

The Convener: Thank you for your advance notice of that.

Alison McInnes: I look forward to discussing the matter further with the cabinet secretary.

Amendment 31 agreed to.

Amendment 61 not moved.

Section 34, as amended, agreed to.

Section 35 agreed to.

Section 36—Interpretation

Amendments 32 and 33 moved—[Michael Matheson]—and agreed to.

Section 36, as amended, agreed to.

Section 37—Regulations

Amendment 48 not moved.

Amendment 34 moved—[Michael Matheson]—and agreed to.

Amendment 10 not moved.

Section 37, as amended, agreed to.

Sections 38 and 39 agreed to.

Schedule—Minor and consequential modifications

The Convener: Amendment 35, in the name of the cabinet secretary, is grouped with amendments 36 to 39.

Michael Matheson: I will briefly explain the minor technical amendments in this group.

Amendment 35 seeks to make a consequential change to section 271 of the Criminal Procedure (Scotland) Act 1995 to ensure that victims of the new trafficking offence are treated as vulnerable witnesses during criminal proceedings and are entitled to the special measures that are available to such witnesses. Amendment 38 seeks to make a similar change to section 8 of the Victims and Witnesses (Scotland) Act 2014 to permit trafficking victims who are being interviewed as part of an investigation to choose the gender of their interviewer in accordance with that provision.

Amendments 36 and 37 seek to repeal sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. The bill as introduced already repeals the offence of trafficking in section 4, but section 5, too, can be repealed as it contains only provisions that are supplementary to section 4. Finally, amendment 39 is a minor technical revision that seeks to ensure that commencement regulations made under section 41 have the usual power to specify different commencement dates for different purposes.

I move amendment 35.

The Convener: Thank you very much, cabinet secretary. It must have been a long morning—the children are already packing their schoolbags, even though the bell has not yet rung.

Amendment 35 agreed to.

Amendment 11 not moved.

Amendments 36 to 38 moved—[Michael Matheson]—and agreed to.

Schedule, as amended, agreed to.

Section 40 agreed to.

Section 41—Commencement

Amendment 39 moved—[Michael Matheson]—and agreed to.

Section 41, as amended, agreed to.

Section 42 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. Cheers are not allowed.

I thank the cabinet secretary, his officials and committee members.

The next meeting is on 23 June, when we will take evidence from Margaret Mitchell as member in charge of the Apologies (Scotland) Bill. We will also consider our stage 1 report on the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill as well as one affirmative instrument.

I formally close the meeting. You can pack your schoolbags now.

Meeting closed at 12:53.

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