The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 8 September 2015

Session 4

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JUSTICE COMMITTEE

24th 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)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Margaret McDougall (West Scotland) (Lab)
*Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*Gil Paterson (Clydebank and Milngavie) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Gavin Brown (Lothian) (Con) (Committee Substitute)
Mary Fee (West Scotland) (Lab)
Michael Matheson (Cabinet Secretary for Justice)
Catriona MacKenzie (Scottish Government)
Michael McMahon (Uddingston and Bellshill) (Lab)
Denise Swanson (Scottish Government)
Paul Wheelhouse (Minister for Community Safety and Legal Affairs)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 8 September 2015

[The Convener opened the meeting at 10:00]

Interests

The Convener (Christine Grahame): Good morning and welcome to the Justice Committee's 24th meeting in 2015. I ask everyone to switch off mobile phones and other electronic devices as they interfere with broadcasting, even when switched to silent. There are no apologies.

I welcome Margaret McDougall to the Justice Committee and ask her to declare any interest relevant to the committee.

Margaret McDougall (West Scotland) (Lab): I have no interests to declare that I am aware of.

The Convener: Good—I thought you were going to say that you had no interest; we would have challenged that. [*Laughter*.]

Roddy Campbell also wished to make a declaration.

Roderick Campbell (North East Fife) (SNP): Thank you, convener. I remind the committee of my declared interest as a member of the Faculty of Advocates.

Decision on Taking Business in Private

10:00

The Convener: Agenda item 2 is a decision on taking business in private. Does the committee agree to take in private agenda item 10, on the Apologies (Scotland) Bill?

Members *indicated agreement.*

Subordinate Legislation

Courts Reform (Scotland) Act 2014 (Consequential Provisions No 2) Order 2015 [Draft]

10:00

The Convener: Item 3 is on the draft Courts Reform (Scotland) Act 2014 (Consequential Provisions No 2) Order 2015.

I welcome Paul Wheelhouse, the Minister for Community Safety and Legal Affairs, and Scottish Government officials Hazel Dalgard, from the civil law and legal system division, and Greig Walker, from the legal services directorate.

The Delegated Powers and Law Reform Committee agreed to make no observations to the Parliament on the draft order.

I go straight to questions from members, as the minister has an opportunity to respond to them; the formal debate will follow this evidence session. Do members have questions?

Members: No.

The Convener: I now move to item 4 and the formal debate. I invite the minister to move motion S4M-14087.

Motion moved,

That the Justice Committee recommends that the draft Courts Reform (Scotland) Act 2014 (Consequential Provisions No. 2) Order 2015 be approved.—[*Paul Wheelhouse.*]

The Convener: No member wishes to speak on the motion. I take it that you have nothing to add, minister.

The Minister for Community Safety and Legal Affairs (Paul Wheelhouse): I have nothing to add.

Motion agreed to.

The Convener: As members are aware, the committee is required to report on each instrument. Are we agreed that I take responsibility for signing off the report?

Members *indicated agreement.*

The Convener: Thank you very much. I suspend the meeting for a minute so that the officials can change over.

10:02

Meeting suspended.

10:03

On resuming—

Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2015 [Draft]

The Convener: Item 5 is consideration of a further affirmative instrument, the draft Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2015.

The minister is of course staying with us, as is Hazel Dalgard. I welcome to the meeting Scottish Government officials Denise Swanson, the head of the access to justice unit, Alastair Smith, from the legal services directorate, and Catriona MacKenzie. I did not see you there as I was blinded by the light. I do not know where you are from.

Catriona MacKenzie (Scottish Government): I am from the civil law and legal system division.

The Convener: Excellent—we could not do without you.

The Delegated Powers and Law Reform Committee agreed to make no observations to the Parliament on the draft regulations, but members will know that we have received representations from some members of the legal profession.

I go straight to questions from members, as the minister has an opportunity to respond to them; the formal debate will follow this evidence session. John Finnie is first, followed by Margaret Mitchell and Roddy Campbell.

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

Good morning, minister. You will be aware of the representations that we have received. You might say that they are unsurprising: people want to be remunerated at a more enhanced rate than the Government is offering. We are told that the rate is the same as it was in 1992. Is that correct?

Paul Wheelhouse: I ask Denise Swanson to answer that.

Denise Swanson (Scottish Government): Yes, the existing rates and fees payable have been the same since 1992. They are the same as are payable for similar elements of work across the legal aid system.

John Finnie: Has there been any calculation of that as a real-terms cut? What with inflation and one thing or another, it represents a significant erosion of what might be seen as the profession's terms and conditions.

Paul Wheelhouse: I am not aware of any such calculation. I might defer to colleagues in a second if that is okay with Mr Finnie, but, with the proviso that I am sure we are all aware of the difficulties that we face in managing public finances, I will say that if we could afford to spend more, we would certainly take that into consideration. However, we are under real pressure, as I am sure Mr Finnie is aware. I will check with Denise Swanson whether any calculation has been made of the real-terms reduction in fees.

Denise Swanson: That is not a calculation that we have done.

John Finnie: The Scottish Government uses the term "access to justice" a lot—we would all commend that approach. I also commend any briefing that highlights the example of Inverness and the Highlands. You might be aware of the briefing from the Law Society, which states:

> "For example, where a person in Inverness is unfairly convicted, he or she is unlikely to be able to find an Inverness-based solicitor willing to travel to Edinburgh to conduct a 30 minute summary appeal hearing for remuneration of £27.40 and limited travel fees."

One would also have to allow eight hours' travel time for that journey—three and a half hours each way, say, and a bit of latitude. Of course, that does not cover Portree, Stornoway, Kirkwall, Elgin, Fort William, Oban and Campbeltown, all of which have more complex communication links with the nation's capital. Surely that does not represent equal access to justice.

Paul Wheelhouse: The issue is also important to the convener's constituents and to the constituents of all members with rural interests. Clients of local solicitors are entitled to be represented at the sheriff appeal court and, indeed, to have equality of arms, which is an issue that I know the committee will be interested in.

It is my understanding that the travel arrangements under the draft regulations are not significantly different from the current set-up. For example, cases will already be heard in Edinburgh in the High Court or, for civil cases, the Court of Session, and solicitors will already face the choice between travelling to Edinburgh themselves to represent their clients and, as they often do, appointing an agent—a local solicitor in Edinburgh—to represent their client for that half-hour hearing in Edinburgh.

It is also my understanding that the £27 that Mr Finnie has quoted is not an accurate representation of the compensation for travel that would be available to solicitors—

John Finnie: Forgive me, minister, but I think that that figure relates to the fee. It is £27 plus the limited travel fees.

Paul Wheelhouse: The figures that we are aware of and which we have tried to summarise come from the Scottish Legal Aid Board's detailed breakdown of a case in which a Glasgow solicitor—I appreciate that it is not a solicitor from Inverness—attends the sheriff appeal court. The fees are calculated on a detailed fees basis in the draft regulations, and the £27 figure that Mr Finnie mentioned does not represent the totality of the fees that the solicitor would be entitled to in representing their client at a case at the sheriff appeal court. For example, there are specific fees for producing letters and supporting documents for the court. To some degree, in relying on the figure that Mr Finnie has quoted, he is comparing apples and pears.

John Finnie: But there is a comparator. Their fellow professionals are paid at a different rate.

Paul Wheelhouse: Can you clarify your point, please?

John Finnie: The point is that solicitor advocates are being treated differently from advocates.

Paul Wheelhouse: Indeed. Under current legislation, solicitor advocates are entitled to a higher rate of support when they appear on behalf of a client at the Court of Session or the High Court. We are talking about the sheriff appeal court, and under the current regulations, solicitor advocates would not be entitled to the same rate as counsel, if counsel were sanctioned by the Scottish Legal Aid Board. We are prepared to look at and review that issue over the next six months to see the impact on solicitor advocates' business.

However, I make it absolutely clear that there is nothing that excludes solicitor advocates from representing clients, as was implied in a phrase in the letter that the Law Society sent to me, which I believe was copied to the committee. That is not accurate. Solicitor advocates might decide on their own behalf that the fee that they are getting is insufficient, which means that the decision whether to represent a client is a commercial one for them. Over the next six months, we will review that very issue of the extent to which the move is impacting on solicitor advocates' business and, indeed, on access to justice—obviously, the choice of who represents them in the sheriff appeal court is important to clients.

John Finnie: The financial constraints are acknowledged—you are right. This is an opening shot; this is a new occasion. Surely we want to get it right straight away and not have to review it.

Paul Wheelhouse: The important point that I would focus on is the degree to which the client who needs representation in the sheriff appeal court is receiving equality of arms in relation to the case. The Scottish Legal Aid Board is putting in place a policy of flexibility, recognising the novel nature of the arrangements and the jurisdictional change. The board will ensure that it looks sympathetically on any applications for sanction for counsel from those with cases in the appeal court. Therefore, we hope to be in a situation in which, if an advocate depute is representing the Crown, those who are making an appeal are represented at an equal level, with the Scottish Legal Aid Board sanctioning counsel.

There is a particular gap. I appreciate the sensitive position of the solicitor advocates and the fact that they may face some disadvantage based on the fees that they currently get when they appear at a higher level. We are doing our best. We need to ensure that we have regulations in place to allow the sheriff appeal court to be up and running for 22 September, which was the will of the Scottish Parliament when it passed the Courts Reform (Scotland) Act 2014. The draft regulations are our best foot forward at this point in time, with a review of the arrangements and their impact in due course. We will reflect on any particular damage that is done to solicitor advocates' business. However, the important thing is to protect the interests of the client.

The Convener: Can I let somebody else in, John? You have had a fair stab at it and I have a queue.

Margaret Mitchell (Central Scotland) (Con): You will appreciate that this has come to us late in the day, minister. The point that seems to be being made—it is a valid one—is that the Scottish civil courts review and the Scottish Parliament's proceedings in relation to the Courts Reform (Scotland) Act 2014 should be considered, because there was no indication that solicitor advocates were intended to be placed in a disadvantageous position compared with members of the Faculty of Advocates or that pleaders should be restricted to instructing members of the bar. On the contrary, the 2014 act contains a section that sets out the circumstances in which a sheriff or the sheriff appeal court can sanction the employment of counsel, including solicitor advocates.

The point is also made that allowing solicitor advocates to be treated as counsel in criminal cases in the sheriff court would be entirely cost neutral to SLAB. What is not neutral is the fear of the Society of Solicitor Advocates, in opposing the fee regulations, that the measure is unrealistic and would have a significant impact on access to

justice, the administration of justice and choice of representation.

To go back to John Finnie's point, it is essential that we get this right now. If there is dubiety about the instrument, we should delay it.

Solicitors also contend that,

"to provide advocacy at the Sheriff Appeal Court, the payment structures for preparation and conduct of an appeal under these regulations are wholly inadequate."

That is not a good way to begin new court reforms.

Paul Wheelhouse: I recognise the arguments that Margaret Mitchell makes. They are similar to points that have been made to us by the Law Society of Scotland and others. I will point out a couple of things.

First, the Scottish Legal Aid Board estimates that for an appeal on conviction and sentence a Glasgow solicitor—I appreciate that this does not address the Inverness point that Mr Finnie raised—could earn fees and outlays of anything from £400 to £600 and more. That would depend on the time that was spent on preparing, travelling for, waiting for and conducting the appeal. If they represented a client from the original defence of case through to appeal at the sheriff appeal court, a solicitor could easily be paid more than £900 per client.

Solicitors are paid in the round for criminal legal aid work, of which summary appeal certificates represent less than 1 per cent of criminal legal aid expenditure. Over the past three years, summary appeals against sentence have averaged around 660 per year and appeals against conviction around 160 per year, in comparison with 86,191 grants of legal aid and assistance by way of representation—ABWOR—for summary criminal work in 2013 to 2014. That puts in perspective how small the proportion of cases that we are talking about is.

10:15

On the choice of representative when sanction for counsel is granted, solicitor advocates will be able to access substantial detailed solicitor's fees for the preparation and conduct of summary criminal appeals. Unlike counsel, of course, they can provide representation as solicitors in the lower courts, without prior sanction.

We have already begun a much wider discussion with the Law Society and the Faculty of Advocates—and the Society of Solicitor Advocates, which will be important, too—on how solicitor advocates are treated and paid in comparison with counsel. I assure the committee that we will look closely at the regulations' impact on solicitor advocates, but I make the point that we are talking about a very small proportion of cases.

I challenge the assertion that the fees are untenable. We are talking about fees of £400 to £600, or up to £900 for representing a client from the original defence of a case through to appeal at the sheriff appeal court, which are reasonably substantial figures, and an hourly rate of £54.80 for appearance at the sheriff appeal court, which compares favourably with the minimum wage.

The Convener: I do not know whether those in the law profession—which I used to be in—will appreciate that comment.

Paul Wheelhouse: I appreciate the skills of our legal profession.

The Convener: The minimum wage should be higher, rather than the other way round.

Paul Wheelhouse: Indeed. We all want it to be higher—indeed, we want a living wage. However, I make the point that solicitors are well paid for the valuable skills that are attributed to them. I appreciate that the private fees that solicitors charge may well be more generous than legal aid fees, but legal aid fees are nonetheless reasonable rates of pay for the work that is involved.

The Convener: I will leave that with you.

Roderick Campbell: For fairly obvious personal reasons, I do not want to get involved in a debate about whether the regulations discriminate against solicitor advocates. However, I am grateful to you for saying that a dialogue about the issues will take place.

In her letter of Friday last week, the president of the Law Society discussed other options that could have led to savings of £260,000. Will you comment on that?

I am rather concerned about the speed at which things are happening. It appears that you met the Law Society last Thursday, and the letter is from Friday. I understand that the committee is not required to report to Parliament until 20 September. Would there be any mileage in further discussions or should we bite the bullet today?

Paul Wheelhouse: I would be grateful for the committee's guidance. We are here to give you as much detail as we can on the facts and figures. I appreciate that there might be concern about the lack of clarity on the numbers. In my discussion with Margaret Mitchell, I tried to explain that we feel that the figures that have been presented are perhaps a result of people misunderstanding the rates of pay that will apply.

The discussion that I had last week with the Law Society was helpful. It is fair to say that the Law Society had not quite appreciated some of the steps that we had taken to address some of its principal concerns, such as the flexibility on

sanction for counsel, which we explained to it. We discussed a similar issue regarding whether comparing the previous regulations and the proposed regulations was like comparing apples and pears.

I would be grateful for the committee's guidance on whether it feels that it has sufficient information. However, if the regulations are not implemented by 22 September, our solicitors will be in a considerably worse position than they will be in if they are implemented by then. I reiterate my commitment that we will review the regulations' impact on solicitor advocates and other legal practitioners to see whether there are access to justice challenges, along the lines of those that John Finnie outlined, or whether there are concerns about particular disadvantages for solicitor advocates compared with advocates.

I would be grateful for a feel from the committee. Should we be able to secure a slot at a subsequent committee meeting—

Roderick Campbell: Convener, given the timetable, would it be possible for us to allow another week for dialogue on the issue before moving to the vote?

The Convener: I want to hear from other members first. However, that is a fair consideration.

Elaine Murray (Dumfriesshire) (Lab): Minister, you referred to the Scottish Legal Aid Board's suggestion that the fee that is paid to a solicitor would be around £400 to £500. However, the letter from the Law Society of Scotland that is dated 4 September states:

> "we find it inconceivable at the rates provided in the regulations that the fee to the solicitor would amount to that suggested by SLAB."

There still seems to be a significant amount of disagreement. The Law Society points out, for example, that the rate for an hour's hearing at the High Court under the current arrangements is £292.20. Although the proposed £54.80 is considerably more than any of us earns per hour, it will be a significant reduction in fees. I presume that a solicitor advocate would do a considerable amount of additional work on top of the hour that they spend in court. The Law Society reckons that the majority of appeal hearings would last no longer than an hour, so the figure of £400 to £500 appears to be a red herring. I agree with Roddy Campbell that we need additional time to look into the figures so that we have more clarity on what the actual remuneration will be under the new regulations.

Paul Wheelhouse: I recognise the concern that Elaine Murray has set out about the apparent drop in fee rates and I do not want to make light of the issue. The way in which fees are calculated differs between the previous regime and the proposed one; there was perhaps more of a lump-sum element to the previous arrangement, which assumed that preparation was included in the fee, whereas we are now moving to having a more detailed breakdown of specific items.

I want to check that the committee has received a detailed breakdown that is based on the sheriff appeal court example that I referred to earlier, which is described as the kind of expenses incurred by XY—

The Convener: Is this in a paper from your office?

Paul Wheelhouse: It was in a letter from the Scottish Legal Aid Board.

The Convener: The answer is no.

Paul Wheelhouse: It would be helpful for the committee to see that example. In relation to Mr Campbell's earlier point, it might be something that the committee should consider between now and making a decision.

Perhaps I can outline some of how the fee is broken down in the example. I will not go through the whole list.

The Convener: I want to slow you down a moment, minister. I also want to bring in Alison McInnes.

Some of us round the table think that we need to know more and that we should not go ahead with item 6 today, given that the minister may be able to answer other questions in a meeting next week. Does the committee think that that would be a better way forward? What do you think, Alison?

Alison McInnes (North East Scotland) (LD): I would agree only if there were a genuine desire to meet the Law Society again and explore some of the questions. The minister said that, when he met the Law Society last week, it had not understood some things and it was good for the Law Society to see the example, but the Law Society still chose to write quite a strong letter of objection after that meeting. The end of that letter says:

> "we ask you to reconsider these regulations as a matter of urgency."

We are not talking about a bit of tweaking of fees; rather, the issue is about access to justice. At the moment, we are being told that there is a risk to that access.

The Convener: We do not have the letter from SLAB and there are still major questions about what the Law Society is saying. Is the minister available to come to the committee next week?

Paul Wheelhouse: I have not checked that, convener. I know that the cabinet secretary is also due to appear before the committee next week.

The Convener: It is important for us to know about that now, because otherwise we will move on to item 6. I will suspend the meeting for a couple of minutes to allow the minister to check whether he is available next week. If the committee agrees, we can take that item next week. That would mean that the minister could debate and answer points then and, in the interim, we would trust that he would have the meetings with the Law Society to take us a bit further.

Paul Wheelhouse: I am not sure that we will get much further with the Law Society, given that it already has access to the information and yet has chosen to take a contrary position. I point out—as I did earlier—that if we do not implement the regulations before 22 September, solicitors will be in a greatly more disadvantaged position.

The Convener: I hear you, but we can deal with the matter next week and vote on it then. I suggest that we suspend for a couple of minutes so that you can see whether you can make yourself available next week, when the issues can be properly and thoroughly addressed in the debate.

Paul Wheelhouse: A short suspension would be helpful, convener.

10:24

Meeting suspended.

10:26

On resuming—

The Convener: Yes, minister. [*Laughter.*] Is there a Sir Humphrey in the house?

Paul Wheelhouse: I have just checked and, if the committee wishes me to appear next Tuesday, I can do so, although it will—unfortunately—mean the cancellation of something to do with new psychoactive substances.

The Convener: I think that that will be a good way forward for the committee and, with respect, for you, minister.

Paul Wheelhouse: Before you conclude, convener, I would like to make an important point, for clarity's sake. The situation regarding the position of solicitor advocates is not created by the regulations; this was set in stone by the creation of the sheriff appeal court through the passage of legislation. We are not asking the committee to agree to put solicitor advocates in a disadvantageous position today, but the regulations are required to enable the sheriff appeal court to get up and running on 22 September. I give the committee comfort that it is not being asked to vote on something that will create that position—that position was set in train by a previous vote of the committee and, indeed, of the Parliament.

The Convener: That is now on the record. [*Interruption.*] I do not want to open up the discussion again. Everything can be challenged next week in the debate that we will have. We can check what the minister has said on the record.

Paul Wheelhouse: We will endeavour to get a further submission to you before next week's meeting.

The Convener: And a copy of the letter from the Legal Aid Board. We have not seen that, so it is impossible for us to comment on it.

I am stopping right there. That ends that item, and we are not moving on to item 6, which is deferred until next week. Thank you very much, minister.

Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (No 4) (Sheriff Appeal Court) 2015 (SSI 2015/245)

The Convener: Item 7 is consideration of an instrument that is not subject to any parliamentary procedure. The purpose of the act of adjournal is to amend the Act of Adjournal (Criminal Procedure Rules) 1996 in consequence of the establishment of the sheriff appeal court by the Courts Reform (Scotland) Act 2014. The Delegated Powers and Law Reform Committee has drawn the Parliament's attention to the instrument as it contains minor drafting errors. The Lord President's private office has undertaken to lay amending instruments to correct those errors. Are members content to endorse the DPLR Committee's comments on the act of adjournal?

Members *indicated agreement.*

The Convener: We will suspend the meeting again—we are suspending like mad today. This will be for just a couple of minutes to let members get their papers organised for stage 2 of the Criminal Justice (Scotland) Bill and to allow the Cabinet Secretary for Justice to come in.

10:29

Meeting suspended.

10:31

On resuming—

Criminal Justice (Scotland) Bill: Stage 2

The Convener: I move on to item 8.

I welcome Michael Matheson, the Cabinet Secretary for Justice. I also welcome the officials who are here to support the cabinet secretary, but who are not permitted to participate in stage 2. I understand that officials may change over as we progress through the bill. When that happens, I will briefly suspend the meeting.

Members should have their copies of the bill, the marshalled list and groupings of amendments for today's consideration. The committee agreed on 1 September to change the order of stage 2 consideration of the bill. We will begin consideration at part 2 and go no further than part 6 today. As I have indicated, we will consider part 1 at a later date. We move straight to the marshalled list.

Before Section 57

The Convener: We start with the group on corroboration, which consists of amendments 9, 1 to 6, 66 and 68. Amendment 9 is in the name of Graeme Pearson, who I know does not intend to move that amendment today. I take it that no other member wishes to move that amendment.

Members *indicated agreement.*

The Convener: Thank you.

Amendment 9 not moved.

Section 57—Corroboration not required

The Convener: I therefore call amendment 1, which is grouped with amendments 2 to 6, 66 and 68. I call Margaret Mitchell to move amendment 1 and to speak to the other amendments in the group.

Margaret Mitchell: Section 57 provides for the abolition of the requirement for corroboration—a provision that triggered a storm of controversy that was aggravated by the intransigence of the then Cabinet Secretary for Justice and the confused and, at times, contradictory responses from him to the concerns that were raised during scrutiny of the provision and the debate that followed.

It was, to be frank, a travesty that the concerns that were raised by various stakeholders—including High Court judges, senators of the College of Justice, the Law Society of Scotland, the Faculty of Advocates, the Scottish Human Rights Commission, the cross-party working group on adult survivors of childhood sexual abuse, and learned academics—were consistently misrepresented by the former justice secretary as a polarised argument between the legal profession and victims.

Let us be quite clear: the attempt to trivialise that crucial debate and to bulldoze the provision through Parliament undermined the fundamental right to a fair trial that every individual who comes into contact with Scotland's criminal justice system has a right to expect.

As Lord Gill stated,

"The rule of corroboration is not some archaic legal relic from antiquity"

but is, in fact, one of our law's

"finest features"—[*Official Report*, *Justice Committee*, 20 November 2013; c 3730.]

Others went further and pointed out that if the requirement for corroboration were to be abolished without any additional safeguards being put in place, that would lead to "many more wrongful convictions" and would create a "new category of victims". It is totally unacceptable that a decision of this magnitude was crammed into the miscellaneous provisions of the Criminal Justice (Scotland) Bill, based on the fatally flawed recommendation of the Carloway commission, which failed to consider that, rather than there being just two options available—namely, the retention or abolition of the requirement for corroboration—there was also a third way, which would include examination of the requirement for corroboration within a wider review of the law of evidence.

I believe that it will remain a stain on this majority Government's tenure in office that, in the face of opposition from all the other parties, from independent members and from the aforementioned stakeholders, at stage 1 it whipped its members into supporting the abolition of the requirement for corroboration, and later decided that although there would be a review under Lord Bonomy, retention was not to be an option in the review's remit and abolition would still go ahead—a move that struck at the democratic competence of this devolved Parliament.

Without doubt, the new cabinet secretary's announcement earlier this year, following Lord Bonomy's review, that the decision to abolish the requirement for corroboration would be reversed was widely welcomed, not least by the majority of members of this committee and by the aforementioned stakeholders.

Today, I am relieved and gratified that the Scottish Government has expressed a willingness to support my amendments 1 to 6, which will

remove from the bill the provisions that would abolish the requirement for corroboration.

I move amendment 1.

The Cabinet Secretary for Justice (Michael Matheson): Good morning, convener. Not only has it been quite some time since the Justice Committee last considered the bill, but there have been significant developments in the intervening period. It is perhaps appropriate that this stage 2 debate is starting with an issue that has been the subject of much debate over the past few years: reform of the requirement for corroboration.

When I took up post as Cabinet Secretary for Justice last November, I said that I would await the outcome of Lord Bonomy's review before reaching any decision on how to proceed. I was at that time very much aware of concerns that had been raised by members of this committee, among others, on whether the reform should proceed under the Criminal Justice (Scotland) Bill in advance of consideration of what other safeguards may be needed for our system. The Government has continued to be concerned about the practical effect that the requirement-for-corroboration rule can have on victims of crimes that are committed in private, many of whom are among the most vulnerable citizens in our society.

I undertook to listen to views on the reform and to take account of Lord Bonomy's recommendations before I made a decision, which is what I have done. As I said to Parliament on 21 April, Lord Bonomy's recommendations are substantial and complex, and taking all of them forward will have a major impact on the justice system. Given the timing for the bill's consideration by Parliament and the fact that we have not yet achieved a consensus in favour of the reform, I took the view that it should no longer go forward in the bill. On that basis, I support Margaret Mitchell's amendments to remove the provisions from the bill.

Although I understand why some people may question why the Government did not reach this decision sooner, I consider that rushing to a judgment without awaiting Lord Bonomy's report would not have been appropriate. As I have mentioned previously, I am very grateful to him and his expert group for the considered and collaborative approach that they undertook in the review. I needed to await their recommendations in order to ascertain whether it would be feasible, within the proposed legislation's timetable, to take forward the reform alongside the report's proposals. As it has turned out, that has not been possible. I hope that members understand why the Government considered awaiting Lord Bonomy's report to be the most appropriate course of action.

I also want to pay tribute to the committee's detailed stage 1 scrutiny of the reform, among the other provisions in the bill. The Government's decision to progress the safeguards review was very much informed by the further evidence that the committee elicited during its stage 1 consideration. Although this meeting may bring to an end the reform of the requirement for corroboration that was proposed under the bill, I hope that a platform will have been created on which to build future reforms to our evidence and procedure laws.

As I mentioned when I made my statement to Parliament in April, we will in due course start to consider Lord Bonomy's recommendations, the reform of the requirement for corroboration and any other relevant issues, with the aim of creating a balanced and cohesive package of reforms.

Throughout the course of the debate on abolition of the requirement for corroboration, we have all heard powerful testimony from organisations that represent victims. Now may not be the time for this reform, but I am sure that none of us is complacent and believes that our system should stay the same forever.

I will now move on to discuss amendment 66 in my name, which proposes moving section 62 to the start of part 6 of the bill. Amendment 66 is a consequential and technical amendment that has been prompted by the removal of all the other provisions in part 2. Section 62 is being moved to a better home among the provisions found in part 6.

Finally, the Government's amendment 68 provides for the deletion from the bill of the jury-majority provisions. That reform is very much related to the reform of the requirement for corroboration, as it was intended to provide a further additional safeguard if the requirement-for-corroboration rule was abolished.

Lord Bonomy's review group, as members will be aware, has recommended that jury research should take place to ensure that

> "decisions about what, if any, changes to jury size, majority and verdicts may be appropriate are made on an informed basis".

I have decided that it is appropriate for that recommendation to be taken forward. It should provide a very important evidence base for any future changes to jury size and verdicts. The Scottish Government will now consider the exact remit and the methodology for such research. In that work, my officials will continue to engage with justice sector partners, organisations and academics.

Lord Bonomy's reference group specifically recommended research on the effects of jury sizes of 12 and 15, on the verdicts of not proven and not

guilty, and on the effect of requiring unanimity. I want consideration of the remit to start with those issues, and to add others as is considered necessary. I hope that the research will commence before the end of this parliamentary session. I will keep the committee informed of progress.

I consider that it is preferable to retain the current jury system until the jury research has been completed. Amendment 68, if agreed to, will mean that Scotland will continue with the present system of a simple majority being required for a guilty verdict. Alongside the jury research, we will consider holistically all of Lord Bonomy's proposed reforms, the requirement-for-corroboration rule and the other relevant reforms, and we will take our time in developing a future package of reforms, which I hope can attract a general consensus.

Gil Paterson (Clydebank and Milngavie) (SNP): I intended to come here today and not say too much. I am a reluctant participant, cabinet secretary. However, I am forced to speak. First, I need to declare to the committee that I am a former board member of Rape Crisis Scotland, where I served for 12 years. I want to speak on behalf of the people on whom today's decision will have an impact. People should not, to be frank, be crowing too loudly today, because others will definitely be affected by the decision.

Some women, in particular—and sometimes children—are denied access to justice because they cannot even get their case past the procurator fiscal because of the lack of corroboration. Things happen in private; in those circumstances, no one can come forward and stand up for those people. People who work in the area often know when people are lying and how it affects them. For me, the sooner the requirement for corroboration goes, the better. It is wrong that people are treated so badly and that the system has no answer for them.

10:45

I believe that we have the only justice system in the world in which there is such a barrier for people who have been raped or seriously sexually assaulted. Therefore, we should be silent and not make big statements on how it affects the legal profession, who have been guarding the requirement for corroboration as if it were holy, when no other jurisdiction in the world has such a method.

I hope, cabinet secretary, that at some point very soon the Government will be in a position to bring another proposal back to Parliament, so that people—women and children—can get their day in court and be judged by their peers, rather than by the requirement for corroboration.

Roderick Campbell: I will make a few brief points. Despite the negativity of Margaret Mitchell's comments, we ought to pay tribute to Lord Bonomy's reference group for the sterling work that it has done, and we should also recognise the swift way in which the cabinet secretary responded to that. I think that that is positive, not negative.

I echo the eloquent comments that Gil Paterson made about some victims. There is clearly an access to justice issue that will remain until we can advance the issue further.

Finally, jury research is novel in Scotland: we await the findings with great interest. The cabinet secretary's amendments on that subject are sensible.

Alison McInnes: There is no doubt that the proposal to remove the requirement for corroboration was the most contentious element of the bill. As it was drafted—and is still drafted this morning—it risked bringing our legal system into disrepute through miscarriages of justice and wrongful convictions.

Lord Bonomy's recommendations have made it clear that there is no doubt that removing the requirement for corroboration would have had profound implications for our justice system. As the cabinet secretary said, Lord Bonomy proposes substantial and complex changes that are all interrelated. It is worth remembering that Kenny MacAskill, the previous Cabinet Secretary for Justice, wanted to press ahead even after he recognised that he needed to ask Lord Bonomy to look at the issues, and he asked us to somehow do that and deal with the issues afterwards. Michael Matheson's comments this morning on how substantial and complex the issues are underline what a reckless plan that was.

We need to reflect that it is only the unprecedented suspension of the bill for 18 months that has allowed us to get to a point where we can address the matter in a much more measured and sensible way, and indeed in the way that the committee recommended in its stage 1 report. That was secured following, not least, my suggestion that we suspend the bill.

I am grateful that we have got to the point that we are at today. However, we did not need to wait 18 months to progress some of the other important issues in the bill. There would have been an easier way forward had it not been for the intransigence of Kenny MacAskill 18 months ago.

Christian Allard (North East Scotland) (SNP): I put it on the record that there has been a very good debate on corroboration, but I make it clear

that I have not changed my mind. The bill is not just about corroboration but, like my colleague Gil Paterson, I want the absolute requirement for corroboration to be removed from the justice system as soon as possible.

John Finnie: I will support Margaret Mitchell's amendments, although I do not support many of her comments or the personal comments that have been made. This is about process and not about individuals, as I see it.

I think that this proves that our system works. There is scrutiny and people listen, and we should reflect positively on that. There has been a lot of good debate but also a lot of ill-informed and intemperate debate. As someone who supports corroboration, I find the notion that, in so doing, I have a disregard for victims deeply offensive.

Elaine Murray: I, too, will support Margaret Mitchell's amendments. A lot of things were said, particularly in the stage 1 debate, that would have been better not said. I was personally offended by some of the things that were said. However, that has to be forgiven, I suppose, because we have now made progress, and we need to look to the future.

I welcome what has been said about jury research because, during the stage 1 consideration, the point was made that we need to have some way of doing jury research, although there are difficulties with it. We welcome that, because we need to understand the way in which juries come to decisions if we are to understand how best to address some of the issues around victims.

The Convener: Unusually, I, too, want to speak. The cabinet secretary knows of my long-standing opposition to and concern about the abolition of the requirement for corroboration. That has not been easy, in the face of my party, and I continue to have reservations about the abolition, so I welcome Margaret Mitchell's amendments. I say to Gil Paterson that that does not mean that I do not have concerns, which John Finnie shares, for the victims of rape or sexual assault. It may be that people say that they just want their day in court, but my concern is that, actually, they want their day in court and a conviction. If we simply have the credibility of one witness against that of the accused, that witness might undergo a more aggressive interrogation than they would if there was supporting evidence. That would be appropriate only if, on balance, it was in the interests of justice. My concern was that the measure might have been counterproductive.

Although we have focused on sexual assaults and rape, there are no eyewitnesses to many crimes. Corroboration is not about an eyewitness; it is about another piece of evidence. There might not be eyewitnesses to a burglary or theft from a house, the theft of a car or an assault, so there has to be some corroboration. In my view, we cannot abolish the need for corroboration for one particular crime, such as sexual assault or rape, and separate it from other crimes, which might not have the so-called other piece of evidence.

I am afraid that I remain convinced that corroboration is one of the proud aspects of the Scottish criminal justice system. I remind members that the legal profession represents victims as well as the accused and that, throughout the profession, even among those who represent victims, there was concern that the abolition of corroboration would be counterproductive.

I do not crow about this. It has been a hard fight for many of us. I am glad that we are now taking slow moves towards considering what progress can be made on bringing to court and to successful prosecution those who ought to be in front of the court and successfully prosecuted.

Separately, I note that the review of the jury system is really to do with numbers, but Elaine Murray has raised the point that I would like to raise with the cabinet secretary, which is that we need research into why juries come to the decisions that they come to, although that would obviously have to be discreet. Senior law officers have advised me they have been in circumstances in which they were convinced that a young man raped a former partner, because the evidence led in that direction, but the jury did not convict of rape, as jurors did not want the young man to be labelled a rapist because of what happened on that occasion, which would perhaps never happen again. There are difficulties with the way in which juries work through things in their heads when they come to decisions. We need to look at why it sometimes seems to members of the public and others that it is obvious that someone should have been convicted but they were not.

Without intervening in the privacy of the jury deliberations, we need some research into why in certain cases people are not convicted. That would be additional assistance. I ask the cabinet secretary to look at not just jury numbers and majorities but why and how juries come to their decisions in cases.

I welcome Margaret Mitchell's amendments. Unless the cabinet secretary wishes to say something, Margaret can now wind up the debate.

Michael Matheson: Convener, it might be helpful if I commented on the point that you have raised on jury research. I have announced today that we are going to take forward jury research, based on the recommendation from Lord Bonomy's report, but I should issue a note of caution that the process will not be quick. It will

take a considerable period of time to carry out that research in a thorough and detailed way. Obviously, there are some legal issues that we have to navigate around, as well, in order to undertake that more fully.

I intend to commission the research in the terms that have been set out by Lord Bonomy in the independent review group's recommendation, but, as that progresses, I am content to consider whether there are further areas that it can explore and move into. My mind is not closed to the possibility of further research into aspects of the reasoning that goes on in juries in deliberating, but its principal aim at the outset will be to fulfil the recommendation that was made by the review group that was chaired by Lord Bonomy.

Margaret Mitchell: There was no intention to crow in my opening comments, but it was important to set out the situation that brought us to the point at which we almost had the abolition of corroboration de facto by default and it was being pushed through the Parliament. It is important to highlight that if we are to learn from those mistakes.

I reiterate that corroboration is far from archaic, and I concur with the cabinet secretary that the rule of corroboration will continue to evolve in conjunction with the rules of evidence and other measures to ensure access to justice for all. That includes addressing the vexing problem of the low conviction rates for rapes and sexual assaults, which Gil Paterson has rightly raised. I hope that it will give him some comfort that another amendment that has been lodged—I hope that we will get to it today—seeks to address that very issue and has the support of organisations that deal with rape victims.

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

Members: No.

The Convener: There will be a division.

For

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)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Abstentions

Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 8, Against 0, Abstentions 1.

Amendment 1 agreed to.

Section 58—Effect of other enactments

Amendment 2 moved—[Margaret Mitchell].

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

Members: No.

The Convener: There will be a division.

For

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)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Abstentions

Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 8, Against 0, Abstentions 1.

Amendment 2 agreed to.

Section 59—Relevant day for application

Amendment 3 moved—[Margaret Mitchell].

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

Members: No.

The Convener: There will be a division.

For

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)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Abstentions

Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 8, Against 0, Abstentions 1.

Amendment 3 agreed to.

Section 60—Deeming as regards offence

Amendment 4 moved—[Margaret Mitchell].

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

Members: No.

The Convener: There will be a division.

For

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)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Abstentions

Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 8, Against 0, Abstentions 1.

Amendment 4 agreed to.

Section 61—Transitional and consequential

Amendment 5 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 5 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Abstentions

Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 8, Against 0, Abstentions 1.

Amendment 5 agreed to.

Schedule 2—Modifications in connection with Part 2

Amendment 6 moved—[Margaret Mitchell].

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

Members: No.

The Convener: There will be a division.

For

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)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Abstentions

Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 8, Against 0, Abstentions1.

Amendment 6 agreed to.

Section 62—Statements by accused

Amendment 66 moved—[Michael Matheson]—and agreed to.

After section 62

The Convener: Amendment 54, in the name of Alison McInnes, is in a group on its own.

11:00

Alison McInnes: Amendment 54 would raise the age of criminal responsibility from eight to 12, which would bring it in line with the age of criminal prosecution. That was raised to 12 in 2010 to reflect the extensive body of evidence that children should not come into contact with the justice system at a young age. However, we are left with an anomaly with regard to criminal responsibility. The law is out of touch with our understanding of children's maturity and their capacity to make decisions and understand the consequences of their actions.

Statistics that I have secured from the Scottish Children's Reporter Administration using freedom of information legislation show that around 1,500 children between the age of eight and 11 were referred to children's panels on offence grounds during the past four years. Almost all of them automatically received a criminal record because they accepted those grounds of referral.

The children's hearings system will no doubt subsequently help most of the children to address their offending behaviour and they will mature into responsible adults. After all, that is what we want to achieve. Surely it is perverse to subsequently further punish and disadvantage them as they move into adult life by branding them as criminals? Their childhood convictions will need to be declared for decades or even the rest of their lives. How can that be right? How can we allow a child's opportunities to be curbed so severely at such a young age? Handing criminal records to eight or nine-year-olds is a destructive, inappropriate response to their offending. I want the law to change.

When very young children display troubling or criminal behaviour it is most often because they are themselves deeply troubled and vulnerable. Many such children will have experienced trauma or neglect or have been victims of abuse. They are first and foremost in need of protection.

Scotland has the lowest age of criminal responsibility in Europe—it trails painfully behind international best practice. The United Nations

Committee on the Rights of the Child has stated that it expects 12 to be the "absolute minimum" age of criminal responsibility. Tam Baillie, Scotland's Commissioner for Children and Young People, was right to say that criminalising children as young as eight has "long tarnished" our international reputation.

Yesterday, members received a joint letter in support of the amendment from 17 organisations, including Barnardo's, the Aberlour Child Care Trust, Together Scottish Alliance for Children's Rights, and the Scottish Youth Parliament. The Law Society of Scotland has also backed the amendment. I hope that all members will join me in ensuring that Scotland upholds the human rights of some of the most vulnerable children in our society.

I move amendment 54.

Elaine Murray: I support amendment 54. I see no reason why, when we do not prosecute children under 12, we should be dishing out a criminal record to them. Scotland is behind much of the rest of the world on the issue.

I have seen the Scottish Government's letter to the convener. I do not understand the argument against the amendment. It says that a lot of

"the underlying issues—including disclosure of criminal records, forensic samples, police investigatory powers, victims and community confidence—are complex."

I cannot understand why increasing the age of criminal responsibility would create all those difficulties, particularly as children under 12 are not being prosecuted anyway. I do not understand that argument.

I appreciate that, at one time, this was a very controversial issue. However, times have moved on and I do not think that this change is as controversial as it once was years ago. It is certainly my intention to support amendment 54.

John Finnie: I commend Alison McInnes for her speech and for her extensive work on the subject. I made several notes. I noted that there is an extensive body of evidence—that is unequivocal. I also noted that we are out of kilter with the UN and with the children's commissioner, who is the very person we charge with looking after the wellbeing and human rights of children. This is a fundamentally straightforward issue. I will certainly be aligning my support with Alison McInnes.

Roderick Campbell: Alison McInnes has referred to the Criminal Justice and Licensing (Scotland) Act 2010. She said that no one under the age of 12 can be prosecuted. I am mindful that a large number of children's organisations basically suggest that the fact that the age of criminal responsibility has not been raised is unfinished business. The question is whether amending this bill is the right method to do that. How complex would that be to do? We have heard from an academic, Professor Leverick, who thinks that this bill is not the right place to make the change. Clearly, there are disclosure issues. There is also a need for a consultation.

When the previous Cabinet Secretary for Justice gave evidence in January 2014, he said that it is not possible to have too many consultations running at the same time. That may or may not have been a good argument, but we need a consultation. I recognise that we must get on with the issue; it will not go away. I look to the cabinet secretary for reassurance on a timetable for dealing with the issue.

Margaret Mitchell: I have a huge amount of sympathy with the intent behind the amendment and with what Alison McInnes has said. However, I am a little wary of the law of unintended consequences, and I am aware of the fact that we have not taken detailed evidence on the issue. I therefore wait with interest to hear what the cabinet secretary has to say. I am not convinced that this is necessarily the right place to properly scrutinise and debate such a change.

Christian Allard: I just wanted to add my sympathy for the amendment. However, Rod Campbell put it in one word: consultation. Consultation is what we need and that debate has to happen and cannot happen only at a committee. We need to have a good consultation to ensure that the people of Scotland can give their views on what should happen.

The Convener: I agree with Margaret Mitchell. I have huge sympathy for the amendment, but it would be a major change in the law and I would have great concern if we were to proceed with it without testing the evidence that is before us. A consultation may very well make the case even more compelling, and that would be a good thing, but to make a major change in law without a consultation by the Government and without this committee even testing the evidence in front of us would be a mistake and it might, as Margaret Mitchell says, have unintended consequences. For that reason, although I am sympathetic to Alison McInnes's intent, I will not be supporting the amendment.

Michael Matheson: The minimum age of criminal responsibility is a substantial and complex issue. We remain open to change being made in this area. However, we have serious concerns that amendment 54 does not address the policy, legislative and procedural implications of change, or offer the requisite safeguards. There are significant underlying issues on the disclosure of criminal records, use of forensic samples, police investigatory powers and the rights of victims.

There is, rightly, particular sensitivity where serious violent or sexual behaviour is involved.

We have a strong track record in promoting and safeguarding children's rights. In 2010, the Government changed the law so that no one under the age of 12 can be prosecuted in the criminal courts. Children aged between eight and 11 facing allegations of having committed an offence can be dealt with by the children's hearings system, which takes an approach that is centred on the child's welfare and best interests.

In 2014, via the Children and Young People (Scotland) Act 2014, we introduced a duty on ministers to consider ways to give better effect in Scotland to the United Nations Convention on the Rights of the Child. The children's hearings system is internationally recognised for its child-centred, needs-based approach to children in conflict with the law. The hearings system can be said to provide the "special protective measures" to which the UNCRC refers.

We share concerns about young children potentially having a criminal record that can impact on their life chances as a result of childhood behaviour. I understand that that is one the main reasons why Alison McInnes has brought forward the amendment. Offence grounds established through the children's hearings system have implications for disclosure. The established policy is that serious violent and serious sexual offences should continue to be disclosed, while reducing the impact on life chances of low-level offending in childhood.

Although such cases are mercifully small in number, serious offending and real harm involving children under the age of 12 does occur. It is vital that police have appropriate powers to establish the facts, including when there is no co-operation from parents. It is important that we have a clear way forward for addressing such issues.

I can therefore advise the committee that an independent advisory group is being established. The group will address the underlying issues in respect of disclosure of criminal records, forensic samples, police investigatory powers, victims and community confidence taking account of the minimum age of prosecution, the role of the children's hearings system, and UNCRC compliance. The group is expected to meet in the next six weeks and will bring forward recommendations for consultation by early 2016.

I believe that that approach provides a way of allowing us to deal with the complex legal issues in a considered way. I therefore ask Alison McInnes to withdraw amendment 54.

Alison McInnes: I have listened to what the cabinet secretary has explained today and I read what he said in his recent letter to the committee. We have been told over and over again that the issue is under active consideration. I raised the issue with the former Cabinet Secretary for Justice when we took evidence at stage 1, and I was assured yet again that it was under active consideration, but it seems continually to be put off.

The convener said that my amendment would introduce a major change, but I do not believe that it would. A major change happened when the age of criminal prosecution was changed and it seems that we need to follow through and tidy up this anomaly, which leaves children carrying a criminal record and does not seem at all fair.

If there are outstanding issues to do with disclosure of criminal records, forensic samples and police investigatory powers, the cabinet secretary has not adequately explained them to us and I see no reason why they could not be resolved at stage 3, if we agree the principle today. We have an opportunity today to approve the principle once and for all. It seems disproportionate to say that we need to kick the issue into the long grass for another year or so before we can begin to consider it. I do not doubt that the Government could craft an amendment for stage 3 that could allow it to address some of the practicalities via secondary legislation and ensure that the provision in the amendment was implemented after guidelines had been issued.

I will press amendment 54 and I urge the cabinet secretary and all committee members to seize this opportunity.

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

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
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)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 4, Against 4, Abstentions 1.

I keep to what I said before. I am using my casting vote against the amendment.

Amendment 54 disagreed to.

The Convener: Amendment 102, in the name of Michael McMahon, is grouped with amendments 103 and 104. I call Michael McMahon to move amendment 102 and to speak to the other amendments in the group.

Michael McMahon (Uddingston and Bellshill) (Lab): Thank you very much for inviting me to speak to my amendment.

It seems a long while ago, but members will recall that I gave evidence at stage 1 of the bill, in December 2013, in the context of my Criminal Verdicts (Scotland) Bill. That bill will do two things: it will remove the not proven verdict and increase the size of majority required for a jury to return a guilty verdict, including circumstances in which a juror has died or in which jurors are ill. The proposals are inextricably linked.

I introduced my bill because I have long been convinced that the three-verdict system is no longer defensible in a modern justice system. It causes confusion and uncertainty for victims of crime and the accused person. The principle that all accused persons are innocent until proved guilty entitles them to a straightforward acquittal in every case where the prosecution case against them cannot be established beyond reasonable doubt. Reform is necessary in order to maintain confidence in the judicial system. In effect, a not proven verdict represents another form of acquittal and continues to at best cause confusion and at worst bring the judicial system into complete disrepute.

In addition, as a not proven verdict does not convey the same clarity as a guilty or not guilty verdict, it can leave an accused person stigmatised, particularly as they have no right to a retrial or appeal to clear their name.

Should the not proven verdict be removed, there is a small chance that the number of guilty verdicts could increase. To ensure that such convictions are safe, I propose to increase the majority that is required to convict. As it happens, the Scottish Government made a similar proposal in the Criminal Justice (Scotland) Bill, but for different reasons. For the Government, an increased jury majority was a safeguard in the context of its proposal to remove the requirement for corroboration. Now that it is no longer pursuing that proposal in this bill, it no longer sees a need to increase a jury majority, as you heard from the minister in the debate on the first group. However, if I can persuade the committee to remove the not proven verdict, I will also try to persuade you to retain section 70, with minor modifications, rather than remove it, as the Government proposes.

My bill has been referred to this committee and I look forward to giving evidence to you at stage 1. However, given the Government's proposed amendments to the Criminal Justice (Scotland) Bill in relation to the jury majority, it was prudent for me to lodge my own amendment. Today's debate provides a useful opportunity for an initial discussion on these important issues. It is for those reasons that I move my amendment.

I move amendment 102.

Roderick Campbell: I have some sympathy for Mr McMahon, because, in the debate that has included so many other issues in the bill, his argument has not been addressed as fully as it might have been. However, I am conscious of the fact that jury research is about to be embarked on, and, if we are to take a proper view on the question of whether we should retain the not proven verdict, we should come back to the issue after that research has been completed.

11:15

Michael Matheson: I am grateful to Mr McMahon for setting out his reasons for wishing to see a change in the jury system. I know that he has been pursuing the issue for some time, seeking legislative change in the area. I am also aware that there has been support for a change to the verdict system—in particular, for the abolition of the not proven verdict—and I am not unsympathetic to Mr McMahon's position. However, recent developments must have a significant impact on any reform in the area.

Amendment 68, which we have already debated, would delete the provisions that increase the jury majority that Mr McMahon seeks to amend. As I said when I spoke to amendment 68, I am acting on Lord Bonomy's recommendation that jury research should take place. Although we are still considering the final remit, I agree with Lord Bonomy's recommendation that that work should include research on the verdicts that are available to the jury, as well as research on jury majorities and size. In the light of that work, I consider it preferable to retain the current jury system until the research has been completed, when we will have more detailed evidence on which to base any future reform.

I intend to move amendment 68 and, on that basis, I ask Mr McMahon not to press amendment 102.

Michael McMahon: I say to Roderick Campbell that jury research is welcome. Of course, we want to establish what people think when they make their decisions. However, I have consulted on the bill on three occasions and have taken on board the issues that have been brought to my attention by those who have responded. In all circumstances, the link between the size of a jury and the majority required to make a decision has been brought to my attention because of one

major factor. In all cases, the purpose of the trial is to prove beyond reasonable doubt whether the case brought by the prosecution has been proved, and someone must be confidently found to be either guilty or not guilty. If, regardless of the severity of the crime that is being tested, one individual's changing their mind can mean the difference between someone being found guilty and their being acquitted on a verdict of either not proven or not guilty, that hardly suggests that the case has been proved beyond reasonable doubt. A majority of 8:7 would mean that seven people had serious doubt about the case that had been brought by the prosecution.

We know—and the legal profession knows—that a simple majority of a jury of 15 people is not sustainable, and no amount of kicking the issue into the long grass will change that. The evidence that I have received in the consultations that I have had before makes it absolutely clear that a simple majority is not sustainable. Although I respect Lord Bonomy and have huge regard for the legal profession, I also know that the legal profession has a tendency to look for the long grass whenever it is possible to find it. It has already been suggested, in the consideration of the bill, that we find the long grass for a number of major issues that need to be addressed.

I have consulted on the matter extensively, and there is already a lot of work out there on the concerns about the size of a majority. To use my own analogy, the case has already been proved. There is nothing not proven about the size of a majority; the case has been established and it is beyond reasonable doubt that we need to move to two-thirds majorities. Nevertheless, having heard the concerns of committee members, I am minded to ask for agreement to withdraw my amendment so that the matter can be examined further, if possible, with the cabinet secretary.

Amendment 102, by agreement, withdrawn.

Sections 63 to 65 agreed to.

Section 66—Duty of parties to communicate

The Convener: Amendment 67, in the name of the cabinet secretary, is in a group on its own.

Michael Matheson: In line with Sheriff Principal Bowen's recommendation, section 66, as introduced, would have required the prosecutor in a case to lodge a written record covering both the Crown's state of preparation and that of the defence.

In evidence that was given to the Justice Committee at stage 1, representatives of the Crown Office, the Law Society and the Faculty of Advocates all expressed a preference for having prosecution and defence lawyers lodge records of their own state of preparation. The previous Cabinet Secretary for Justice undertook to review the matter and the committee welcomed his commitment to do that.

Having spoken to those involved in sheriff court procedure, we propose amendment 67 to remove the obligation upon the prosecution to lodge the written record. Rules about how and when written records are to be lodged will be left to court rules. That is to allow the prosecution and defence to lodge their respective parts of the joint written record separately. That will mirror current practice in the High Court and is supported by the Crown Office and the Scottish Courts and Tribunals Service.

I move amendment 67.

Margaret Mitchell: I seek clarification, cabinet secretary. Preparing a joint record suggests that there has been some agreement by both parties, but if the parts are lodged separately, are we creating room for disagreement? I ask that question merely for information.

The Convener: I will let the cabinet secretary answer that point after Roddy Campbell has asked his question.

Roderick Campbell: It is sensible to make each party responsible for providing its own record. That will enable the court to see where the fault line lies if there are problems.

Michael Matheson: The principal change that amendment 67 will make is that, rather than the prosecution being responsible for making the final submission of the joint record to the court—both the part from the Crown Office and Procurator Fiscal Service side and that from the defence agent—it will be the responsibility of each side to submit its own part. The two parts will make up one document for the court—the presiding sheriff or judge—to consider.

That approach will facilitate flexibility to allow the defence to lodge its part of the written record and to allow the prosecutor to lodge its part. The parts will then become a single report, which will be considered by the court.

Amendment 67 agreed to.

Section 66, as amended, agreed to.

Sections 67 to 69 agreed to.

Section 70—Guilty verdict

Amendments 103 and 104 not moved.

Amendment 68 moved—[Michael Matheson]—and agreed to.

Section 71 agreed to.

11:24

Meeting suspended.

11:25

On resuming—

After section 71

The Convener: Amendment 106, in the name of Margaret Mitchell, is grouped with amendment 49.

Margaret Mitchell: Automatic early release is a complex issue, as was highlighted in the evidence that the committee took from various academics during scrutiny of the Prisoners (Control of Release) (Scotland) Bill. A significant body of evidence correctly identified the issue of cold release as problematic. It is essential that we get the release of offenders from prison absolutely right.

That is why I do not intend to move amendment 49, which was prepared last year, before the issue of cold release was raised. It is also why the Scottish Government should be prepared to reconsider the provisions in the Prisoners (Control of Release) (Scotland) Act 2015.

The 2015 act does not deal effectively with prisoner release. Rather than end automatic early release, it simply changed the timing of automatic early release from the two-thirds point to the final six months of the sentence. Professor Cyrus Tata got to the nub of the problem at stage 2 of the bill, when he pointed out that the bill would not end automatic early release:

> "It is the short-term end where there is much more to criticise—where people are released nominally on supervision but do not get supervision or the kind of support that they need."—[*Official Report*, *Justice Committee*, 27 May 2015; c 5.]

The Law Society of Scotland also described shortcomings in the procedure surrounding the bill:

> "To propose such a radical change to penal policy, as that contained within section 1 of the Bill, without the prior consideration of a large body of expert evidence, and to amend proposals significantly when a Bill is already before the Justice Committee is of significant concern."

The Law Society continued:

> "We would further suggest the creation of a body of experts with power to hear evidence from persons with professional knowledge in the field before this Bill progresses."

I regret that the cabinet secretary did not act on the Law Society's advice. Amendment 106 would provide for the establishment of a dedicated commission, to examine the rules governing the release of offenders across the board, including short-term and long-term prisoners, and to look at the rules governing post-release supervision.

I sincerely hope that the cabinet secretary will support amendment 106, with the aim of getting the new approach to automatic early release right. Individuals with expertise would provide unrivalled insight into our criminal justice system and that aspect of sentencing.

I move amendment 106.

Elaine Murray: I am pleased that Margaret Mitchell does not intend to move amendment 49, which puzzled me because it seemed to propose taking us back to a system of cold release. I am pleased that we will not consider that amendment.

With respect, amendment 106 also seems to be slightly behind the times, because the Prisoners (Control of Release) (Scotland) Act 2015 has been passed, despite my having reservations about aspects of it. Margaret Mitchell cited Professor Tata, but he and Professor McNeill—and others, I think—said that prisoner release should be considered in the wider context of sentencing policy. A commission to review only prisoner release arrangements would not be sufficient to tackle the entire issue; I would prefer there to be a review of sentencing, alternatives to imprisonment and all the rest of it.

Roderick Campbell: I will be brief, because Elaine Murray has made most of the points that I was going to make. It seems a little as though Margaret Mitchell is rehearsing the arguments that we heard in relation to the 2015 act, which we just passed. One thing that is missing is the cost of her proposed little exercise, which we should bear in mind.

11:30

Michael Matheson: Amendment 106 proposes a commission to look at early release of prisoners. The committee will recall that this Government established exactly such a commission when we took office: it was called the McLeish commission, which submitted an excellent report in 2008.

We remain committed to the independent McLeish commission report, which was clear that long-term reform to the system of early release was needed but that such reform could be taken forward only when prisoner numbers were at a long-term lower sustainable level. I am keen to progress policy to help meet the aspirations of the McLeish report on how we use our prisons. That is why I took through the reforms to automatic early release that this committee scrutinised earlier this year, and I will continue to seek to progress policies that will help achieve fundamental reform of our penal policy.

I listened to Margaret Mitchell's earlier explanation with some interest, although a large part of it appears to be based on rehearsing

arguments that were debated during the course of the Prisoners (Control of Release) (Scotland) Bill, which has since been passed by Parliament.

I am aware that Margaret Mitchell has also stated that she no longer intends to move amendment 49. However, it is worth bearing in mind that, if amendment 49 was passed by the committee, what it proposes would be likely to cost in the region of £100 million per year to implement. We estimate that ending all automatic early release and severely curtailing even the possibility of discretionary early release in the manner provided for would result in an increase in the prison population of around 3,100, which would be approximately a 40 per cent increase in Scotland's already high prison population.

If the approach proposed by amendment 49 were to be taken—and it is Margaret Mitchell's view that it should be taken—it is unclear to me where the additional £100 million per year would be found and where the 3,100 additional prisoners would be placed.

I believe that amendments 49 and 106 are unnecessary. The issue to which they refer was considered in great detail by the committee when considering the Prisoners (Control of Release) (Scotland) Bill earlier this year. On that basis, I would ask the committee to reject amendments 106 and 49.

Margaret Mitchell: The main point is that the Prisoners (Control of Release) (Scotland) Bill has been passed but will not come into effect for a number of years. Given that it does not abolish automatic early release, there is room to look at the issue again. Clearly, abolishing automatic early release would have cost implications, which is why a commission should be set up to consider all such aspects in an effort to get automatic early release correct.

I will reflect on what has been said on amendments 106 and 49 and might come back with further amendments at stage 3.

The Convener: You need to withdraw from the committee—sorry, not withdraw from the committee but withdraw amendment 106. That was a Freudian slip.

Margaret Mitchell: I seek leave to withdraw amendment 106.

Amendment 106, by agreement, withdrawn.

Section 72 agreed to.

After section 72

Amendment 49 not moved.

Sections 73 to 81 agreed to.

Section 82—References by SCCRC

The Convener: Amendment 7, in my name, is grouped with amendment 8.

Amendment 7 looks complicated, but it is not really. I am going to take members back to the Cadder case and the emergency legislation that was brought in when the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 was passed. Members will remember that we went through stages 1, 2 and 3 of the bill on the same day because there might have been a flood of applications for appeals as people had been interviewed by the police without the option of having legal representation.

We also did something else on that day: we changed the power of the Scottish Criminal Cases Review Commission and gave extra power to the High Court. I thought that that had come in by mistake and I hope that that was the case. I want to take the committee back to before the introduction of the 2010 act to what the Criminal Procedure (Scotland) Act 1995 provided for under the Scottish Criminal Cases Review Commission and the High Court.

In those days, prior to the 2010 emergency legislation, if someone brought an application to the SCCRC for review of their case because of a miscarriage of justice, the SCCRC had to look at all the aspects of the case and the new evidence and then ask whether referring the case to the High Court would serve the interests of justice. That was the test. If it was in the interests of justice, the case would be referred to the High Court, and the High Court had to take the referral and hear the case—but that was then.

We changed the system under the 2010 emergency legislation. We introduced new tests. The test for the SCCRC included the interests of justice, but we brought in a test of finality and certainty, which seemed strange to me. If a case is referred to the High Court because it is in the interests of justice, why are we talking about finality and certainty? For whose finality and certainty are we speaking? We are not speaking for the person who brings an application that the SCCRC refers because it thinks that it is in the interests of justice.

The system got worse, however, because we amended it thereafter, and that is what my amendment 7 seeks to deal with; amendment 8 is about the SCCRC.

Under the current regime, if an application goes to the SCCRC and it thinks that referring the case to the High Court would be in the interests of justice, and it has also done the finality and certainty tests, the High Court can say, "That is all very well but we don't think that we should take

this referral in the interests of finality and certainty."

It seems to be that before 2010 when the SCCRC was independent and away from politicians and the High Court—we should remember that High Court judges also sit in the appeal court—we were able to say that a case should have another crack of the whip by going to the High Court. Now we say that such a case must pass the test of finality and certainty at the SCCRC and, even if it does, it has to pass another test of finality and certainty at the High Court and the High Court can reject it.

I do not think that that is right. I am asking the committee and the cabinet secretary to consider going back to the situation before the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

The 2010 act changed the position because we thought that there would be a flood of applications to the appeal court following Cadder, but there were not. I have the figures here. Between 1999 and 2014, the SCCRC received a total of 1,844 cases, it completed reviews of 1,804 cases, and it referred 122 cases to the High Court. The procedure is tough. If someone makes an application to the SCCRC, it is not an easy path to getting their case heard again. Many cases have been successful in court because the tests that the SCCRC applies are very firm.

I am asking members to ask themselves why we changed the position in 2010. I think it was for political expediency at the time. We should go back to where we were in 1995 and leave the SCCRC with the power to look at cases and say which should be referred to the High Court in the interests of justice but not allow the High Court to refuse to accept those cases. Let us get rid of the test of finality and certainty because it is unjust and let us not leave the High Court with the right to refuse a referral that has already gone through the tests.

I move amendment 7.

John Finnie: Convener, I support your amendment and commend you on your explanation of it. It is a complicated area about the relationship between the various bodies and the High Court's gate-keeping role around its own workload. I fully support your proposals.

Roderick Campbell: Convener, I have just checked the bill because I was not sure that I agreed with your definition of what the bill seeks to do. We have moved on from the 2010 act. Even though the High Court would no longer have a gate-keeping role, it would still be able to use an interests of justice test and thereby have an ultimate review function.

On the one side we have an array of people who support the great work of the SCCRC, not least of which are the Law Society and the Faculty of Advocates. Against that, we have the comments from the Crown and from Lord Carloway that not having the provision would mean that, if new evidence came to light, they would be powerless to do anything. I am also conscious that, when we took evidence, it was accepted that only those SCCRC appeals have an interests of justice test while normal appeals to the High Court do not, so the arguments are very finely balanced.

I will oppose Christine Grahame's amendment, but I hope that those finely balanced arguments will prove to be largely academic. If a situation arose in which there had been a reference from the SCCRC on an interests of justice test that was subsequently overturned because the appeal court took the view that the interests of justice should prevent the appeal from proceeding, that would cause public disquiet. Although I accept the provisions, I hope that the debate will prove to be more academic than anything else.

Michael Matheson: The effect of amendments 7 and 8 would be to make changes to how the SCCRC decides whether to refer cases to the appeal court and how the appeal court considers such appeals.

The commission has an important part to play as one of the checks and balances in our system of justice. It has a mix of one third legal members and two thirds lay members with experience of the criminal justice system to ensure that its members can apply a suitable balance of expertise and knowledge to the cases that it considers. It has a special power to refer cases to the appeal court when the normal appeal process has been exhausted, where it considers a miscarriage of justice may have occurred and it is in the interests of justice to have the case considered by the appeal court.

However, the final decision as to whether a miscarriage of justice has occurred is made by the appeal court. That is to ensure that the final decision on the rights of an individual in any case is made by an independent and impartial tribunal, as required under the European convention on human rights.

Given the role of the appeal court in those cases, it would be inappropriate to remove the ability of the appeal court to consider the interests of justice when considering appeals based on a commission referral. It is key to its role as final decision maker that it considers where the interests of justice lie in each and every case. I therefore invite the committee to reject amendment 7.

Amendment 8 seeks to remove the requirement for the SCCRC to consider the need for finality and certainty in criminal proceedings when deciding whether to refer a case to the appeal court.

The commission took the need for finality and certainty into account as part of the interests of justice test even before the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 came into force. Indeed, it is another ECHR concept that requires to be taken into account when cases are dealt with in our justice system.

It has been noted that the commission does its job very well. To allow it to continue to do its job well, it is important that the commission continues to take the need for finality and certainty into account when reaching a decision on whether to refer a case to the appeal court. I therefore invite the committee to reject amendment 8.

The Convener: I thank you for your comments, cabinet secretary. I wholly disagree with them, and none of that was said in the debate on the emergency legislation that brought in the current provisions. In fact, there was scant information—nobody really knew what I was talking about at the time—so I think that the provision came in very quickly without very much consideration.

I remind my colleague Rod Campbell that the law now in force under the 1995 act, as amended by the 2010 act, states:

> "Where the Commission has referred a case to the High Court under section 194B of this Act, the High Court may, despite section 194B(1), reject the reference if the Court considers that it is not in the interests of justice that any appeal arising from the reference should proceed."

That means that the High Court can overturn a decision on the interests of justice test by the SCCRC. The 1995 act then goes on to say in section 194DA(2):

> "In determining whether or not it is in the interests of justice that any appeal arising from the reference should proceed, the High Court must have regard to the need for finality and certainty in the determination of criminal proceedings."

That makes the High Court judge and jury of its own case and gives it a gate-keeping role that should have been the role of the SCCRC.

As the cabinet secretary said, prior to that amendment being made to the 1995 act, it was the SCCRC that considered finality and certainty in the interests of justice. The 2010 amendment was put in as a more heavy handed way of simply preventing some cases from going forward because of Cadder. That is my concern. We have already passed legislation in haste and there have been unintended consequences, and I think that this bill will have unintended consequences. I know that, when the 2010 act was considered, the SCCRC was unhappy that it was being hamstrung. Therefore, I will press amendment 7.

11:45

Michael Matheson: Convener, can I respond to some of the points that you have made?

The Convener: Yes, you may.

Michael Matheson: Based on a recommendation that was made by Lord Carloway, the bill will change the provisions in the 2010 act to push the gate-keeping process that the convener referred to from the beginning of the consideration of an appeal to the end. Under the bill, the appeal court will not be able to refuse to accept a referral from the Scottish Criminal Cases Review Commission on the basis of that being in the interests of justice until it has actually considered the appeal. The matter of the interests of justice will then be considered after the appeal has been heard before the court.

Therefore, under the bill, the gate-keeping to which the member refers in the 2010 act is shifted from the beginning of the process to the end. It is only right that the appeal court has the power to consider the interests of justice at that particular point, having heard the matter.

The Convener: That does not give me any comfort, because it could mean that someone succeeds at appeal, but the High Court sitting as an appeal court then says, "However, we don't think that it is in the interests of justice and finality to grant this." I actually think that that is worse in some respects.

I regret to say that, as you know cabinet secretary, I remain a difficult customer. This is another bee in my bonnet—it is a big bonnet with lots of bees in it. I will press my amendment 7.

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

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 5, Against 3, Abstentions 1.

Amendment 7 agreed to.

Amendment 8 moved—[Christine Grahame]—and agreed to.

Section 82, as amended, agreed to.

After section 82

The Convener: We will deal with Mary Fee's amendments, because she is here, and we will stop after them.

Amendment 107, in the name of Mary Fee, is grouped with amendments 108 and 109.

Mary Fee (West Scotland) (Lab): Amendments 107 to 109, in my name, are designed to ensure that children and young people are provided with the necessary support and protection should their parent or carer be sent to prison. Evidence shows that children and young people who are affected by the imprisonment of a parent are particularly at risk of negative outcomes such as stigma, bullying, trauma and mental health problems. The issue has been raised in previous sessions of Parliament and has received cross-party support.

An estimated 27,000 children in Scotland have a parent in prison. Until we can accurately identify those children and the numbers who are affected, their particular needs that arise from parental imprisonment will not be taken into account by local authorities and other public bodies as part of their children's services planning process. In short, those children will continue to slip through the net. As such, I have included amendments on developing a national strategy and on reporting requirements for ministers.

Amendment 107 would require the Scottish ministers to introduce through subordinate legislation a national strategy on the impact of sentencing on children who are affected by parental imprisonment. A robust system is needed that ensures stronger links between the justice system, statutory services and voluntary organisations that work with children and families who are affected by imprisonment. A national strategy is necessary to ensure that a more strategic, co-ordinated and multi-agency approach is taken by the Crown Office and Procurator Fiscal Service, the Scottish Courts and Tribunals Service, Police Scotland, the Scottish Prison Service, local authorities, national health service boards and the voluntary sector to identify the wellbeing needs of children who are affected by parental imprisonment and to provide support and assistance to meet those needs.

Amendment 108 would require the Scottish ministers to prepare an annual report on sentencing and the impact of parental imprisonment. As I have stated previously, the impact on children of sentencing and parental imprisonment is often overlooked. Those children are often unseen and their wellbeing needs that have been created by the imprisonment of a parent are overlooked or simply not picked up as part of getting it right for every child. An annual report would support the development of a national strategy, as well as acting as part of the monitoring of the effectiveness of child and family impact assessments, which I will come on to shortly.

The details to be provided would include the total number of people who have responsibility for a child who have been remanded in custody or sentenced to a term of imprisonment or other detention, the total number of people who have responsibility for a child who have been convicted of an offence and sentenced, the total number of child and family impact assessments undertaken when people who have responsibility for a child have been remanded in custody or sentenced to a term of imprisonment, and confirmation of the total number of children who, following an impact assessment, require a child's plan under section 33 of the Children and Young People (Scotland) Act 2014.

Requiring the Scottish ministers to produce an annual report that focuses on children who are affected by imprisonment would increase the focus on those issues. It would also improve the evidence base by ensuring that key agencies had to provide the Scottish ministers with a wide range of information.

Amendment 109 would ensure that a child and family impact assessment was undertaken when a person was remanded in custody to await trial or sentencing or when a person was sentenced to a period of imprisonment. A child and family impact assessment is vital to ensure that processes are put in place to assess the likely impact on the wellbeing of the person's dependent child or children in the family. Such assessments will help to identify support and assistance that may be necessary to meet the dependent child's wellbeing needs that arise from those circumstances, as well as those of the remaining family.

Child and family impact assessments have been recommended by Scotland's Commissioner for Children and Young People since 2007, by the UN Committee on the Rights of the Child in 2011 and by Barnardo's Scotland and the National Society for the Prevention of Cruelty to Children in their report "An unfair sentence—All Babies Count: Spotlight on the Criminal Justice System", which has been endorsed by Together Scotland, the SCCYP and Families Outside. The assessments have also been widely supported in responses to the consultation on my proposed member's bill—

the support for children (impact of parental imprisonment) (Scotland) bill.

My member's bill consultation highlighted the fact that current procedures and processes are not working for such children, as key justice services are not under GIRFEC duties, so the children often remain hidden and unsupported. No robust form of identification or assessment is in place for that group. Criminal justice social work reports are not always requested or conducted and, when they are, they do not touch on the child and family; their intention is to establish what the family can do for the offender to reduce reoffending, not what statutory services can do to support the family. Children's voices are lost in the justice system, and child and family impact assessments are needed as a trigger to ensure that children who are affected by parental imprisonment are recognised and supported through GIRFEC.

I move amendment 107.

Roderick Campbell: My principal objection to the group of amendments is that the committee has not considered the matters in detail. There may also be an overlap with the Children and Young People (Scotland) Act 2014. In opposition to some of the comments that children's organisations have made, I remind the committee of evidence that Dame Elish Angiolini gave us in June 2012, when she said that her commission on women offenders

> "took some excellent evidence from Dr Nancy Loucks on the impact that family and child impact statements could have. We gave careful consideration to the matter, but I do not believe that any judge who sentenced without reference to the fact that someone had children and the impact that imprisonment would have would be doing their job appropriately."

Nevertheless, she took the view that

> "We must move away from creating more bureaucracy—more reports—and look at what would make a difference to the sentencing process. Consideration of children should be critical to that process, but I believe that such issues should arise out of the professionals' training—it should be their bread and butter. That is how social workers, defence solicitors and judges should approach the matter."—[*Official Report*, *Justice Committee*, 26 June 2012; c 1582.]

That is in opposition to the pro-assessment lobby, but my main objection is that the committee has not considered the matter in detail, so it would be inappropriate to support the amendments at this stage.

Alison McInnes: Rod Campbell might well be right that things should operate in the way that he described, but it is clear from what Mary Fee and many agencies over the years have said that that is not what happens. There is clear evidence of the impact of parental imprisonment. As Mary Fee said, 27,000 children around the country have a parent in prison, and they are being let down. There is no doubt that they have particular needs. I commend Mary Fee's enlightened approach and support her amendments.

Margaret McDougall: I should declare that I am a member of the cross-party group on families affected by imprisonment.

I support Mary Fee's amendments because there is a lack of consistency in how the children of parents who have been taken into custody or imprisoned are dealt with across the country. Impact assessments should be consistent across the country, and a national strategy should be put in place with regular reporting to the Government.

The Convener: John Finnie will be followed by Margaret McDougall—I mean Margaret Mitchell. I knew that I would get my Margarets muddled up.

John Finnie: Like Alison McInnes, I was somewhat surprised by Rod Campbell's comments. The word "should" was used. I thought from what he outlined that he was making the case in support of Mary Fee's amendments.

Roderick Campbell: I was quoting—

The Convener: Rod Campbell can come back in with a supplementary later if he wants to.

John Finnie: Mary Fee used the phrase "slip through the net". The net catches some, and it is not being suggested that there is a complete disregard for the wellbeing of children. I know that a lot of good work takes place in many parts of the country with the active involvement of and a lot of collaboration between the authorities but, as has been highlighted, it is clear that the reports to the sheriff prior to sentencing are not picking up on crucial aspects. I am not necessarily enthusiastic about more annual reports, but I fully support the principle of addressing the obvious gaps that have been highlighted.

Margaret Mitchell: I, too, have a lot of sympathy with amendment 109. I seek clarification—although I think that Mary Fee has given this—that the assessments would kick in at the point of custody and after sentencing. Although the judge should have all the facts, we know that, in practice, they do not. I support the amendment on that basis.

The Convener: I am quite sympathetic to what has been proposed, but I would like to hear what the cabinet secretary has to say. There appears to be a gap in how families and children are taken into account when so much can impact on them. Sometimes children end up on a criminal path because of the way that the parents have been. I would like to hear what the cabinet secretary has to say first.

Michael Matheson: The majority of the amendments in the group focus on the needs of

children who are affected by parental imprisonment. I thank Mary Fee for raising those matters, but we believe that a person-centred approach should be taken for all children and young people up to the age of 18 that recognises their differing needs, so we do not believe that the amendments are necessary.

The existing provisions in the Children and Young People (Scotland) Act 2014 provide appropriate coverage for all vulnerable children, and the law places a duty on local authorities and health boards to make services available. Amendment 107, which seeks to put in place secondary legislation to create a national strategy on the impact of sentencing on children who are affected by parental imprisonment, is not necessary. The 2014 act already contains provision to provide support as appropriate to meet a child's wellbeing needs. That includes a requirement on services and agencies to work together in a co-ordinated way. A child whose wellbeing is affected by parental imprisonment will receive the support that they need through the implementation of parts 4 and 5 of that act.

Our national parenting strategy recognises the needs of this group of vulnerable families. The strategy sets out a commitment to work with the Scottish Prison Service to encourage involvement between parents in custody and their children. We are also committed to providing targeted support for parents in prison to aid their reintegration and to help them to deter their own children from offending behaviour. In addition, the Scottish Prison Service has recently produced minimum standards for working with the children and families of prisoners, and the Scottish Government is providing support via a number of public-social partnerships.

12:00

Amendment 108 would place a duty on the Scottish ministers to provide an annual report to Parliament on the number of parents who have been remanded or sentenced, the number of convictions, the types of sentences and the number of impact assessments that have been carried out. Part 3 of the Children and Young People (Scotland) Act 2014 places a duty on each local authority and the relevant health board to jointly prepare a three-year children's services plan for the local authority's area. Those plans will be required to provide for children's services—both universal and targeted—as well as taking into account related services, of which the Scottish Prison Service is one.

In addition, the Scottish Prison Service is examining options to gather information relating to parents in custody. Any formal recording of such information will safeguard the children's rights and ensure that the relevant and appropriate data collection protocols are met.

Amendment 108 seeks confirmation of the total number of children affected by parental imprisonment who require a child's plan under section 33 of the 2014 act. I do not consider that collecting and reporting on the number of those plans for such children would be useful or necessary. Rather, we propose that health boards and local authorities should consider whether a child who is affected by a parent's imprisonment requires a child's plan to be put in place.

Amendment 109 calls for the introduction of child impact assessments. However, the named person service is for every child and is intended to ensure that concerns are picked up early and that no one, including the vulnerable, is left without support. As Rod Campbell said, the commission on women offenders, which Dame Elish Angiolini chaired, concluded in 2012 that the current arrangements for court social work reports adequately cover any consideration of the impact of imprisonment on children and that an additional report would add to the many reports and papers that a court has to consider.

The existing arrangements already provide for the accused's parenting or other caring responsibilities to be brought to the court's attention before they are sentenced, and the defendant's solicitor can also explain their circumstances in mitigation. The introduction of such an assessment would have a considerable impact on the court and on criminal justice social work processes.

I therefore ask the committee to reject amendments 107 to 109.

Mary Fee: I note the cabinet secretary's comments, and I am grateful for the committee's supportive comments. Margaret Mitchell asked when an impact assessment would be carried out. Amendment 109 would require a child and family impact assessment to be undertaken when a person was remanded in custody to await trial or sentencing or when a person had been sentenced. It would take place after that point, not prior to it.

As John Finnie rightly said—to a degree, Rod Campbell picked up the point as well—there is already good practice. However, that good practice is not mirrored across the country. Key justice services are not under GIRFEC duties, so children often remain hidden and unsupported and, too often, children's voices are not heard. My amendments would allow their voices to be heard and the correct support to be given.

My member's bill consultation highlighted significant gaps in service provision in practice. Although there is some good practice in working with children, there is no consistent approach—it

depends on which part of the country people are in.

I therefore press amendment 107 and I will move my other amendments.

The Convener: The question is, that amendment 107 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
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)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 4, Against 4, Abstentions 1.

I am in the position that I was in before. I hope that the cabinet secretary has taken on board everything that Mary Fee said. I will not support the amendment, but I think that she has brought some essential points to the table.

Amendment 107 disagreed to.

Amendment 108 moved—[Mary Fee].

The Convener: The question is, that amendment 108 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
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)

Abstentions

Finnie, John (Highlands and Islands) (Ind)
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 4, Abstentions 2.

Amendment 108 disagreed to.

Amendment 109 moved—[Mary Fee].

The Convener: The question is, that amendment 109 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (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)
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 109 agreed to.

The Convener: That concludes our stage 2 consideration for today. I thank Mary Fee for her attendance and I also thank the cabinet secretary and his officials.

12:06

Meeting suspended.

12:13

On resuming—

Interests

The Convener: Item 9 is a declaration of interests. I welcome Gavin Brown to the committee as a substitute for Margaret Mitchell for the following item of business. I invite him to declare any interests that are relevant to the committee.

Gavin Brown (Lothian) (Con): I declare that I am retained on the roll of solicitors in Scotland.

The Convener: Thank you. We now go into private session to discuss a draft report.

12:13

Meeting continued in private until 12:23.

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