The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 6 October 2015

Session 4

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JUSTICE COMMITTEE
28th 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:

Andy Bruce (Scottish Government)
Craig French (Scottish Government)
Elaine Hamilton (Scottish Government)
Michael Matheson (Cabinet Secretary for Justice)
Michael Russell (Argyll and Bute) (SNP) (Committee Substitute)
Arlene Stuart (Scottish Government)
Paul Wheelhouse (Minister for Community Safety and Legal Affairs)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Justice Committee

Tuesday 6 October 2015

[The Convener opened the meeting at 09:30]

Community Justice (Scotland) Bill: Stage 1

The Convener (Christine Grahame): Good morning. I welcome everyone to the Justice Committee's 28th meeting in 2015. I ask everyone to switch off mobile phones and other electronic devices, as they interfere with broadcasting even when they are switched to silent. Apologies have been received from Gil Paterson. Mike Russell will be substituting for him, but he is caught somewhere on a motorway. He should be here shortly.

This is our final evidence session on the Community Justice (Scotland) Bill. I welcome Paul Wheelhouse, the Minister for Community Safety and Legal Affairs, and his accompanying Scottish Government officials: Andy Bruce from the community justice division, Arlene Stuart from the community justice operational unit, Elaine Hamilton from the Community Justice (Scotland) Bill team, and Craig French and Carolyn O'Malley from the legal services directorate. As this is an evidence session, it is perfectly all right for the minister to invite an official to speak, if he so wants.

I believe that the minister has a very brief opening statement—I had a word with him about keeping it brief.

The Minister for Community Safety and Legal Affairs (Paul Wheelhouse): I will do my best to rattle through it, convener.

The Community Justice (Scotland) Bill provides the statutory basis for the new model for community justice in Scotland. The bill will replace the current model, which is based on eight regional community justice authorities, with the new model, which will deliver a community justice solution to achieving improved outcomes for community justice, reducing reoffending and supporting desistance.

The new model is based on the response to consultations in 2012-13 and 2014 and on much partner and stakeholder engagement, which I would be happy to talk about. The new model seeks to deliver better outcomes for communities by promoting a collaborative approach to the planning and delivery of improved outcomes and putting decision making in the hands of local communities and agencies that are best placed to assess local needs. Arrangements at a national level will provide strategic leadership, enhanced opportunities for innovation, learning and development, and assurance on the delivery of improved outcomes.

I commend the committee for taking extensive evidence from such a wide range of stakeholders. I have followed the evidence sessions closely, and I welcome the broad support from stakeholders for the policy principles in the bill. On the creation of the new national body community justice Scotland, there is clear support for its role in leading the sector, driving improvement, and promoting learning and innovation. There is consensus on strong accountability arrangements to ensure that the model demonstrates that the improved outcomes for communities that we all want to see have indeed been achieved. A strategic approach to community justice that is driven by a national strategy and outcomes-focused planning has also been welcomed.

However, it is clear that there are matters of detail on which the views are more mixed and that there are practicalities around implementation that need to be clarified. I welcome the opportunity to do that today.

Funding for the new model—in both the transition and the implementation phases—has raised many questions, and the Scottish Government is making available significant funding to assist the transition over the next three years, subject to the comprehensive spending review. The transitional funding is intended to build capacity and develop further partnership arrangements across Scotland. The reports against funding will identify how the funding has been utilised in supporting the change process. That will provide an evidence base to identify what, if any, further funding would be required for future years.

I am aware of the impact that short-term funding has on planning in general and on the third sector in particular. The funding mechanism for community justice social work services is currently being reviewed, and a move from an annual system of funding to funding over a three-year period is one of the issues that is being considered by the funding group, which will report later this year. Of course, such considerations must be seen in the context of the broader financial settlement for Scotland. I reassure committee members and the third sector that I value the contribution that the third sector makes to community justice. Officials are working with the third sector now to strengthen its role in the bill.

On the arrangements for community justice planning, please be assured that I have no wish to duplicate effort. I expect community justice to be

planned within the wider community planning structures. Strong partnerships and co-production will be vital to the success of the new model. I also appreciate that the definition of community justice requires further consideration, and I will explore how we might broaden the definition at stage 2.

A very important issue that was mentioned frequently during the committee's evidence sessions is early intervention. The Government has a clear focus on advancing the whole-system approach and improving life chances, so the drive in community justice to reducing reoffending is part of our wider approach to promoting social justice and tackling inequality, which includes action to improve early years experiences.

This is an important period for community justice in Scotland. We have made clear the Scottish Government's commitment to reduce reoffending and the harm that it causes to individuals, families and communities. That means making use of the evidence base, to increase the use of robust and effective community sentences, reduce the use of short-term prison sentences and improve the reintegration of people who have committed offences back into communities. I am confident that the changes that the bill has brought about will support that ambition.

I said that faster than I would normally have done.

The Convener: It was faster, but quasi-brief.

I apologise for my mistake in mentioning Carolyn O'Malley. She is not invisible—she isnae here.

Craig French (Scottish Government): Ms O'Malley is here, but not as a witness.

The Convener: I did not mean to say that she was absconding from her duties—unless she is.

Craig French: She is not, as far as I am aware.

The Convener: There we are. Now we will have questions from members, starting with John Finnie and Rod Campbell. [*Interruption*.] I do not know whether that is a signal or a pen waving. What is that? We will also have questions from Christian Allard and Margaret Mitchell. Off we go.

John Finnie (Highlands and Islands) (Ind): Good morning, minister. You may have pre-empted a number of questions with your brief—or quasi-brief—statement. However, I will ask you about your undertaking to explore the definition of community justice, which is very welcome. Previously there was a definition that included preventing offending. Although the exploration is welcome, is there a reason why that definition was not utilised initially?

Paul Wheelhouse: That is an important issue and I welcome the fact that John Finnie raised it. The Government remains committed to the Christie commission's principles, including the principle of making a decisive shift towards prevention.

Prevention of first-time offending is being taken forward on a number of fronts by central and local government, and prevention is already rooted in community planning. Our expectation is that community justice planning will be rooted in wider community planning.

Across the Scottish Government, early intervention and prevention are being taken forward through a range of policies and strategies, including early years and youth justice. A range of other policies are addressing the causes of offending, such as homelessness and drug misuse. The new national strategy for community justice will link across those strategies, which contribute to early prevention and primary prevention. Therefore, we believe that there is no need to include the prevention of first-time offending in either the definition of community justice or the scope of the bill. The Government is addressing first-time offending in other ways, which I have outlined. The bill focuses on reducing reoffending, rather than prevention.

I hope that that helps to show how we have reached our position. I will listen to the committee's views on the matter, but that is the approach that we have taken through wider work to tackle prevention. The bill focuses on reducing reoffending. In that way it is preventative, as it tries to prevent reoffending.

The Convener: That is a nice distinction. I think that that is what we meant by prevention.

John Finnie: I understand that it is not a play on words, but a lot of different streams have to come together. Prevention is a very clear thing that people understand. They might understand prevention better than early intervention.

Paul Wheelhouse: I accept that. We are considering whether the definition should be expanded, as I said. It could include elements such as desistance, prevention and early intervention, and recognise community justice's role in secondary and tertiary prevention.

The bill is focused primarily on reducing reoffending, but I take John Finnie's point. When we look at expanding the definition, we can try to bear it in mind.

Roderick Campbell (North East Fife) (SNP): When Dame Elish Angiolini's commission reported in 2012, it talked about community justice operating in a "cluttered landscape". We heard evidence from Dame Elish and from Mark Roberts of Audit Scotland, who said that complexity could be "inevitable" in this area.

NHS Forth Valley also gave evidence. It said:

"the more bodies we introduce, the more difficult it becomes for our population to understand and the harder it becomes for us all to engage. Our call would be for Parliament to try to make arrangements as simple as possible."—[*Official Report*, *Justice Committee*, 15 September 2015; c 47-48.]

What can be done to try to make arrangements as simple as possible, so that people can more readily understand how things should operate?

Paul Wheelhouse: I certainly identify with the desire to make things as simple and transparent as possible. It is entirely right to try to do that.

However, we must reflect on the fact that some people whom we are trying to help—by reducing their reoffending and getting them back into a positive place—have extremely complex needs, which inevitably may need to be tackled by a multiagency approach. In some cases—although maybe not every case—it will be inevitable that the solution will involve a number of different partners trying to deliver a better outcome for the individual.

We believe that the bill brings coherence by providing a strong leadership function and a strategic collaborative approach to the planning, reporting and commissioning of services. The new national strategy and common outcomes for community justice should also lend coherence and strategic direction to what community justice Scotland is aiming to achieve. The bill disestablishes the eight community justice authorities, which are regionally based, removing one layer. That reduces some complexity, but I appreciate that a large number of statutory community justice partners are still involved.

If one accepts that point, the bill makes clear who the community justice partners are, what they are required to do and whom they must involve in taking forward the work. The bill defines the role of community justice Scotland and makes it clear how and when Scottish ministers are engaged. It also sets out a role for communities. We believe that the key relationships are articulated in the bill.

I return to my earlier point that the needs of some individuals are highly complex and may involve health, education, housing and employability issues. Therefore, we need to have the appropriate architecture. As Mr Campbell articulated, we need to find a way to make the relationships as clear as possible and help people to understand how that process should work effectively. We believe that the bill does that.

Roderick Campbell: What is the Government's view on some people's suggestion that there should be a lead community justice partner in each local authority area?

Paul Wheelhouse: Local authorities had discussions with the Convention of Scottish Local Authorities, as Mr Campbell may be aware. The bill makes it very clear what duties are placed on statutory community justice partners, including local authorities. They will be responsible for preparing and delivering on the community justice outcomes and the improvement plan for the local area. In preparing that plan, they must consult community justice Scotland and appropriate community bodies, including the third sector, service users and communities.

Local government partners will have a key role to play in that. The statutory community justice partners must also report on the plan annually, having first consulted community bodies and anyone else that they consider appropriate. There should be good engagement between the local authority and relevant local community partners as part of that process.

Section 30 of the bill places a duty on statutory community justice partners and community justice Scotland to co-operate with each other in carrying out their respective functions. That is a clear role.

Collective responsibility is vital to the success of the new model for community justice. That is why, in the process that we have identified, we do not set out a lead partner for each local area. Having a lead agency would open up the potential for the other partners to avoid their responsibilities and to defer to one partner to do everything. We want to promote collaborative working, hence we have not specified a lead partner. We believe that the model we have put forward vigorously promotes collaborative partnership and generation of evidence.

Ultimately, it is for the local community justice partners to decide how to organise themselves and assign roles. It is possible that they may choose to appoint the local authority to a lead role and they have discretion to do that, if that is what they wish.

Roderick Campbell: To what extent do you believe, or recommend or otherwise, that smaller local authorities in particular might choose to co-operate with other local authorities?

Paul Wheelhouse: That came up in the discussion with COSLA. In the engagement that I have had, it has been suggested that one of the aspects that local authorities find attractive in the current model is that they have been able to work together at local level. Examples were given in areas such as Ayrshire, for example, where three local authorities might want to work together on the basis that they do so on a number of issues already.

There is nothing to prevent that from happening through the model that we propose. There could

be a degree of collaboration, and sharing and exchange of information and knowledge. It is for local partners to determine that, and we will give them discretion in the model that we propose on how they take forward such matters.

Community justice Scotland's key role in ensuring quality, and in giving confidence to the communities and to Parliament about the oversight of activity, is also important.

The Convener: Are there any supplementary questions on the issue of community partners that was raised?

09:45

Alison McInnes (North East Scotland) (LD): I wanted to follow that up. The current model is attractive to the third sector, but—

The Convener: I do not want us to go on to the third sector just now. One of the issues is that the list of community partners in section 12 is not comprehensive enough. Do you have a view on that, minister?

Paul Wheelhouse: I take the point. I have heard from the third sector, in particular—I do not know whether you want me to focus on the third sector just now. I have had discussions with the sector.

The Convener: I will let Alison McInnes back in, given that you have mentioned the third sector, but it is not just the third sector that is not on the list. Housing associations, for example, are not there.

Paul Wheelhouse: We have the potential to look at that. I am keen to explore how the skills matrix for community justice Scotland is taken forward, so that we consider how to recruit appropriate expertise in housing and employability, which will be important areas of knowledge for the organisation and local partners if they are to work more effectively to deliver solutions for individuals.

We can review the list when the system is operating, and if additional statutory community justice partners are required, the Scottish ministers may, under section 12(3), modify the list by regulation, which will be subject to the affirmative procedure. The Parliament will have the chance to express a view on whether partners should be added.

The Convener: You are not minded to change the list at this stage.

Paul Wheelhouse: We think that we have the right list, but if the committee has a strong view on the matter we will listen to it, of course. There is a mechanism whereby the list can be adjusted in future, through the affirmative procedure, should that be required.

The Convener: I will bring Alison McInnes back in, given that she was launching into a question on the third sector.

Alison McInnes: The third sector is significant in the area that we are considering. A range of bodies—national and local—contributes. Third sector bodies find it reasonably easy to connect with the current community justice authorities, because there are only eight, but they have expressed concern about the need to link into 32 community justice partnerships. How do you respond to that concern? How will you support third sector bodies to be able to do what they will have to do?

Paul Wheelhouse: I agree that the third sector is an extremely important partner. Roughly a third of the community justice activity that we deliver is done by the third sector—I think that that is broadly right, although I do not have a definitive figure. The sector plays a hugely positive role, and I know from my work on drugs policy and reducing reoffending that what it does is crucial to giving people opportunities to demonstrate employability and a pathway back to employment. On a number of fronts, the third sector is a vital player in the delivery of effective and efficient services for individuals; it makes a huge contribution.

Under section 18, statutory community justice partners will have to consult and enable the participation of the third sector in planning services and improving community justice outcomes. However, I acknowledge that the third sector has said that it is not as visible in the bill as it would have liked to have been. We are listening to the sector's concerns and, with officials and third sector organisations, we are exploring how we might amend the provisions to provide for a stronger participatory role for the sector.

I know that there are also concerns about commissioning and security of funding from local government. I am happy to talk about that, too, if it is relevant to your point.

Alison McInnes: If the convener does not mind, it would be helpful if you talked about how the reforms could tackle some of the short-term funding issues that third sector organisations face. Such organisations spend a great deal of time chasing funding, and that time would be better invested in front-line services.

Paul Wheelhouse: I recognise those concerns. Sacro and others have made the same point to me. I have heard that up to half of some third sector organisations' management time is devoted to securing next year's funding, which is not optimal in relation to the delivery of outcomes. The issue with financial planning is that people typically work on an annual cycle. Work is going on to review the funding mechanisms, in recognition of

the fact that short-term funding is a significant constraint for many third sector organisations.

Funding for criminal justice social work under section 27 of the Social Work (Scotland) Act 1968 has been protected year on year in the face of significant cuts from the UK Government for section 27 funding. We have provided a total of £750 million of ring-fenced funding since 2008-09, but that does not deal with the year-to-year funding issues, so a funding technical advisory group has been established to oversee the work of developing a new formula for section 27 funding to replace the current model. A move from an annual system of funding to a funding model over a three-year period is one of the issues being considered by the group to help to reduce the need for year-to-year firefighting on the funding front. The advisory group is due to report to the main funding group this autumn. Recommendations will then be made to the joint Scottish Government and COSLA settlement and distribution group. If proposals are endorsed, we should see a new funding model being piloted in financial year 2016-17, and it would then go live in 2017-18.

I hope that that helps Alison McInnes to understand where we are with that issue. We certainly recognise that there is a balance to be struck between the nationally operating third sector organisations that she referred to and some very local ones, and that must be reflected in the commissioning arrangements, as it may not be appropriate to have national contracts where a local third sector organisation may be fulfilling its role well at a local level and where a local community justice operation desires to keep that relationship going, rather than having a nationally imposed model.

The Convener: Who is on the funding technical advisory group?

Paul Wheelhouse: I defer to Arlene Stuart to answer that.

Arlene Stuart (Scottish Government): The membership of the technical advisory group is drawn mainly from local government finance officers, criminal justice social workers, Social Work Scotland, COSLA and ourselves. It reports to a broader funding group that has representation from the third sector and others including community justice authorities.

The Convener: Who are the voluntary sector representatives that they report to? I just want to tease it out in a bit more detail, so that the voluntary sector are not just hearing warm words, and so that we know that it is involved right in the middle of all of that.

Arlene Stuart: Absolutely. The representatives are the criminal justice voluntary sector forum; the chair of that forum, who is also the chief executive of Sacro, sits on the main funding group.

The Convener: Are there any other voluntary groups on that?

Arlene Stuart: The forum is an umbrella group. When members appoint a representative, that representative commits to feeding back to the entire forum. We have also given the criminal justice voluntary sector forum £50,000 this year to help it to build capacity and capability for the new model. Subject to the comprehensive spending review, we hope also to do that next year and the year after. It has identified a post and appointed someone to that post who is actively working with partners to decide what the third sector's role will be and how it will work in practical terms on the ground.

The Convener: You said something about the technical advisory group reporting in the autumn. Is that next autumn?

Arlene Stuart: It is this autumn.

The Convener: Of course, we are in autumn, as far as I know, so when will it report?

Arlene Stuart: We are in autumn, and it is due to report at the end of October or in early November.

The Convener: Thank you.

Christian Allard (North East Scotland) (SNP): On that point, I would like to add that we heard from the West Lothian community planning partnership, which said that it is not only about the third sector but also about the private sector and others. If we receive a lot of calls about ensuring that the third sector is more prominent in the bill, we should not lose sight of the fact that there are other providers in the private sector. How do you see that changing in the bill?

Paul Wheelhouse: We cannot yet anticipate who would be on community justice Scotland, but it is possible that those individuals could be employed to provide people with knowledge and that those opportunities for the private sector might present themselves. I know from my work on reducing reoffending how important the private sector is in providing employment opportunities. There are some progressive companies out there, thankfully, that are trying to do their best to support former offenders who have a conviction that they have to declare to get an opportunity for employment. Examples include Virgin in the transport sector and a number of hotel and hospitality groups that are good at employing individuals in roles that are appropriate, given the nature of their past offences.

The private sector can play a really positive role, and we are encouraging private sector companies,

organisations and representative groups such as Scottish Business in the Community, which is an umbrella group for the business community, to work with us on providing pathways for former offenders and perhaps those with substance misuse issues to find opportunities for employment, which, after all, can play a huge part in re-establishing a more positive role in the community.

Christian Allard: You said that you might extend the bill's remit to prevention. Pete White of Positive Prison? Positive Futures said that he

"would like the term 'offenders' to be removed from the bill."—[*Official Report*, *Justice Committee*, 22 September; c 24.]

Is that something that you might consider?

Paul Wheelhouse: I am certainly aware of the sensitivities around such words. I am trying to be careful in what I say, because I am conscious that I, too, am using those terms. The issue is clearly a sensitive one. We want to try to get to a point at which people who have served their sentence and paid their debt to society are seen as positive contributors to society. It is not the most constructive approach if people have to wear a big sign around their necks for the rest of their lives. We will look in due course at how such issues are handled in the bill and the guidance around it, but I know that the bill is—as bills are—drafted in typical legal terminology that might sometimes seem a bit harsh to those who are involved in helping people with a conviction or history of convictions.

The Convener: I am trying to remember the term that Pete White suggested, but we will come up with it in a minute after we have looked at the *Official Report*.

Paul Wheelhouse: I think that it might have been "persons with convictions" or something along those lines.

The Convener: It was

"persons who have at any time been convicted of an offence".—[*Official Report*, *Justice Committee*, 22 September 2015; c 24.]

Paul Wheelhouse: If there are any sensible terms that can be used, convener, we can look at them.

Margaret Mitchell (Central Scotland) (Con): The financial memorandum clearly states that £2 million will be available for the national body, but as one of our witnesses very succinctly and effectively put it, there will be

"absolutely hee-haw ... available for local authorities."—[*Official Report*, *Justice Committee*, 15 September 2015; c 25]

The Convener: I thought that we had got rid of "hee-haw". That will be the last "hee-haw" of the evidence session, I think.

Margaret Mitchell: There is transitional funding of £1.6 million for the 32 local authorities, but that seems to be it. Are you satisfied that the proposed funding for community justice Scotland represents value for money?

Paul Wheelhouse: I recognise that this is a key point that was raised in evidence, but irrespective of the terminology that was used, the transitional funding, which commences in the current financial year, is being split equally, with an assessed £50,000 going to each local authority for use across the community planning partnership in each area. I understand that that estimate has been based on the cost estimate provided by Perth and Kinross Council.

Our intention is for the funding to be available for three years, commencing this year and ending in 2017-18, but the position will be reviewed at the end of 2015-16 in light of the outcome of the next United Kingdom comprehensive spending review and any evidence that might come forward from the sector between now and then. The third sector also has an important role to play in planning, delivery and evaluation, hence Arlene Stuart's point about the intended funding of £50,000 per annum for the criminal justice voluntary sector forum over the next three years. Again, that will be subject to the outcome of the CSR later this autumn.

We realise that local authorities are concerned about the longer-term position, but I point out that the total cost of the current model is £2.7 million per annum, of which £1.8 million is the operating costs for community justice authorities. The total cost of the new model is estimated at £2.2 million, and we cannot deny that there is an assumption of savings being made in the longer term. However, that will fall on both central spending and spending at the local level, and we believe that the new model will be an effective means of delivering community justice at a local level. We also think that it is not easy to make a direct comparison between the two models.

Margaret Mitchell: Funding is really important, given the real sensitivity between the national body and local bodies with regard to ensuring that the latter have the flexibility to deliver local solutions for local problems. Can you provide any more information about the work that is being undertaken just now to identify problems with the transitional funding? For example, is there an issue with people who are employed in criminal justice agencies? Will they all be re-employed within either community justice Scotland or the new local authorities?

10:00

Paul Wheelhouse: I will defer to Arlene Stuart on the detail of the discussions that are taking place between the Government and the Convention of Scottish Local Authorities, because that is happening at official level. Certainly, however, we are in on-going dialogue with COSLA about the financial package that is available and we have corresponded with it about the evidence base. We have highlighted that the basis for our £50,000 assumption is the cost estimate from Perth and Kinross Council, and we have invited it to come back with its thoughts on that, in case any contradictory evidence is available.

Arlene Stuart: There are two relevant points. The first concerns the on-going funding and what we are doing in terms of understanding how the transitional funding is being used. On that point, we are working closely with all the local areas. We have funded a post in COSLA, so someone can be employed to lead on the transitional work. She is working closely with areas to see how people are managing the change. We know that some areas have used the funding to appoint some co-ordinators to pull partners together to start their action planning and understand how well things are working on the ground, what gaps there might be and what actions might be taken. Yesterday, I was at an event in the Borders where I saw that in practice and I know that West Lothian Council, Midlothian Council and Fife Council have done the same.

We will work closely with COSLA on identifying whether there are any particular issues. We have suggested to people that they might wish to report to us next May on how they have used the funding for this year, but we have also asked them to produce transition plans for 2016-17 and to send them in by January. Those will identify what the local arrangements are and what the local priorities are for the year of transition, and whether any obstacles and challenges have been identified. We will work with them during that period.

There are sensitivities involved for the 20-something people who are currently employed by the community justice authorities. We are working closely with the conveners and the treasurers with regard to what the transition means for people on the ground.

Potential opportunities are afforded through the transitional funding, but the recruitment to community justice Scotland would be done through open and fair competition. Given that people in the community justice authorities have been working in this area, you would hope that many of them would be well placed to take some of those positions. However, recruitment to community justice Scotland would be a matter for the chief executive and the senior personnel officer, when they are appointed.

Margaret Mitchell: If someone does not get recruited, or if they do not wish to go for a place, what happens to them?

Arlene Stuart: They might not wish to go for a place. When we established the community justice authorities, about 10 years ago, we said that, if there were to be any sort of severance, for any reason, they would have to develop severance schemes and submit them to the Scottish ministers for approval. We asked the CJAs to do that over the summer and we are still getting them in. What it will mean for individuals on the ground is that, once the schemes have been approved, the community justice authorities will be able to let individuals know what the situation will be for them. It is the responsibility of the community justice authority, as the employer, to do that, but we are giving them all the support that we can. The area is quite technical as it involves human resources, finance, pensions and so on.

Margaret Mitchell: If someone did not wish to accept the severance and did not get recruited elsewhere, what would happen?

Arlene Stuart: I would have to check the employment law around that. However, my understanding is that, if they do not seek employment elsewhere—some have done so, and have got co-ordinator posts or have gone to inspection agencies—or if they do not wish to go to community justice Scotland, they would have to take the severance option. That would be the case unless the local authority that hosts them—but who is not their employer—wishes to take them on using some form of redeployment package. However, that would depend on local circumstances.

Margaret Mitchell: So they would really have to take the severance package.

Arlene Stuart: Potentially.

The Convener: Not necessarily. I think that Alison McInnes wants to come in.

Alison McInnes: The Government has a no compulsory redundancy policy and I hope that that will apply in this instance. However, I am concerned to hear that eight different severance packages are being developed: I hope that everyone across Scotland will be treated equally.

Arlene Stuart: We have put out strong guidance about that. What we have said is very clear and it is all available online. A severance scheme must follow the terms of the Scottish public finance manual, which refers down to the civil service compensation scheme. We have asked people to make sure that their schemes are in line with that in order for them to go through the

approval route, so we would expect them all to be broadly similar. Obviously individual circumstances will differ—people will have been in their posts for different lengths of time and so on.

Margaret Mitchell: That was the point that I was getting at.

The Convener: Have you exhausted your questions for now?

Margaret Mitchell: Yes.

The Convener: Elaine Murray has a supplementary question.

Elaine Murray (Dumfriesshire) (Lab): I would like clarification on one of the minister's answers to Margaret Mitchell. If I heard correctly, the minister said that £50,000 had been allocated to each local authority, whereas the indication was that there was £1.6 million to be split between the 32 local authorities. Is every local authority getting £50,000, irrespective of the size of the authority?

Paul Wheelhouse: That is my understanding. It seemed a fair way of doing it.

Elaine Murray: Okay.

The Convener: Dumfries and Galloway will be happy—or perhaps not happy, but satisfied.

Margaret McDougall (West Scotland) (Lab): I will continue on the funding side of things. Peter McNamara made his views on funding for community justice authorities quite clear at the session that he attended. If there is to be more prevention and if fewer people are to be incarcerated or locked up, should less funding go to prison services, because more work will be done in the community? What are the minister's views on that?

Paul Wheelhouse: I could make myself very unpopular with my colleague Michael Matheson, who is responsible for prisons. I will bring in Andy Bruce in a moment; he has a direct line on the Scottish Prison Service.

Where we can reduce reoffending, that will have benefits for wider society and not just for the prison estate and the Scottish Prison Service. It will have benefits for communities and for families, whose loved ones will not be incarcerated. The impact on children will have benefits for education provision and could generate savings there. I certainly agree that tackling the issue and reducing reoffending can produce significant long-term economic and public spending benefits to Scotland.

Both activities are in the justice portfolio and we have to take decisions year to year on what we fund through the Scottish Government budget. We try to ensure—as the Scottish Prison Service is already doing—that the SPS is a key player in working to reduce reoffending. It does a considerable amount through its preventative work in the prison estate to educate offenders and help them to reintegrate into society.

It is possible that the changes will not result in a reduction in Scottish Prison Service spending, as the SPS might put more money into further enhancing the preventative agenda to reduce reoffending. I would not want to see reducing reoffending in a little silo on its own. It can be done by the SPS and by other justice partners, but it is important that the activity takes place. I will bring in Andy Bruce on the detail.

Andy Bruce (Scottish Government): I absolutely recognise the logic that, if we are trying to elicit the shift in the balance from custody to the community, it stands to reason that there should be a resource flow to accompany that. The difficulty is that, until we reduce the number of people in custody, it is difficult to realise a saving that can be put into the community.

As the minister suggested, we will seek to do that in a couple of ways. One is to make sure that we get the most out of all the funding that is in the community already. Approximately £95 million per year of section 27 funding goes to criminal justice social work, and there is also all the funding that is in the health system—in alcohol and drug partnerships, for example—and in education that can be brought to bear to help with the prevention agenda.

We are taking steps along the way. Committee members will be familiar with the work on women offenders. The Government put in funding of £1.5 million per year to establish an initial set of projects. That was extended this year by a transfer from the Scottish Prison Service to the community. Although we recognise that that is a small amount, we are starting to shift the balance, and that is a clear example of doing it for women's community-based justice services. The money is coming from the SPS budget into the community to allow those services to be sustained and improved.

The Convener: I have one point to raise before Margaret McDougall moves on. Mr Bruce, have you just made the case for early intervention and prevention to be done prior to somebody being sent to prison, as part of community justice, so that savings could be made right away? I do not recall how much it costs to keep someone in prison for a year. Can you give me an annual figure?

Andy Bruce: There is one for modelling purposes, but I do not have it to hand.

The Convener: I think that it is £36,000-odd. It must have gone up; it used to be £32,000.

It strikes me from what you have said that, to make the savings, you have to stop people going into prison. You seem to be putting the cart and the horse the wrong way round. That is exactly why we were looking at early intervention and prevention in the first place, as well as looking at preventing reoffending. If you intervened first, you would perhaps make savings right away that you could plough back into community justice.

Paul Wheelhouse: I recognise the point that you make, convener. However, prevention goes much wider than the role that community justice partners will play as a result of the bill. Every bit of work that is done in early years intervention potentially reduces the risk of someone offending in the first place. I suppose that it is a question of where we set the boundaries for the role of community justice Scotland.

The Convener: I do not quite see why you would separate the aspects. You have spoken about silos, but there is a silo in that respect. People who have been in prison are dealt with through community justice and people who have not yet been in prison are dealt with somewhere else. They are the same people; it is part of a progression. That is the point that I am making about savings to the public purse.

Paul Wheelhouse: Absolutely. There is a significant number of relevant strands of Scottish Government policy, including our policies on youth justice and organised crime, through which we work to prevent people from offending in the first instance.

I recognise that the roles are important, which goes back to my comment in response to John Finnie that we will look at the form that prevention takes and at the definition of community justice. However, the primary function of community justice social work as it stands is to reduce reoffending, and the new body will be part of delivering that.

It is important that we look for synergies in that work. The same partners—statutory partners in areas such as education, health and housing—are involved in the model that we are proposing, as we know that they have a significant role to play in preventing people from offending in the first place.

The Convener: Some local agencies can identify people who are on the brink of having to be put in prison, but they will not be part of the system. The idea of separating the categories seems to be artificial and compounds the problem of people going to prison.

There you are—those are just my thoughts on the matter. I do not know whether the committee agrees with me.

Paul Wheelhouse: I recognise your point, convener—I am not ignoring it. As I said to Mr Finnie earlier, we will look at how we can reflect that in the definition.

The Convener: I will let Margaret McDougall back in. I am sorry, Margaret; I have got that off my chest now.

Margaret McDougall: I am glad that you did.

Minister, in your response to my question, you mentioned victims and families. However, victims and their families, and witnesses, are not mentioned anywhere in the bill. We have taken evidence from Families Outside, which rightly said that victims and their families, witnesses and families of the accused are all part of the justice system. Why are they not included in the bill?

Paul Wheelhouse: I recognise that victims and their families have a great interest in what is happening. We have a number of strands of work as part of the legislation that is in force, not least through the Victims and Witnesses (Scotland) Act 2014, which has put in place measures to help victims and their families to understand the process. There are trigger points for communication with victims and their families that relate to the nature of a sentence, whether someone is coming to the end of their sentence and when they will be released, so that we can let victims know what is happening. Procedures are improving on that front.

We certainly recognise that there is a role for community justice Scotland in that respect. There is also a potential role in looking at community sentences such as community payback orders. That would involve making those sentences robust enough to give the judiciary and communities confidence that they are viable alternatives to custodial sentences.

There will be work with communities that are affected by crime to work out what the most sensible community payback orders in those areas are—there might be a local need that those who have been sentenced can help to address, which provides a useful service to the community. That can help to create faith in the process of community sentencing, so that people trust that a community sentence is not a weak option but is of value to the community. There are a number of ways in which we can reflect the impact on and work with victims, families and communities that have been affected by crime.

10:15

We have not defined Victim Support Scotland in the way that we have defined other community justice partners in the bill. Victim Support Scotland is a key organisation that the Scottish Government

works with and we have reflected its role in the support that we give it across Scotland.

We have made it clear that, in preparing a plan for an area, local partners must consult community justice Scotland and appropriate community bodies—including third sector services and communities, which could well include the likes of local victims groups—and work with them to identify appropriate community sentences and packages to help maintain faith in the system.

Margaret McDougall: Does that mean that victims and families will not be mentioned in the bill? Are you saying that consultation will happen, but it will not be reflected in the bill?

Paul Wheelhouse: Local victims groups will not be specified in the same way as the community justice partners are. We will require local partners to consult key local groups, which could include victims groups. We can reflect that and our expectations of engagement with local groups in the guidance on the bill. As I said, there are opportunities to work with victim support groups on sentences.

Elaine Hamilton can clarify the detail of the bill to help to answer Margaret McDougall's question.

Elaine Hamilton (Scottish Government): Section 18 of the bill sets out the requirements for community justice partners to engage and, under section 18(1)(b), community justice partners are required to consult

"such community bodies in relation to the area as they consider appropriate ... and ... such other persons as they consider appropriate."

We have drafted that provision quite widely so that third sector bodies, communities and individuals can all participate in the planning of community justice priorities in their local areas.

Margaret McDougall: So victims and their families are not mentioned and you have no intention of including them in the bill.

Paul Wheelhouse: That is not a fair representation of what we are doing; we are giving local partners discretion to determine who it is appropriate to consult. We can encourage the local partners at local authority level to work with victims groups, which could be an attractive thing for them to do. However, people have questioned whether there might be too much centralisation, so we are allowing flexibility. I hope that local partners will work with local victims groups to help to increase their confidence in the system.

The Convener: You mentioned guidance for the community justice partners. I think that Margaret McDougall is getting at the point that to get the community to buy into whatever is being done, rather than something being done to people, you should be doing it with them. Victims are an important part of that process.

Paul Wheelhouse: I accept that what Margaret McDougall is saying is important. In the discussion that we had with 120 stakeholders at Murrayfield last week, the role of communities was raised in the context of sentencing and giving confidence in community sentences. We recognise that that confidence has to be in place for people to see community sentences as a viable alternative. We want to reduce the number of people who are incarcerated, but we need to give communities the confidence that that is the right way to go.

Working with local groups would help to ensure confidence in the community sentences that are passed. We can look at how we can reflect that in guidance on the bill to address the point that Margaret McDougall raises and give confidence that those groups will be consulted. We have not specified such groups as statutory partners for the reasons that I just gave.

Margaret McDougall: You have also not specified housing or employment bodies.

Paul Wheelhouse: Housing and employment are important factors. As I have said already, we can appoint people to community justice Scotland who have expertise in those areas. I hope that doing so will help to integrate those issues into our thinking.

Housing and employability are key areas of value. Let us not forget that local authorities have a statutory function in providing housing. I appreciate that registered social landlords are also involved, but local authorities have a statutory role in housing through the planning system and local housing strategies. A body that has a statutory role in local housing provision is formally represented in the bill as a statutory partner.

To reflect a point that was made earlier, we need to look at how we can involve public and private sector employers. We have indicated that we are looking at how we can reflect the third sector as a key employment route and the wider role that that sector has in delivering community justice.

The Convener: I have a wee question to ask about the guidance. When do you intend to publish it? Will that be before stage 3?

Paul Wheelhouse: I defer to Elaine Hamilton.

Elaine Hamilton: Guidance is being prepared, and we expect it to be issued after royal assent. It is being taken forward in conjunction with stakeholders and is very much a collaborative effort to ensure that all the relevant issues are covered and are covered in ways that people will understand. That guidance is in preparation, in conjunction with our stakeholders.

The Convener: It would help the committee to see even draft guidance before stage 3, which might allay some of the concerns that committee members are raising. At least that would take us a step further. Is that possible?

Elaine Hamilton: I will take that request back to my colleagues who are preparing the guidance, particularly with regard to transition. We will ascertain whether we can share something with the committee before stage 3.

The Convener: I am talking about the involvement of housing services and of witnesses and victims—that kind of stuff. Once the bill has gone through Parliament, we will never know about that. It would be helpful if we knew in advance.

Paul Wheelhouse: I recognise that that would help the committee and colleagues in the wider Parliament, and we will look at what we can do in time for stage 3.

Margaret McDougall: The community justice authority boards are made up of local elected members. Is there any intention to include local elected members on the board of community justice Scotland?

Paul Wheelhouse: As Arlene Stuart explained, once the organisation is up and running and looking to recruit board members, individuals will have the opportunity to put themselves forward. I am not aware of a post in community justice Scotland that we have specified should be filled by a representative of local government, although I will check with Arlene Stuart. The skills matrix, if you like, that will be developed for the board's composition might require at least one individual to understand local government, since local government has a key role to play in delivering community justice locally, so there are opportunities.

As I explained in a previous answer, each of the 32 local authorities has a key role in the community planning partnerships; councils already have a central role there. We see community planning partnerships as critical to the future model.

Through the various roles that local government has—we have touched on its key role at the local level in delivering housing and as a potential employer—it will affect a number of facets of community justice. We will see in due course whether people emerge who are recruited to the board of community justice Scotland.

Margaret McDougall: I am glad that you mentioned community planning partnerships, because they are key to delivery. However, there is quite a divergence in the performance of community planning partnerships across Scotland. How will you ensure that they are able to fulfil their role?

Paul Wheelhouse: That comes down to the role of community justice Scotland. It will support the work of the local community planning partnerships in taking forward community justice by providing support and advice, rolling out best practice, sharing information and making sure that everything that can be made available on good practice around Scotland is provided to each area so that it can take forward its own work. There is scope, where necessary, for community justice Scotland to fulfil a more direct role in eliminating any problems that arise at the local level.

With community justice being delivered by community planning partners, we will have a pathway to local accountability through local government. That is an important issue for residents in each local authority area; the usual democratic accountability will apply, with local government being accountable for its performance at a local level.

We have not appointed a lead partner, such as a local authority, because we believe that all partners—including all the statutory partners—should support the work at the local level and pull their weight. They should not leave it up to local government or any other partner to deliver the whole thing on its own. We expect that all bodies will pull together and be equally accountable for their performance to Scottish ministers or others.

The Convener: Elaine Murray will ask the last lot of questions.

Elaine Murray: My questions lead on from Margaret McDougall's questioning. We have heard slightly divergent views from witnesses about the balance between the national community justice Scotland body and the roles of community justice partners. What balance is the bill trying to achieve, particularly in procurement, which was one of the areas that concerned witnesses?

Paul Wheelhouse: We recognise that that is a key area that has arisen in the evidence. We believe that the bill sets out the appropriate balance of responsibilities.

The Scottish Government is clear that local leadership and ownership of community justice is vital to the success of the new arrangements. We believe strongly that the new model will deliver a community solution to improving outcomes for community justice, reducing reoffending and supporting desistance. As we discussed earlier, we hope that communities will look at the role in terms of prevention as well, if that is possible.

Therefore, the model is first and foremost a local one. It will allow flexibility, for example, to use local third sector organisations that have particular

strengths. We should not impose a national arrangement on local partnerships. We recognise that local areas are best placed to determine the priority outcomes in those areas and the activities that are required to achieve those outcomes.

The local arrangements will be complemented by community justice Scotland, which will work with local partners to provide national leadership, promote innovation and learning and provide quality assurance that outcomes are being delivered locally. We have struck a balance, and we are allowing flexibility.

Commissioning is an important issue. There are existing platforms for local authorities to commission and procure services from the third sector and from other organisations. We do not want to duplicate unnecessarily; if there are good platforms that are already used to procure activities, they can continue to be used.

Opportunities may arise to do something at a national level, which would be impossible either for the eight current CJAs or the 32 local community planning partnerships to do. We can work with local partners and community justice Scotland to ask whether it is sensible to do something at a national level and, if so, to do it.

Where possible, we want each local authority area and each community planning partnership to work in its own right or to collaborate with others, as we discussed earlier. The Ayrshire authorities, for example, might work together to jointly procure services from the third sector or others.

The model is flexible, but it provides the opportunity, should that be appropriate, for a central procurement exercise.

Elaine Murray: When something has been nationally procured, will community justice Scotland manage contracts on behalf of all?

Paul Wheelhouse: Yes. Other procurement vehicles are available at a national level, but we are working through with COSLA what the balance should be. We think that we are reassuring COSLA; the local authorities were sensitive to the issue, but we have explained that we do not want to undo the good work that has been done on local platforms for procurement. Local authorities can work together to jointly procure, if that is appropriate. That is an issue for them.

There might well be an opportunity that we can take advantage of to do something Scotland-wide on commissioning that is more efficient and perhaps reduces the need for third sector organisations to contract individually with every local authority. Groupings might come together, and opportunities might arise from that.

Arlene Stuart might want to add to that. She is closer to the detail.

Arlene Stuart: First and foremost, because the model is local, any commissioning and the procurement and contracting that follow should be carried out locally. Of course, there might also be in-house services. When there are opportunities to achieve economies of scale—regionally, between any two local authorities or across Scotland—we would expect people to take them.

If a service or contract was being put in place across Scotland, local partners might look to community justice Scotland to provide support. We expect community justice Scotland to have people with the right set of skills to provide such support.

However, it does not necessarily follow that all national contracts would have to be through community justice Scotland. As the minister said, there are existing arrangements, such as using Scotland Excel, having a lead local authority or health board and using NHS National Services Scotland.

Some of the national contracts that community justice Scotland might take on early doors are many of the ones that I manage at the moment. We would pass the responsibility from the Scottish Government and Scottish ministers to community justice Scotland.

The important point about commissioning for community justice is that, for the first time, there will be a strategic approach. Community justice Scotland will develop that with partners and stakeholders, including purchasers and providers in the third sector, in-house or in the private sector.

The Convener: That concludes the questions. I thank the minister and his officials for their attendance.

10:31

Meeting suspended.

10:36

On resuming—

Criminal Justice (Scotland) Bill: Stage 2

The Convener: Item 2 is day 4 of stage 2 proceedings on the Criminal Justice (Scotland) Bill. I welcome to the meeting the Cabinet Secretary for Justice, Michael Matheson, and Scottish Government officials, who are supporting the cabinet secretary but will not take part in the proceedings. As far as we are concerned—but not, I should say, the cabinet secretary—they must remain silent.

Members should have their copies of the bill, the marshalled list and the groupings of amendments for today's consideration. They might also find the purpose-and-effect notes that the Government sent for last week's amendments useful for this session.

I aim to complete all the amendments today, so you are nailed to your chairs. If necessary, however, we will have a little break after an hour or so if I see anyone faltering.

Before we move to the consideration of amendments, there are two declarations of interest to be made.

Alison McInnes: I draw members' attention to my entry in the register of interests, particularly my membership of Justice Scotland.

Roderick Campbell: I want to draw members' attention to my entry in the register of interests as a member of the Faculty of Advocates.

Section 14—Release on conditions

The Convener: Amendment 18, in the name of John Finnie, is grouped with amendments 142, 47, 143, 19, 145, 20, 146, 147 and 21 to 27. I must point out the various pre-emptions in this group. If amendment 18 is agreed to, I cannot call amendment 142; if amendment 145 is agreed to, I cannot call amendment 20; and if amendment 147 is agreed to, I cannot call amendment 21. I do not expect members to commit all that to memory, so I will repeat those pre-emptions as we go along.

John Finnie: Amendment 18 and, indeed, the other amendments in this group relate to investigative liberation and release on conditions. My amendments would allow for a period during which a suspect can be released from custody to be up to a maximum of 28 days. That differs from the blanket 28-day period that is set out in section 14(1). Indeed, Lord Carloway recommended that the period during which a suspect could be subject to investigative liberation should not exceed 28 days. The Law Society of Scotland supports the amendment, believing that one advantage of having a shorter period in which a person can be released from custody is that it is more likely that conditions imposed by a constable under section 14(2) will be accepted by an individual who is subject to investigative liberation if it is for a shorter period.

The provision in the bill is a major change, and it does not follow Lord Carloway's proposal. There is a question of proportionality attached to it. In the Government's amendment 146, we once again see a diminution of the authority exercised from inspector to sergeant. When we previously debated the matter, we heard what seemed to be Police Scotland's view on it, which is that there should be equal access to facilities across Scotland. I therefore think it entirely reasonable for the inspector to keep doing this sort of thing.

Amendments 22 to 27 would allow a sheriff to review not only a condition of interim liberation under section 14 but the time period that had been imposed. We know that the bill facilitates a review of terms, but why does it not allow for a review of duration? As I have said, Lord Carloway never intended a blanket 28-day period.

I move amendment 18.

The Cabinet Secretary for Justice (Michael Matheson): The amendments in this group relate to investigative liberation, which is a new process for the police. At present, if the police want to liberate a suspect subject to conditions such as requiring them not to approach victims or witnesses, they must charge that person. Lord Carloway recommended that the police should be able to release a suspect subject to conditions, even though the suspect has not been charged, but that the conditions should apply only for a limited period.

That recommendation recognises that in some of today's complex police investigations the police might need to break off an interview while they wait for, say, laboratory results or mobile phone records. Imposing conditions on a suspect for a limited period means that they can leave the suspect at liberty while other aspects of the investigation are progressed. However, the police can also take the suspect straight back into custody if they attempt to interfere with victims or witnesses or otherwise compromise the investigation.

My amendments in this group, which I will speak to in a moment, are aimed at ensuring that the investigative liberation process works fairly and proportionately. Although I agree that it is important to ensure that investigative liberation conditions do not have an unnecessary impact on a suspect's private life, I regret to say that the

Government cannot support the amendments in the names of John Finnie and Elaine Murray.

On amendments 18 to 27, in the name of John Finnie, I entirely agree that it would not be appropriate for every suspect released on investigative liberation to be subject to conditions for a full 28 days. However, the bill already ensures that that will not happen. As drafted, the bill does not impose a blanket 28-day investigative liberation period; instead, it provides that any investigative liberation conditions that have not been lifted before then fall away automatically after 28 days. That reflects Lord Carloway's recommendation that 28 days is the appropriate maximum period for investigative liberation.

Section 15 sets out that conditions must end after 28 days and can end sooner, while sections 16 and 17 set out how conditions can be modified or removed before the end of the 28-day period. In particular, section 16 provides that an inspector must keep under review whether there are still reasonable grounds to suspect that the person subject to the conditions committed an offence and whether the conditions imposed continue to satisfy the demanding test of being necessary and proportionate to ensure the proper conduct of the investigation. If the inspector is not satisfied that those tests are met, either more proportionate conditions can be imposed or the conditions must be lifted altogether. Moreover, if a suspect is not satisfied with the police's review of the appropriateness of the conditions, section 17 allows the suspect to challenge the conditions before a sheriff, who will also have the power to modify the conditions or to remove them completely.

Investigative liberation is all about the conditions that are imposed, and the bill makes it clear that those conditions can be removed after review by an inspector or a sheriff. That can happen at any time, and there is no requirement for them to be in place for 28 days. The bill states that, as soon as conditions stop being both necessary and proportionate, they must be removed or modified. In other words, the 28 days is a backstop. The decision on when it is no longer appropriate to keep a person subject to investigative liberation will be made on a day-to-day basis as the investigation into the offence unfolds.

The amendments in the name of John Finnie would cause investigative liberation conditions imposed on the suspect to fall away after a number of days not exceeding 28 days, which the police are to specify at the time of releasing the suspect. It might be possible in some cases for the police to do what amendment 19 would require them to do, which is to estimate and specify at the time of release the period of time required to carry out further investigations. Where the police are able to do so, they could set a shorter period at the outset, but that would only ever be an estimate. Investigations are not always predictable.

The purpose of imposing investigative liberation conditions is to protect the interests of justice and to help to protect victims and witnesses. If the police guessed wrongly by a day or two, and underestimated how long would be required to carry out the investigation, that would mean that the investigative liberation conditions would cease to apply at a time when they were still needed to protect alleged victims.

10:45

Amendment 22 would allow a sheriff to review not only the investigative liberation conditions imposed on a suspect but the period specified by the police during which the conditions would run. In other words, amendment 22 presupposes that the other amendments in this group in the name of John Finnie will be supported. I do not think that it is feasible or in the interests of justice to require constables to specify a period for investigative liberation to run, and it follows that there is no reason for giving sheriffs the power to review any period specified. I therefore urge John Finnie not to press amendments 18 to 27.

Amendment 47, in the name of Elaine Murray, would change the purpose for which investigative liberation conditions may be imposed. Conditions would still have to be necessary and proportionate but would have to be for the purposes of securing specific things, rather than for the broad purpose of ensuring the proper conduct of the investigation. I am concerned that the list of purposes for which conditions could be imposed could be unnecessarily restrictive and may suggest that the detailed purposes should be linked to standard conditions. Investigative liberation conditions need to be tailored to the needs of the particular investigation. Standard conditions could be too restrictive in some circumstances and insufficient in others.

The thrust of any condition imposed under investigative liberation is that it should be necessary and proportionate. Some of the purposes listed in amendment 47 appear inconsistent with that general principle. There is no requirement for a person to surrender themselves to custody, as the police already have the power to arrest during the period of investigative liberation. Although it might seem pertinent for the police to take into account a person's protection and wellbeing when setting conditions, that could lead to conditions being set that would not be proportionate, or indeed necessary, for a person not charged with an offence. I therefore invite Elaine Murray not to move amendment 47, but I

will undertake to consider before stage 3 whether an amendment is necessary to expand or to illustrate what the general purpose of

"ensuring the proper conduct of the investigation"

under section 14 might cover.

I turn to the amendments in my name. The bill as introduced allowed a suspect to be subject to a number of periods of investigative liberation, provided that the total of the periods did not exceed 28 days. Amendments 142, 145 and 147 change the position so that investigative liberation conditions can be imposed on a suspect only for a maximum period of 28 consecutive days in relation to a particular investigation. It will not be possible to impose investigative liberation conditions over a number of shorter periods adding up to a total of 28 days. These amendments deal with the concern that was raised by some at stage 1 that the police would be able to subject a person to repeated arrests and periods subject to investigative liberation conditions.

Amendment 143 sets out certain types of condition that can and cannot be imposed when releasing a person on investigative liberation. Requiring a person to be in a particular place at a particular time—for example, a home detention curfew—would significantly disrupt most people's lives. In the Government's view, that would be too severe an intrusion into the liberty of someone who has not been and may never be charged with an offence, so the amendment provides that conditions that impose curfews will not be permitted. It will, however, be possible to impose conditions banning a suspect from being in a particular place at a particular time, in order to protect victims and witnesses and prevent interference with evidence.

Amendment 146 will allow investigative liberation conditions to be authorised by a police officer of sergeant rank or above. At present, the bill provides that conditions must be authorised by a constable of inspector rank or above, but in most cases custody sergeants will make the initial decision on whether it is necessary or proportionate to keep a person in custody. Like all constables, custody sergeants will be under an on-going general duty to take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody. Having taken the initial decision to keep a person in custody, they will need to keep under consideration whether it remains necessary to hold that person. At present, the bill would not allow a custody sergeant to release a person subject to investigative liberation conditions, but amendment 146 will allow that specialist officer to release the person, subject to conditions.

Custody sergeants are under the command of Police Scotland's custody division, which sits separately from the territorial policing divisions. It deals with the safety and wellbeing of those in police custody. It has its own management and governance structure, which is independent of the territorial divisions and is commanded by a chief superintendent who is accountable directly to an assistant chief constable who is a member of the force executive. That ensures better oversight and management of persons in custody, and better decision making on custody matters.

The independence and increased professionalisation of custody division removes the need for decisions on liberation to be taken at inspector level. The officer best placed to make decisions on a person's liberation and, by extension, any conditions that are to be attached to that liberation will in most cases be the sergeant in charge of the custody centre.

I consider that the arrangements for the management and governance of custody facilities, coupled with the procedural safeguards that are built into the bill, mean that it is appropriate for most investigative liberation conditions to be set by a custody sergeant.

A custody sergeant will be independent from the investigation, so they will need to consult the senior investigating officer to determine what conditions are necessary for the interests of the investigation and for the protection of victims. The process will ensure that conditions are tailored to the investigation and that the final decision on what is proportionate and necessary will be made by an officer with the right knowledge and expertise in dealing with custody matters.

The bill sets a minimum authorisation rank for investigative liberation decisions. I believe that that rank should be sergeant, but investigative liberation decisions could also be made by more senior officers. The bill provides the detailed framework and sets a minimum rank required to ensure good decision making on investigative liberation. The provisions must be flexible enough to cover relatively minor offences, complex technical investigations and very serious offences.

It will be for the police to ensure that the new option of investigative liberation is used appropriately and proportionately in each case. The bill provides the legal framework, but day-to-day decision making will be supported by detailed guidance. The police guidance in the standard operating procedures for custody will be revised to take account of the bill. There will be scope for the police to develop more finely grained authorisation processes for investigative liberation conditions in different circumstances. Higher authorisation requirements could be set before a suspect could be released on investigative liberation for

particular offences, for example domestic violence; for particular types of suspect, for example children; or when unusual conditions are set. Those are practical operational matters for Police Scotland and it would be unnecessarily restrictive to set out the detail on them in the bill.

There will still be a requirement for any conditions set to be kept under review by an inspector. That inspector could modify any conditions set by a sergeant that the inspector did not agree were necessary and proportionate. Authorisation to release on investigative liberation will be given during the initial 12-hour detention period and I believe that custody sergeants are best placed to make such decisions. However, the requirement to keep conditions under review will ensure that all conditions are subject to detailed oversight by inspectors.

The amendments in my name in this group are designed to ensure that, in all cases, correct and fully informed decisions are made, that the proper conduct of the investigation is assured and that the rights of the individual are protected.

I invite the committee to support the amendments in my name.

Elaine Murray: Amendment 47, in my name, amends section 14 by replacing the conditions that are being imposed

"for the purpose of ensuring the proper conduct of the investigation into a relevant offence"

with a series of conditions required of the person. The reason for that is that, if someone is released on certain conditions, it seems more appropriate that the conditions should relate to their behaviour on release, rather than the way in which the police are conducting the inquiry. That issue was raised with us at stage 1.

The comments that the cabinet secretary made in the previous discussion are helpful and I will bear them in mind. Amendment 48, in my name, which will be discussed later, is on a similar topic and I note that amendment 155, in the name of the cabinet secretary, is similar to amendment 48, so I wonder whether he will consider a similar amendment to amendment 47 at stage 3, if amendment 47 is considered to be too restrictive. It is important that the conditions for release relate to the way the person behaves when they are on investigative liberation.

I am very supportive of the intention behind John Finnie's amendments and again I think that the cabinet secretary's comments were helpful. I am interested to hear how John Finnie reacts to those comments when he sums up.

I am very supportive of amendment 143, which no longer permits a curfew.

Roderick Campbell: I have some sympathy with the suggestion behind amendment 47, but I also bear in mind what the cabinet secretary has said this morning.

In relation to his amendments, John Finnie should reflect further on the detailed provisions in sections 15, 16 and 17, in which 28 days is specified as a long-stop period and the detention period might be a great deal less. There are safeguards in there and we should reflect on that. I disagree with the idea that there should be an additional test before a sheriff to determine the length of detention.

Margaret Mitchell: It is good that John Finnie has raised the point, but amendment 142, in the name of the minister, allays our concerns about the provision and explains what would happen more fully.

The idea behind amendment 47 is good, but the amendment is not flexible enough to suit every situation. I welcome the minister's offer to reconsider the issue at stage 3.

The minister's amendments to section 14 make improvements that will help the bill in general.

John Finnie: I have noted everything that has been said. I should stress that Lord Carloway never intended there to be a blanket 28 days. I reiterate the point that the Law Society of Scotland supports amendment 18. The cabinet secretary said that it is a new process and he is right about that in respect of release subject to conditions. However, we have heard again that some investigations are complex. Some of us can recall when the introduction of a six-hour detention was seen as hugely draconian; we have moved through various phases since then and are now being told that 28 days is required.

Language is very important and the portrayal of anyone who is not supportive of such measures as being somehow less supportive of victims of crime is unfortunate and entirely inaccurate. For example, the cabinet secretary talked about the implications that restricting detention would have for attempts to interfere with witnesses, but if someone attempts to interfere with a witness at the moment, that is a crime in common law of attempting to pervert the course of justice, and they would be arrested without warrant. That is the right way to treat such a crime and the bill would have no impact on that.

The cabinet secretary assures us that an inspector will keep the 28-day period under review, yet it will be a sergeant who will authorise the detention, and the same information is put out about custody division. Police Scotland may believe that that is an important use of terminology. However, people place a lot of store in the decisions that are made in the supervisory

role about detention. I point out that every constable has an obligation to ensure that no one is disproportionately retained in custody.

The question is one of proportionality, and it is my view that the backstop remains excessive. For that reason I will press amendment 18.

11:00

The Convener: The question is, that amendment 18 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)
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)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

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

Amendment 18 disagreed to.

Amendment 142 moved—[Michael Matheson].

The Convener: The question is, that amendment 142 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)
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)
Russell, Michael (Argyll and Bute) (SNP)

Against
Finnie, John (Highlands and Islands) (Ind)

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

Amendment 142 agreed to.

Amendment 47 not moved.

Amendment 143 moved—[Michael Matheson]—and agreed to.

Amendment 19 not moved.

The Convener: Amendment 144, in the name of the cabinet secretary, is grouped with amendments 158, 159 and 198 to 204.

Michael Matheson: Amendments 144, 158, 159 and 198 to 204 make no change to the substance of the bill. They simply improve its structure.

The amendments move what is presently chapter 7 of part 1 into a schedule. Chapter 7 sets out the consequences for someone who fails to comply with conditions imposed on them when they are released from police custody either on investigative liberation or on undertaking. In essence, the consequences are that they have committed an offence.

Part 1 is mainly concerned with setting down the rules according to which the police are to deal with suspects, and the part flows better if those rules are not interrupted by a chapter dealing with what the courts are to do in the event that a suspect breaches a condition imposed on him or her by the police.

I move amendment 144.

Amendment 144 agreed to.

The Convener: I remind members that if amendment 145, in the name of the cabinet secretary, is agreed to, amendment 20 will be pre-empted.

Amendment 145 moved—[Michael Matheson].

The Convener: The question is, that amendment 145 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)
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)
Russell, Michael (Argyll and Bute) (SNP)

Against
Finnie, John (Highlands and Islands) (Ind)

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

Amendment 145 agreed to.

Amendment 146 moved—[Michael Matheson].

The Convener: The question is, that amendment 146 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)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Russell, Michael (Argyll and Bute) (SNP)

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

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

Amendment 146 agreed to.

Section 14, as amended, agreed to.

Section 15—Conditions ceasing to apply

The Convener: I remind members that if amendment 147 is agreed to, amendment 21 is pre-empted.

Amendment 147 moved—[Michael Matheson].

The Convener: The question is, that amendment 147 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)
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)
Russell, Michael (Argyll and Bute) (SNP)

Against
Finnie, John (Highlands and Islands) (Ind)

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

Amendment 147 agreed to.

Section 15, as amended, agreed to.

Section 16 agreed to.

Section 17—Review of conditions

Amendments 22 to 27 not moved.

Section 17 agreed to.

Before section 18

Amendment 148 moved—[Michael Matheson]—and agreed to.

Section 18—Person to be brought before court

The Convener: Amendment 149, in the name of the cabinet secretary, is in a group on its own.

Michael Matheson: Amendment 149 clarifies part of section 18. Section 18 requires that, wherever practicable, a person who has been arrested and charged and is not being liberated must be brought before a court no later than the end of the court's first sitting day after charge.

The words "wherever practicable" allow for rare situations where it is not possible for an accused to be brought before a court by the end of the first sitting day. That might happen if, for example, there was an unusual distance or very bad weather preventing travel between a remote police station and court by the first sitting day. It might also happen if the accused person became ill and was unfit to attend court on the first sitting day.

Amendment 149 restructures section 18(2) and clarifies that, if it is not practicable to bring someone before the court on the first sitting day, the person should be brought before the court as soon as practicable after that.

I move amendment 149.

Amendment 149 agreed to.

Amendment 101 moved—[Michael Matheson]—and agreed to.

Section 18, as amended, agreed to.

After section 18

The Convener: Amendment 150, in the name of the cabinet secretary, is grouped with amendments 150A, 151, 152, 65, 255, 196, 197 and 222.

Michael Matheson: Amendment 150 replaces section 43(4) of the Criminal Procedure (Scotland) Act 1995, which provides that, if a child is to be brought before a court, they should be kept in a place of safety rather than a police station. The amendment will preserve a protection for children when the police decide that they must hold them in custody, which they are likely to do only in the case of the most serious offences. Children 1st has indicated its support for the amendment, which we welcome. We recognise that it has been suggested that consideration should be given to extending that protection to all 16 and 17-year-olds, rather than only those who are subject to a compulsory supervision order, and we would be happy to engage on the implications of that.

Amendment 150A from John Finnie would amend amendment 150. Amendment 150 defines "an appropriate constable" in relation to certification that detention in a police station is

more appropriate than a place of safety as meaning a constable of the rank of inspector or above. Amendment 150A would omit "inspector" and insert "superintendent", meaning that certification would have to be by an officer of the rank of superintendent or above. Currently, certification may be by an officer of the rank of inspector or above, or by the officer in charge of the police station to which the child is brought.

It is important that decisions are made in a timely, efficient and proportionate way that makes the best use of inspectors' knowledge, skills, experience and training, while ensuring that they are supported in decision making if needed. Such an approach is in the interests of children and young people.

There are a limited number of superintendents, and requiring a superintendent to make the decision may not be in the interests of the child, as a superintendent will not necessarily be at the station, and a delay may be to the detriment of the child.

Requiring certification by an officer of the rank of superintendent or above would constrain the police's operational flexibility and would not make best use of the skills, knowledge and capabilities of appropriate officers of the rank of inspector or chief inspector. It is important that we support effective decision making at the appropriate level of seniority. For the reasons that I have given, I ask Mr Finnie not to move his amendment.

Amendment 151 replaces section 42(3) of the Criminal Procedure (Scotland) Act 1995. The amendment requires the police to notify at least one parent or guardian, if they can be found, of the court where the child is to appear, the date on which they are to be brought before the court, that the attendance of the parent or guardian at court may be required and, in supplement to existing law, the general nature of the offence with which the child has been charged. The police may withhold such notification if they have grounds to believe that notifying the parent or guardian would be detrimental to the child's wellbeing.

Amendment 152 replaces section 42(7) of the Criminal Procedure (Scotland) Act 1995. The amendment requires the police to notify the relevant local authority of where the child is to appear, the date on which they are to be brought before the court, and the general nature of the offence with which they have been charged, the relevant local authority being the authority for the area where the court sits. In line with other provisions of the bill, that protection has been extended to 16 and 17-year-olds who are subject to supervision.

I turn now to section 42 of the bill. It is a progressive and significant provision that requires a constable to treat the need to safeguard and promote the wellbeing of the child as a primary consideration. With reference to amendment 65, in the name of Elaine Murray, the term "wellbeing" is consistent with language used in the Children and Young People (Scotland) Act 2014, and is understood by the police.

The term "wellbeing" was given full consideration by Parliament in the context of the scrutiny of the Children and Young People (Scotland) Bill, and there was strong support from children's groups for its use. Wellbeing is at the heart of the getting it right for every child approach, which itself is rooted in the United Nations Convention on the Rights of the Child. The principles of the UNCRC are the foundation for any assessment of the wellbeing of a child or young person.

Our approach is consistent with a wider assessment of children's needs. It is that wider assessment that the bill requires the police to make a primary consideration as they decide whether to arrest, detain, interview or charge a child. The factors that they will consider will be dictated by the circumstances of the investigation that they are dealing with.

It is right that the wellbeing of the child should be a primary consideration in all those circumstances. Any assessment of wellbeing must seek to identify all the factors in the life of the child or young person that may be benefiting or adversely affecting their wellbeing. That can potentially help to further children's rights, as it is more inclusive. Consistency is important in this area, and the forthcoming statutory guidance on wellbeing in respect of the Children and Young People (Scotland) Act 2014 reinforces the value of alignment with the 2014 act on the issue. There is a danger in creating confusion around terminology, and both the 2014 act and the bill provide consistency and clarity around expectations.

The committee highlighted concerns regarding the lack of consistency in use of the terms "welfare", "best interests" and "well-being" of the child in this and other legislation. As demonstrated in amendments 151, 170, 188 and 196, I have taken that on board to ensure consistency. If the phrase "best interests" was brought into section 42 by amendment 65, that inconsistency would be reintroduced. Taking account of those points, I therefore ask Elaine Murray to not to move amendment 65.

Amendment 196 replaces the protections in section 42(9) of the Criminal Procedure (Scotland) Act 1995, ensuring that, where it is practicable and not detrimental to the wellbeing of a child who is officially accused of committing an offence, that

child should not associate with an adult when in custody.

Amendment 197 replaces section 43(5) of the Criminal Procedure (Scotland) Act 1995 and continues to ensure that the principal reporter is notified of cases where the procurator fiscal has decided, for whatever reason, not to proceed with a prosecution against a child. The purpose of the amendment is to enable the principal reporter to consider whether other appropriate action should be taken. In particular, the amendment makes it clear that, despite the decision not to prosecute, where a constable reasonably suspects that the child has committed the offence that led to their detention, they may be kept in a place of safety, in accordance with the provisions of the Children's Hearings (Scotland) Act 2011, until the principal reporter has decided whether it is necessary to make a compulsory supervision order in respect of the child. The effect of the provision largely reflects the status quo.

11:15

Amendment 222 adjusts the meaning of police custody as a consequence of amendment 197. The effect will be that a person who is not being prosecuted will no longer be in "police custody" within the meaning of part 1 of the bill. It would apply if the principal reporter has directed that the person should remain in a place of safety under section 65 of the Children's Hearing (Scotland) Act 2011 pending a decision on whether to make a compulsory supervision order in respect of that person.

Amendment 255, in the name of Alison McInnes, seeks to amend section 42 of the bill, which relates to safeguarding and promoting the wellbeing of the child as a primary consideration. The amendment would add a subsection that states:

"A decision"

to hold a child in custody or interview a child about an offence

"must be exercised for the shortest possible period of time."

I am not entirely sure what exercising a decision means, but I take the general point about ensuring that children are not kept in custody or interviewed for longer than necessary.

However, there is already a general duty under section 41 of the bill to ensure that people are not held unnecessarily that has the intended effect. Importantly, that duty relates to the test of necessity, whereas the phrase "shortest time possible" has no such test and could lead to an inappropriate release.

Section 10 also sets a carefully balanced test that must be considered before anyone is held in custody. In deciding whether that test is met in relation to a child, the police will have the wellbeing of the child as a primary consideration, as provided for by section 42. Amendment 255 therefore adds nothing to the bill and does not work in terms of ordinary language. I invite Alison McInnes not to move it.

I move amendment 150.

John Finnie: I welcome amendment 150. I am sure that most police officers will acknowledge that dealing with young people in such circumstances is one of the most challenging things that they do, and therefore the background is very important. It may seem that amendment 150A makes a change for change's sake, given that I fully support everything that is already there, but my thinking is that the decision is of such importance that it should be taken by someone who is detached from the operational experience.

The cabinet secretary says that there will not be a superintendent at every station. I sincerely hope that that there will not be—if there were, it would mean that there were far too many superintendents. However, likewise, there will not be an inspector at every station. I am quite sure that the cabinet secretary is not trying to say that a superintendent would not be available to make timely decisions, not least because a duty superintendent has to make timely decisions on very sensitive matters that we need not go into here. To my mind, there is nothing more sensitive than a decision to formally detain a child.

I move amendment 150A.

Elaine Murray: The cabinet secretary said that Children 1st supports his amendments, but it did not support them originally. It did not support them because it looked as though the amendments would be discussed with other amendments on the rights of under-18s that will be discussed later on, and because the amendments do not go far enough as they would protect only a very small number of 16 and 17 year-olds who are under compulsory supervision orders and would not protect other 16 and 17-year-olds.

As a result of the way in which the amendments fall in our discussions, I will support them at this point. However, I think that the provisions will require further amendment at stage 3 in order to give greater protection to 16 and 17-year-olds.

My amendment 65 would amend section 42, which has as its title "Duty to consider child's best interests". If my amendment's proposed introduction of the concept of "best interests" into the text of section 42 is inconsistent or confusing, I cannot see how having "best interests" in the section title is any less so. The meaning of "best interests" has been determined by a body of case law and is nationally and internationally

recognised. It has been used since 1959 and is in accordance with the United Nations Convention on the Rights of the Child. As I said, "best interests" is used in the section title but not in its text, which is inconsistent.

"Well-being" is a relatively new term, and although it appears in previous legislation it is not as well defined as "best interests". It could be difficult to define in the context of section 42 and therefore difficult to implement. The use of the phrase "best interests" of a child is in line with international human rights obligations.

I listened to what John Finnie had to say on amendment 150A, and he has convinced me that it is appropriate.

Alison McInnes: As we have heard, section 42 places a duty on a constable to consider a child's best interests in the early stages of the criminal justice process. It currently states that, when taking decisions on arrest, custody, interviews and charge, the constable

"must treat the need to safeguard and promote the well-being of the child as a primary consideration."

My amendment 255 would require the constable to exercise their power to hold a child in police custody and interview them

"for the shortest possible period of time."

The amendment would make it explicit that that would have to be a consideration.

Amendment 255 is supported by Justice Scotland, and its intention is somewhat obvious: it is to ensure that when constables make decisions they bear in mind the unique vulnerability of children and the potentially damaging impact of their being held in custody or interviewed for long periods of time. The amendment is even more important given the committee's agreement last week to an amendment that allows children to be held for up to 24 hours, which I opposed. The purpose of my amendment is to emphasise the need not to use up all that time. I will press my amendment, and I support Elaine Murray's amendment 65.

The Convener: You have not moved your amendment yet—you are just speaking to it.

Does anyone else want to come in?

Margaret Mitchell: I understand the intention behind John Finnie's amendment 150A. The decision to hold a child in custody is a serious one and possibly should be taken by a high-ranking officer. However, I wonder whether John Finnie has considered the unintended consequence of his amendment. As amendment 150 currently stands, an inspector, if they happened to be present, could decide that it was not appropriate to keep the child in custody. That would mean that the decision would be made more quickly than if people had to wait for a superintendent. We are widening the scope of the bill by including inspectors, who could be more readily available to take such important decisions more timeously. That is something to consider. I was persuaded that the minister had the provision more or less right in his amendment 150.

On Elaine Murray's amendment 65, there is an issue about the terminology, especially if "best interests" is used in the section title. However, the cabinet secretary is sure that the phrase "well-being" is more appropriate. That could be a drafting issue, or there might be a more fundamental issue. However, I think that the cabinet secretary has looked at the issue.

The sentiment behind Alison McInnes's amendment 255 is absolutely right: children should be held in custody for "the shortest possible ... time". However, how does one define that? Can some test be devised? Is the phrase relative and therefore vague? Does it add anything? I am uncertain about that and will be interested to hear the cabinet secretary's comments.

Roderick Campbell: John Finnie's amendment 150A would introduce a requirement for the decision to be taken by a superintendent, which would be unnecessarily restrictive and not necessarily in the child's best interests.

I have some sympathy with Elaine Murray's amendment 65. We are struggling a wee bit with consistency. The cabinet secretary persuaded me that the bill is at least consistent with the 2014 act, but I still cannot quite understand what consideration might have been given when the 2014 act was drafted to the use of "well-being" and its implications for the Children (Scotland) Act 1995, which refers to "best interests". It would be helpful to have further clarification of the point before stage 3.

Michael Matheson: It may be helpful if I deal first with the issue about the title of section 42. That has already been changed within the bill. It is not a matter of amendment; it is a matter that is dealt with through printing. It has been changed from "best interests" to "wellbeing" to ensure consistency. I hope that that addresses the concern that members had regarding the section title.

The Convener: Just to clarify, we thought that there would be a reprint.

Michael Matheson: It is a matter of printing, yes; it is not a matter of an amendment to the bill. The bill will be reprinted before stage 3.

The Convener: You are saying that the title has not been changed yet but that it will be changed,

with the permission of the parliamentary authorities. Is that correct?

Michael Matheson: Yes. There is a technical process that it goes through for that.

The Convener: I just wanted to clarify that for the record.

Michael Matheson: The title will say "wellbeing" rather than "best interests". I hope that that clarifies the point.

However, that point aside, a number of the amendments that I have lodged try to achieve that consistency and read-across with other children's legislation. It is important to ensure that the police and other organisations have a consistent understanding of the terminology.

I turn now to the issue that John Finnie raised in amendment 150A on the rank of the officer taking decisions in relation to a detained child. Last week, I made the point that

"the issue is about the quality of the decision making".—[*Official Report, Justice Committee*, 29 September 2015; c 40.]

The decision is best taken by the individual who is best able to make an informed decision at that particular time. Operationally, I believe that the decision can best be made at the rank of inspector or chief inspector. Clearly, it could be made by an officer of a higher rank, if necessary, but I think that the rank of inspector or chief inspector should be the minimum at which a decision of such a nature should be made. There is no need to move up to the rank of superintendent. Of course, superintendents operate on an on-call basis for operational matters, but there is an issue to do with the speed at which decisions can be made in such instances. I believe that it is appropriate that the decision should be made as quickly as possible, and having decisions made at the rank of inspector or chief inspector will allow us to maximise the speed at which that can happen.

Returning to the issue that Elaine Murray raised, I am happy to have a dialogue with her between now and stage 3 if there are areas where she feels that further changes need to be made, and to consider what those are.

On amendment 255, in the name of Alison McInnes, I have already outlined how issues of language and definition mean that how what it proposes would be applied in particular circumstances is unclear. Legally, the amendment adds no protections to the bill, so it does not fit well within the bill. I understand the general thrust of what Alison McInnes is trying to achieve through the amendment, and I am happy to explore that with her between now and stage 3, to see whether there is a way of addressing the issue, or even whether there is a need for it to be addressed. However, as it stands at present, the language in and the drafting of the amendment do not add anything to the bill and do not sit well with the terms that are used in the bill.

John Finnie: I certainly did not in any way mean to be disparaging about the federated ranks. Amendment 150A is about the importance that is attached to the treatment of young people. In practical terms, in the area that I represent, for example, it just means phoning someone; indeed, an inspector will not be on duty in the vast majority of places. I am sure that the cabinet secretary does not wish to give the impression that a superintendent is not instantly available to answer a phone to deal with the many challenges that the modern police service faces outwith routine office hours—not that that is how the service works. I think that the amendment demonstrates the significance of the decision to detain a child by having it taken at the higher rank.

I press amendment 150A.

The Convener: The question is, that amendment 150A 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)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

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

Amendment 150A disagreed to.

Amendment 150 agreed to.

Amendments 151 and 152 moved—[Michael Matheson]—and agreed to.

Section 19—Liberation by police

The Convener: Amendment 153, in the name of the cabinet secretary, is grouped with amendments 154, 155, 48, 156, 157 and 160 to 164. If amendment 155 is agreed to, I cannot call amendment 48, as it will be pre-empted.

11:30

Michael Matheson: The amendments in this group relate to police powers to release people on undertaking.

Release on undertaking is distinct from investigative liberation under chapter 2 of part 1 of the bill. Investigative liberation is a new concept that will allow the police to release on conditions suspects who have not yet been officially accused of committing an offence. In contrast, the power to release on an undertaking in chapter 3 restates existing police powers to release suspects who have been officially accused.

Powers to release on an undertaking are used by the police under the oversight of procurators fiscal. That reflects the fact that, once a suspect has been officially accused, the police initial investigation phase is complete and it is for the procurator fiscal to decide whether further inquiries are required and how to prosecute. The amendments in my name in this group add more detail to that process of liberation by the police.

Section 19 deals with police powers to release suspects who have been officially accused. At present, it allows the police to release such people with or without an undertaking. Amendment 153 provides that a person who has been arrested under a warrant cannot be liberated from police custody without being subject to an undertaking.

Most persons arrested under warrant will require to remain in custody to appear at court. However, there are limited occasions when the police may wish to liberate a person who has been arrested under the terms of a court-issued warrant. Those decisions are taken in consultation with the procurator fiscal. Amendment 153 makes it clear that, if liberation is desirable, the person must be liberated on an undertaking to appear at a specified court at a specified time, and not simply liberated to be cited.

Amendment 154 is a minor amendment simply to emphasise in the bill that the conditions set by undertakings have a limited lifetime.

Amendment 155 adds what are commonly known as standard conditions to be attached to an undertaking. Such conditions currently exist in the Criminal Procedure (Scotland) Act 1995 and mirror some of the conditions set on a person liberated from a court on bail. The conditions include that the person must not interfere with witnesses or evidence or behave in a manner that causes alarm or distress to witnesses.

The conditions are a useful feature of the present system and reiterate to the person signing an undertaking the standards of behaviour that are expected of them while liberated. Amendment 155 states the standard conditions with more precision and, at the same time, retains the flexibility to impose any further conditions that are necessary and proportionate to ensure that those standard conditions are observed.

Amendment 156 makes it clear that the sort of undertaking conditions that can be imposed include requirements to be in a specified place at a specified time, or to refrain from entering a specified place or type of place for a particular period. Those are curfew-type conditions. The bill as introduced stated that curfews could be imposed as undertaking conditions. Amendment 156 simply rewords the non-curfew conditions as they can be applied in undertakings for consistency with their counterparts for investigative liberation, as amended by amendment 143, which was debated earlier.

Amendment 157 provides that undertaking conditions can generally be authorised by a constable of the rank of sergeant or above but that curfew conditions requiring a suspect to be in a specified place at a specified time must be authorised by an officer of the rank of inspector or above.

I consider that the arrangements for the management and governance of custody facilities, coupled with the safeguards provided in the bill, mean that it is appropriate for most undertaking conditions to be set by a custody sergeant. The arguments for allowing sergeants to set undertaking conditions are similar to those that I made for investigative liberation conditions, although the context here is different.

Once a person has been charged, the police need to consider whether it is necessary to keep that person in custody until they can be brought before a court under section 18 of the bill or whether they can be released, either with or without an undertaking. The assessment of release options should be made by a specialist custody officer in consultation with the senior investigating officer and in accordance with the Lord Advocate's guidelines on liberation by the police. That process will ensure that any special conditions are tailored to the particular case but that the final decision on what is proportionate and necessary will be made by an officer with the right knowledge and expertise in dealing with custody matters.

The bill already allows a specialist custody sergeant to decide to keep a person in custody or to release them without undertaking. Amendment 157 would allow that custody sergeant to release a person subject to undertaking conditions. The independence and increased professionalisation of custody division removes the need for decisions on liberation conditions to be taken at inspector level. The officer best placed to make decisions on whether a person should be released subject to undertaking conditions will, in most cases, be the sergeant in charge of the custody centre.

I believe that a higher level of authorisation is justified when imposing curfew conditions. There

may be cases where it is necessary and proportionate to impose a curfew on a suspect, but it is important to recognise that doing so would place very significant restrictions on the suspect's liberty. My amendment 157 therefore requires curfew conditions to be authorised by an inspector.

The provisions have to be flexible enough to cover the full spectrum of criminal offences, but there is scope for the Lord Advocate and the police to set out in guidance more finely grained authorisation processes for undertaking conditions in different circumstances. I believe that those are matters for the Lord Advocate and Police Scotland and that it would be unnecessarily restrictive to set out that detail on the face of the bill.

I believe that amendments 153 to 157 reinforce the robust and comprehensive system for police liberation set out in the bill.

I now come to amendments 160 to 164, which are also in my name. Those amendments restructure the provisions that are already in the bill on the procurator fiscal's power to rescind or modify an undertaking and on the expiry of undertakings.

Amendments 160, 161, 162 and 164 are primarily drafting improvements that clarify the powers of the procurator fiscal and restructure the provisions on the rescission and expiry of undertakings in order to make the provisions easier to navigate.

Amendment 163 is more substantial. In addition to restating provisions about rescission of undertakings, it gives a new power to the police to arrest people who are reasonably suspected of being likely to breach an undertaking. It is based on an existing power that the police have to arrest suspects in anticipation of their breaching bail conditions.

Amendment 163 will ensure that people who are likely to breach an undertaking can be arrested in the same circumstances as people who are likely to breach bail conditions. The power could be used if, for example, the police consider it likely that the person will interfere with witnesses. Actual breach of undertaking is already an offence in respect of which the person can be arrested.

I will now respond to Elaine Murray's amendment 48, which sets out the purposes against which the necessity and proportionality of conditions can be tested. It restricts those purposes to securing that the person surrenders to custody if required to do so, that the person does not interfere with a witness or otherwise obstruct the course of the investigation into the offence in connection with which the person is in police custody, the protection of the person or, if the person is under 18 years of age, the welfare or interests of the person.

As I explained earlier, amendment 155 will provide more flexibility to prevent interference with witnesses and evidence. Therefore I would ask Elaine Murray not press her amendment.

I believe that, taken together, the provisions in the bill on release on undertaking and the amendments in my name provide clarity and help to balance the interests of justice with individuals' rights, and I invite the committee to support them.

I move amendment 153.

The Convener: I am waning a little, so we will go on to the end of the group of amendments on release and undertaking before taking a five-minute break. I call Elaine Murray to speak to amendment 48 and others in the group.

Elaine Murray: As the cabinet secretary said, amendment 48 refers to standard conditions and is similar to amendment 155 in the name of the cabinet secretary, which I agree is probably more flexible. However, I believe that the protection of a person or the welfare and interests of a person under 18 are important enough to appear on the face of the bill. Although I am prepared to support amendment 155, which will supersede amendment 48 if it is agreed to, there may still be a case for further amendments at stage 3 to include the protection of the person and the best interests of someone who is under 18.

Michael Matheson: If amendment 155 is agreed by the committee and becomes part of the bill, I will be more than happy to explore the issue further with Elaine Murray after the stage 2 process.

Amendment 153 agreed to.

Section 19, as amended, agreed to.

Section 20—Release on undertaking

Amendment 154 moved—[Michael Matheson]—and agreed to.

The Convener: I call amendment 155 in the name of the cabinet secretary. I remind members that, if amendment 155 is agreed to, I cannot call amendment 48, which would be pre-empted.

Amendment 155 moved—[Michael Matheson]—and agreed to.

Amendments 156 to 158 moved—[Michael Matheson]—and agreed to.

Section 20, as amended, agreed to.

Amendment 159 moved—[Michael Matheson]—and agreed to.

Section 21—Modification of undertaking

Amendments 160 to 162 moved—[Michael Matheson]—and agreed to.

Section 21, as amended, agreed to.

After section 21

Amendments 163 and 164 moved—[Michael Matheson]—and agreed to.

Section 22 agreed to.

The Convener: Members will be delighted to know that I am suspending the meeting for a five-minute break.

11:43

Meeting suspended.

11:48

On resuming—

Section 23—Information to be given before interview

The Convener: Amendment 28, in the name of John Finnie, is grouped with amendments 165 and 166.

John Finnie: Amendment 28 would oblige a constable not only to caution a person not more than one hour before an interview, but to repeat the caution "immediately before" the constable interviews the person about an offence.

A long time ago, when I was learning about the law, the importance of timely cautions was constantly reinforced: it forms a significant part of case law. One hour is a long time for someone who is a suspect, and we know that many people who find themselves in police stations as suspects have challenging conditions. There should always be an overriding consideration of fairness and there should be the opportunity for the person to get their rights straight away. I imagine that most constables do that anyway. The amendment would disadvantage no one, but would simply reinforce people's rights. I hope that members will support amendment 28.

I move amendment 28.

Michael Matheson: The bill provides for and will enhance the rights of individuals who are to be interviewed by the police by conferring upon them the right, if they so choose, not to say anything other than to give basic information, the right to have a solicitor present and the right to have another person or a solicitor informed that they are in custody. Those are fundamental rights and it is only correct that the bill will ensure fully that suspects are given such information in a timely and clear way.

I understand the reasons that John Finnie has set out in speaking to amendment 28, and I am sure that we all agree that the intention behind the relevant provisions in the bill is to ensure that anyone who is arrested or who is attending voluntarily at a police station is clearly informed about their rights. The question is whether amendment 28 would achieve that aim proportionately; it could require that the person who is to be interviewed be informed of their rights twice in the space of the hour prior to the interview. Although I am fully supportive of the principle that individuals should fully understand their rights, I do not believe that it is necessary for them to be informed of them twice in so short a time.

There are, in the bill, other safeguards of individuals' rights. A person must be told on arrest, and on arrival at the police station, that they are under no obligation to provide any information to the police other than their name, address, nationality and their date and place of birth. In addition to that, the letter of rights includes information about the right to remain silent and states that any information will be recorded and may be given in evidence if the matter proceeds to trial. Therefore, I ask John Finnie not to press amendment 28.

I hope that the Government's amendments in the group will provide further reassurance to John Finnie and the committee. We are fully supportive of the aim to ensure that suspects and accused persons are regularly advised of their rights and of relevant information. In that respect, amendment 165 will add to the information that a person must be told before they are interviewed: it will require a police officer to inform a suspect

"of the general nature of"

the offence that they are suspected of committing. Under section 3 of the bill, that information will already be given when a person is initially arrested. For consistency, however, we consider it appropriate that that information be stated again prior to the interview. I consider that to be a particularly important change for suspects who attend a police station voluntarily, because such persons may not already have been given that information. Amendment 165 will ensure that they are given it.

Amendment 166 will enhance protection of persons who are to be interviewed under the post-charge questioning procedure. The power to allow the police to question an accused person about an offence after he or she has been charged with that offence is included in the bill, as recommended by Lord Carloway in his review. An application to

carry out questioning after charge has to go before a court. Where the court grants such an application, it must specify the length of time for which questioning is permitted, and can add other conditions to ensure that the questioning is not unfair—for example, to limit the scope of the questioning. Amendment 166 will ensure that a person who is being interviewed by the police in such a situation will be told of the time limit for the questioning and of any other conditions that have been imposed by the court. It is, therefore, an additional protection of the rights of the accused.

As I have already said, I hope that the Government's amendments 165 and 166 will, by adding to the information given to suspects, be sufficient to satisfy members that amendment 28 is unnecessary.

The Convener: John Finnie will wind up and say whether he will press or seek to withdraw amendment 28.

John Finnie: It is my intention to press amendment 28, which enjoys the support of the Law Society of Scotland. It would be a modest provision under the sections governing "Rights of suspects". It would oblige a constable not only to caution a person one hour before the interview, but to caution them immediately in advance of it. That is simply to reinforce the point that a person is not obliged to say anything. It would not be an onerous task, so it would be entirely proportionate to support the amendment. I hope that members will do so.

The Convener: The question is, that amendment 28 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
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)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

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

Amendment 28 disagreed to.

Amendments 165 and 166 moved—[Michael Matheson]—and agreed to.

Section 23, as amended, agreed to.

Section 24—Right to have solicitor present

The Convener: Amendment 29, in the name of John Finnie, is grouped with amendments 243 to 248, 250, 251 and 253. If amendment 29 is agreed to, I cannot call amendments 243 and 244, because they will have been pre-empted.

John Finnie: I concur with a number of representations that I have received that say that the proposed threshold in paragraphs (a) and (b) of section 24(4) is inappropriate. Section 24(4) currently says that

"a constable may, in exceptional circumstances, proceed to interview the person without a solicitor being present if the constable is satisfied that it is necessary to interview the person without delay in the interests of—

(a) the investigation or the prevention of crime, or

(b) the apprehension of offenders."

That wording could, and likely would, be used legitimately to cover a huge percentage of instances. Amendment 29 would ensure that a person would be interviewed without a solicitor being present only in the most exceptional circumstances. I consider that to be a fair and balanced approach.

I move amendment 29.

Alison McInnes: John Finnie and I are concerned about the same things, but we have taken a different tack to try to address them. All my amendments in the group seek to strengthen the rules around the ability of the police to interfere with the fundamental rights of both adult and child suspects. I am talking about the right to be assisted by a solicitor during interview, the right to a consultation with a solicitor, the right of adults to have an intimation sent to another person, and the right of children to have access to their parent or guardian.

Section 24 states that a

"constable may, in exceptional circumstances, proceed to interview the person without a solicitor being present if the constable"

believes that it is necessary to proceed in

"the interests of—

(a) the investigation or the prevention of crime, or

(b) the apprehension of offenders."

The section grants the right to override a suspect's request for legal assistance. Section 36 establishes that constables may delay a person's right to a private consultation with a solicitor on the same basis.

I firmly believe that referring to the prevention or detection of crime and "the apprehension of offenders" is far too broad a basis on which to deny someone their right to be assisted by a solicitor. That is why my amendments 243 to 245,

250, 251 and 253 would create a switch to an interference-based definition of need that stresses that restriction of those rights must be to prevent "interference with evidence" or another person, and would elevate the making of such decisions from constable to superintendent level.

Members will note—as the convener has already indicated—that my amendments 243 and 244 would be pre-empted by agreement to amendment 29, which is in the name of my colleague John Finnie. His amendment contrasts with mine: it would allow a constable to proceed to interview the person without a solicitor being present only in exceptional circumstances. Amendment 29 does not specify what those circumstances may be, nor does it mention sign-off up the ranks. It would still grant the police too much leeway, although it is obviously better than what is in the bill.

The bill suggests that denial of those fundamental rights could become routine. My amendments highlight the significance of those decisions and would ensure that proper safeguards are in place to discourage misuse of the powers.

Elaine Murray: I agree that there is a need for the police not to routinely abuse their powers, but I do not believe that the bill encourages that, because it makes it quite clear that it is talking about "in exceptional circumstances". Obviously, with things such as the prevention of crime, there are important circumstances in which it may be necessary to act very quickly.

I do not disagree with what Alison McInnes says about

"interference with evidence in connection with the offence"

and so on, but I think that those things are, to an extent, encompassed. There might be an argument for expansion at stage 3 to include some of them, but I am not very sure about that.

On amendment 245, which is on the "appropriate constable" being a superintendent who

"has not been involved in the investigation"

of the offence, I do not see how somebody who has not been involved in that investigation could judge whether an exceptional case has arisen. Therefore, I would also resist amendment 245.

Roderick Campbell: I do not have anything to add to what Elaine Murray has said, other than that I support it.

12:00

Michael Matheson: The amendments in the group relate to authorisations for interviewing suspects without a solicitor being present, to delaying intimation of the fact someone is in custody and to delaying consultations with solicitors.

I appreciate that the intention behind the amendments is to protect suspects. That is a key purpose of part 1, which aims to strike the right balance between protecting the rights of suspects and ensuring effective investigation of crime. In order to do this, chapters 4 and 5 of part 1 confer crucial rights on suspects, including the right to have a solicitor present during interview, the right to have someone else informed that they are in custody and the right to a private consultation with a solicitor at any time. There will be exceptional circumstances in which these rights cannot be delivered, but we should set a high bar for when that can happen.

Amendments 29 and 244 would amend section 24(4), which deals with circumstances in which a person could be interviewed without a solicitor. Section 24(4) permits such an interview only "in exceptional circumstances" but does not define those circumstances. That reflects the recommendation in the Carloway report that interviewing a suspect without a solicitor, against the suspect's wishes, should be possible only in exceptional circumstances. Lord Carloway recommended that "exceptional circumstances" should not be defined because case law has made it clear that it means in very rare cases:

"for example where an immediate interview is required in order to protect persons or property from serious harm."

Section 24(4) also includes an additional test so that before proceeding to interview where there are exceptional circumstances, police must also be

"satisfied that it is necessary to interview ... without delay in the interests of—

(a) the investigation or the prevention of crime, or

(b) the apprehension of offenders."

John Finnie's amendment 29 would remove that additional test of necessity. In doing so, it would remove protections for suspects and reduce transparency in decision making—although I appreciate that that was probably not the intention.

Alison McInnes' amendment 244 would leave the "exceptional circumstances" element of the test in place but would narrow the parameters of the necessity test. The effect of that would be, for example, to prevent the police from deciding that it was necessary to interview in exceptional circumstances in cases where there was an additional suspect on the run. Amendment 251 would substitute the same narrower test into section 36(2), which deals with circumstances in which a suspect's exercise of their right to a

private consultation with a solicitor could be delayed.

Amendments 243, 245 to 248, 250 and 253 all seek to require that decisions to interview without a solicitor or to delay intimation or consultations be made by constables of senior rank. The assumption underlying the amendments seems to be that requiring that particular decisions be made by very senior officers is necessary to ensure good decision making.

All constables go through professional training throughout their careers to ensure that they are fully able to carry out whatever role they have to undertake. All custody facilities across Scotland now come under the command of the custody division, and there is a corporate approach to dealing with people in custody, with a national standard operating procedure and training for all officers who work in those facilities.

The Justice Committee agreed last week that sergeants should make the initial decisions to keep people in custody. It would be during that initial authorisation procedure that any requests would be made to delay notifications to solicitors or named persons and, potentially, to interview without a solicitor being present. The person who makes that initial custody decision would be best placed to consider the other rights-based decisions. The decisions that would be covered by the amendments relate to rights that are afforded to people who are being held in custody. I believe that such decisions are best made by specialist custody officers within the custody division—as is the case at present.

The decisions that would be affected by the amendments may also need to be made in exceptional circumstances in which time is of the essence. One example might be a kidnap scenario: requiring authorisation from a superintendent before interviewing a suspect could endanger life by creating delay in a situation in which time is critical. There is a relatively small number of superintendents in Scotland: although there will always be a superintendent on call, that superintendent may not be instantly available to make such a decision.

I appreciate that we are talking about important decisions to withhold or delay the delivery of crucial rights to suspects. The bill already sets high tests to ensure that the powers can be used only when absolutely necessary. However, I have listened to the arguments that have been put forward by Alison McInnes and I agree that authorisation by a police constable may not be appropriate in all cases. Therefore, I urge John Finnie not to press amendment 29 and Alison McInnes not to move her amendments, and I will undertake to consider the matter further and to lodge amendments at stage 3 to ensure that the decisions are made by constable of the most appropriate rank.

The Convener: John Finnie's body language seems to show that he is not persuaded, so I do not know whether that has done it, cabinet secretary.

John Finnie: No, convener—I am grateful to the cabinet secretary for his comments. He says that the bill does not define "exceptional circumstances" and he rightly alluded to Lord Carloway's recommendations and the fact that there is ample case law. I suppose that that is the challenge when we are trying to make statute and to make reference to case law but not make the statute voluminous every time. Likewise, there is no definition of what a constable's "satisfaction" is or what constitutes "necessity" with regard to interviewing a person. However, I acknowledge that the cabinet secretary has seen that there are problems, so I am happy to wait to see what he comes back with at stage 3. I will not press amendment 29; I seek permission to withdraw it.

Amendment 29, by agreement, withdrawn.

The Convener: Amendment 243, in the name of Alison McInnes, has already been debated with amendment 29.

Alison McInnes: I will move amendment 243. I understand that the cabinet secretary has asked me not to move amendment 245.

The Convener: We are all getting a bit battle weary—I can hear it in your voice.

Amendment 243 moved—[Alison McInnes].

The Convener: The question is, that amendment 243 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Russell, Michael (Argyll and Bute) (SNP)

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

Amendment 243 disagreed to.

Amendment 244 moved—[Alison McInnes].

The Convener: The question is, that amendment 244 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Russell, Michael (Argyll and Bute) (SNP)

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

Amendment 244 disagreed to.

Amendment 245 not moved.

Section 24 agreed to.

Section 25—Consent to interview without solicitor

The Convener: Amendment 55, in the name of Elaine Murray, is grouped with amendments 56, 167, 57, 58, 168, 59, 60, 173, 61 to 64, 38 and 32.

I take a deep breath here, because I must point out that there are various pre-emptions in the group—you will be tested on this immediately after I have read it out. If amendment 58 is agreed to, I cannot call amendment 168. If amendment 63 is agreed to, I cannot call amendments 184 and 185 in the group "Rights of under 18s: minor amendments". If amendment 38 is agreed to, I cannot call amendment 32. By the looks on your faces, I am guessing that you all took that in.

Elaine Murray: I will try to get through this as quickly as possible, as I have several amendments in the group. My amendments aim to afford the same protection to 16 and 17-year-old children as the bill gives to children under the age of 16.

My amendments 55 and 56 apply to section 25, which is on the ability to consent to interview without a solicitor present. The bill treats older children aged 16 and 17 differently from children who are under 16, despite the fact that it defines a child as someone under the age of 18. That is the case in much of the legislation that we have passed, such as the Victims and Witnesses (Scotland) Act 2014, the Children and Young People (Scotland) Act 2014 and the Human Trafficking and Exploitation (Scotland) Bill, which we passed last week.

We know that young people who have contact with the criminal justice system are often vulnerable in different ways. Many young offenders have poor literacy and numeracy skills and some may have chaotic home lives. Recent research by the British Psychological Society indicates that many have neurological conditions or acquired brain injury, and some will have taken legal or illegal substances that render them less risk averse than normal.

Apart from that, a young person who is under arrest with the prospect of interview by the police may be frightened, worried that their parents, school or employers are going to find out and distressed. That in itself could lead to panicked rather than rational behaviour. Access to calm and informed legal advice from a solicitor is particularly necessary when a young person is vulnerable or not thinking clearly.

My amendments 55 and 56 would protect older children aged 16 and 17 from making the wrong decision to consent to interview without a solicitor being present, by ensuring that no one under the age of 18 can give such consent. The amendments are compliant with the United Nations Convention on the Rights of the Child, which states that children who are accused of breaking the law have the right to legal help and fair treatment.

In addition, amendments 57 and 58 would remove children under 18 from the provisions that exclude from consenting to interview without a solicitor persons who appear to a constable to have a mental disorder or who cannot communicate effectively with the police or understand what is happening. Those provisions will not be necessary if amendments 55 and 56 are agreed to.

In my view, amendments 167 and 168 are inadequate, as they offer the additional protection only to young people aged 16 and 17 who are on a compulsory supervision order. The vast majority of children on CSOs are under the age of 16, so the number who would be protected by the amendments is very small. I agree that those young people need protection, but they will receive it if my amendments are agreed to.

Amendments 59 and 60, which are to section 30, are similar and would ensure that all children under the age of 18, rather than 16, have the right to have intimation sent to another person that they are in custody. The child's parent or another adult named by the child will receive intimation as quickly as practicable. The arguments for amendments 55 and 56 regarding the vulnerability of under-18s are the same. An appropriate adult should be aware that a child has been taken into custody.

Amendment 61 would prevent 16 and 17-year-olds from requesting that no intimation be sent to their parent or other named adult. Exactly the

same arguments can be made regarding the varied vulnerabilities of older children as were made for amendments 55 and 56. Amendment 61 would ensure compatibility with the rest of the bill and with recent legislation, as I stated.

Amendment 62 would give a parent or other adult who has been sent intimation that a child who is under 18 is in police custody the right of access to the child. That would change the age to which that right applies from 16 to 18.

Amendment 63 would remove section 32(2), which refers to 16 and 17-year-olds, as that section will not be necessary if amendment 62 is agreed to. Amendment 64 is consequential on amendment 63.

Amendment 38, in the name of John Pentland, would remove any reference to age in the section on support for vulnerable persons, so that all persons would have equal rights to support should a constable believe them to be suffering from a mental disorder—although that condition would be removed by John Finnie's amendments, which, incidentally, we also support—or if a person is unable to communicate sufficiently with the police.

My amendment 32 is an alternative. It would change the age of 18 in section 33(1)(b) to 16. That is a back-up in case my other amendments and John Pentland's amendment 38 are not agreed to. It would provide vulnerable 16 and 17-year-olds with support.

I move amendment 55.

Michael Matheson: In Scots law, there are a number of definitions of a child, and those are put in place for different purposes. Under the Children and Young People (Scotland) Act 2014, the term "child" generally means a person who has not attained the age of 18. However, under the Children's Hearings (Scotland) Act 2011 and the Criminal Procedure (Scotland) Act 1995, "child" generally means a person who is under 16, although the definition is extended to 16 and 17-year-olds who are subject to a compulsory supervision order.

For the purposes of arrest, detention and questioning, the bill defines a child as a person who is under the age of 18. Everyone of any age has the right of access to a solicitor in the context of part 1. However, the bill reflects the self-evident fact that 16 and 17-year-olds have greater capacity, maturity and autonomy than younger children, and that is commonly reflected in other rights and responsibilities. The age-based laws that allow for 17-year-olds to live independently, vote, work and marry reflect the extent of self-determination that can exist at 16 years of age and beyond. With that greater right of self-determination should come the right for older young people to have a bigger say in the major issues and incidents in their lives.

This bill seeks to respect, reflect and act on young people's individual views in a meaningful yet responsible way. Currently, the bill provides that a child under 16 cannot consent to an interview without a solicitor being present. The bill further provides that anyone aged 16 or 17 can decide to be interviewed without a solicitor, but there is a safeguard: in order to do so, they must have the agreement of a relevant person.

12:15

While I sympathise with the underlying intention, the effect of Elaine Murray's amendments 55 to 58 would be to remove the right of any 16 or 17-year-old to consent to be interviewed without a solicitor.

The Scottish Government prefers an approach which would allow young people aged 16 and over to make their own decision, with safeguards in place to support them in that.

That is consistent with Lord Carloway's recommendations and takes account of article 12 of the United Nations Convention on the Rights of the Child—the right to an opinion and for that to be listened to and taken seriously.

Crucially, the effect of Elaine Murray's amendments would be to remove the obligation on those young people to take on a solicitor. While those young people could not be lawfully interviewed without a solicitor, they could still be charged, released or released on investigative liberation.

On balance, it is preferable to allow for the greater level of self-determination of 16 and 17-year-olds, while also providing additional protection for those subject to compulsory supervision.

I assure the committee that we plan to have further dialogue with partners, including children's organisations, on those issues before stage 3. The wider needs of 16 and 17-year-olds who may be vulnerable but are not subject to compulsory supervision will also have to be reflected in guidance and practice requirements, which will have to be fully implemented on the ground.

I ask Elaine Murray not to press her amendments 55 to 58.

We also take seriously the fact that some 16 and 17-year-olds are more mature than others. After further discussions with Police Scotland and the Scottish Children's Reporter Administration, we are persuaded that amendments are required to improve the protections afforded to 16 and 17-year-olds in custody who are perhaps more vulnerable.

I have therefore lodged amendments 167 and 168, which relate to young persons aged 16 and 17 who are subject to a compulsory supervision order under the Children's Hearings (Scotland) Act 2011. Our amendments provide that all who are subject to such orders, and specifically those aged 16 and 17, should be treated in the same way as those aged under 16. Most significantly, that will remove the right of those young people to waive access to a solicitor.

The Scottish Government amendments are a positive and proportionate change. I believe that they strike an appropriate balance between respecting individual autonomy and affording protection to the most vulnerable youngsters.

Section 30 of the bill sets out the right of a person in police custody to have another person told that they are in custody. Section 32 sets out the right of those under 18 in custody to access the person sent intimation under section 30.

The bill as introduced did not allow a 16 or 17-year-old to notify a responsible person that they were in police custody, without requiring that person to come to where the young person was being held. Amendment 173 allows those young people to intimate without requiring the relevant adult to attend at the police office.

I recognise and acknowledge Elaine Murray's amendments 59 to 64, which also seek to deliver a raising of the relevant age in sections 30 and 32, but this time to include all those under 18. However, as I have said before, I do not believe that such a blanket approach is appropriate in respect of 16 and 17-year-olds.

I ask Elaine Murray to consider the package of Government amendments that I have lodged and not to press amendments 59 to 64.

Amendments 38 and 32, in the names of John Pentland and Elaine Murray respectively, relate to the age at which the vulnerable persons provisions in section 33 apply.

Section 33 places a duty on the police to seek support for vulnerable adult suspects who, as a result of a mental disorder, are unable to understand what is happening or to communicate effectively with the police.

That is intended to reflect Lord Carloway's recommendations in relation to vulnerable adult suspects. As he defined a child as someone under the age of 18, it followed that adults should be those aged 18 or over, which is the approach that the section currently takes.

In their written evidence, however, the Scottish appropriate adult network, Police Scotland and the Scottish Association for Mental Health suggested that the definition of vulnerable person should be expanded to include 16 and 17-year-olds. They noted that that would reflect current practice whereby appropriate adults provide support to vulnerable suspects aged 16 and over.

The bill already makes important distinctions between those under 16 years of age and those aged 16 and 17. On reflection, therefore, I am now persuaded that the bill should provide an additional safeguard by including vulnerable child suspects aged 16 and 17 in the vulnerable persons provisions in section 33.

Amendment 32, in the name of Elaine Murray, achieves that and I am happy to support it. However, I am unable to support amendment 38, in the name of John Pentland. That amendment would remove the age criteria from section 33 entirely, resulting in support being sought in relation to children younger than 16.

Although I completely understand the desire to ensure support for all vulnerable persons in custody, section 33 is aimed specifically at those vulnerable adult suspects who are currently supported by appropriate adults, to put that support on a statutory basis. Those support arrangements are simply not designed to cater for the specific needs of children—needs that are met through other means.

The bill strengthens support for children and young people, with a range of provisions in relation to intimation, access and support. For example, children under 16 would always have support from a relevant person and a solicitor, even in cases where they did not have particular communication difficulties. There are also protections for 16 and 17-year-olds, some of which are specific to children subject to compulsory supervision.

Given that the particular support needs of children are addressed elsewhere, I consider that the focus of section 33 should remain on those aged over 16, so I ask Elaine Murray to consider not moving amendment 38, in John Pentland's name.

Margaret Mitchell: The cabinet secretary makes a strong case. He refers to 16 and 17-year-olds being more mature and refers to both the Children's Hearings (Scotland) Act 2011 and the Criminal Procedure (Scotland) Act 1995. I welcome his amendments that look at vulnerable 16 and 17-year-olds. I think that they strike the right balance, as does Elaine Murray's amendment 32.

Elaine Murray: I am grateful to the cabinet secretary for accepting amendment 32. However, he has not persuaded me that my earlier amendments are not necessary. As I said, other legislation such as the Victims and Witnesses (Scotland) Act 2014 and the Human Trafficking and Exploitation (Scotland) Bill recognise the

vulnerability of people under the age of 18. Although we have age-based laws, maturity is not necessarily the same as age. Somebody aged 14 could be more mature than somebody aged 17 given their life experience and so on.

I remain of the opinion that children under 18 who are being interviewed by the police are going to be vulnerable for a whole variety of reasons, not least the circumstances in which they find themselves. Children who come to the attention of the criminal justice system are often vulnerable in a number of ways that are not absolutely obvious on first inspection, so I press amendment 55.

The Convener: The question is, that amendment 55 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)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

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

Amendment 55 disagreed to.

Amendment 56 moved—[Elaine Murray].

The Convener: The question is, that amendment 56 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)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

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

Amendment 56 disagreed to.

Amendment 167 moved—[Michael Matheson]—and agreed to.

Amendment 57 not moved.

The Convener: Amendment 30, in the name of John Finnie, is grouped with amendments 31, 169, 33, 189, 34, 190, 249, 191 and 220. I know that you love pre-emptions, so I point out that if amendment 31 is agreed to I cannot call amendment 169 and that if amendment 34 is agreed to I cannot call amendment 190.

John Finnie: Amendment 30 relates to section 25, which is on consent to interview without a solicitor. The amendment removes the mental disorder requirement when it appears to a constable that a person over 16 years of age is

"unable to ... understand sufficiently what is happening, or communicate effectively with the police"

for the purpose of that person not being entitled to waive their right to be interviewed without having a solicitor present.

The Law Society and others believe that it is difficult for a police officer to assess whether a person is suffering from a mental disorder—indeed, it is a challenge for many people. The support of a solicitor should not be restricted as it is presently. Indeed, anyone unable to understand sufficiently what is happening or unable to communicate effectively with the police should not be interviewed without a solicitor present.

I move amendment 30.

Michael Matheson: In its stage 1 report the Justice Committee highlighted concerns that the definition of vulnerable person in the bill may not capture all those needing additional support when in custody and asked that the Scottish Government give that further consideration.

A particular concern raised during stage 1 was about the use of the term "mental disorder" as part of the definition of a vulnerable person in sections 25 and 33 of the bill. There were suggestions that that term should be removed and that the only criteria for identifying a vulnerable person in custody should be that they are unable to understand sufficiently what is happening or to communicate effectively with the police. Amendments 30, 31, 33 and 34, in the name of John Finnie, seek to do that.

Although I appreciate those concerns and the desire to ensure that all those who require support to communicate with the police receive it, it is worth revisiting the intention behind sections 25 and 33 and the underlying recommendations by Lord Carloway.

When discussing the support needs of vulnerable suspects, Lord Carloway's report noted that individuals who are intoxicated through alcohol consumption or drug use or who are experiencing short-term illness may be unable to

communicate effectively but that such difficulties will be cured through the passage of time. It also noted that some individuals may not be able to understand what is happening as a result of language or hearing difficulties but that that could be resolved through the use of an interpreter or by other means.

A deliberate—and crucial—distinction was made between those scenarios and cases in which an individual has a permanent or semi-permanent condition that results in their being particularly vulnerable and requiring additional support to ensure that they understand what is happening and can communicate with the police. It is at those cases that the relevant provisions in sections 25 and 33 are aimed.

That is why, as part of the definition of a vulnerable person, the term "mental disorder" was used. That term encompasses mental illnesses, personality disorders and learning disabilities, and it reflects the current basis on which support from appropriate adult services is offered.

The police already have considerable experience in identifying those at risk and arranging for support where necessary. Equally, they have experience in dealing with those who, for the reasons that I have mentioned, may be experiencing communication difficulties of a more temporary nature.

If the reference to "mental disorder" is removed, the requirements of sections 25 and 33 would apply in relation to those who are temporarily intoxicated or who simply require an interpreter or other assistance. That would result in communication support being sought where it is simply not required, with potentially significant practical and financial implications for current providers of appropriate adult services. It may also have an impact on the legal profession as a result of an increase in the number of adults unable to consent to be interviewed without a solicitor present.

12:30

I consider that a requirement that communication difficulties be linked to permanent or semi-permanent conditions is vital in order to identify those who genuinely require the support and protection offered by sections 25 and 33. For that reason, I am not persuaded that the term "mental disorder" should be removed. However, for the reasons given by John Finnie and others at stage 1, we intend to keep the provisions under review as part of wider on-going work to examine the remit and provision of appropriate adults. The criteria for support under section 33 can be changed by subordinate legislation, if that is considered desirable in future. On that basis, I ask John Finnie to consider withdrawing amendment 30 and not moving amendments 31, 33 and 34.

Amendments 169 and 190, in my name, will make minor changes to the definition of "mental disorder" in sections 25 and 33. The term is currently defined by reference to section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003, but subsection (2) of that section contains further context to the definition—in particular, it sets out characteristics that do not of themselves signify mental disorder. To ensure consistency with the 2003 act, it is desirable to refer to the definition of "mental disorder" in its entirety.

Amendment 189 is a minor technical amendment to ensure stylistic consistency between sections 25(2)(b) and 33(1)(c), which are worded in similar terms.

Amendments 191 and 220 relate to the regulation-making power in section 34. They will remove that section from the bill and replicate it after section 53, with a number of changes. As the bill stands, the powers in section 34 would allow the Scottish ministers to amend part of the definition of a vulnerable person in section 33, which currently provides that such persons are those who,

"owing to mental disorder",

seem to be

"unable to understand sufficiently what is happening or to communicate effectively".

Section 25(2)(b), which describes persons who may not consent to being interviewed without having a solicitor present, also uses the definition, but there is no means of altering it by subordinate legislation. I consider that such a power should be added, to ensure that any changes made to section 33 can, if appropriate, be replicated at section 25.

I also consider it prudent to further extend the regulation-making power to allow the Scottish ministers to amend the definitions relating to mental disorder and the police at sections 25(6) and 33(5). The terms are also used in sections 25(2)(b) and 33(1)(c), which themselves can be amended by regulation, so consequential changes may be required if those powers are ever used.

Amendment 249, in the name of Alison McInnes, relates to concerns that were raised at stage 1, including in the committee's report, that although section 33 will place a duty on the police to request support it does not identify where the responsibility lies for ensuring the availability and adequate provision of suitably trained persons.

The committee will be aware that, more recently, Lord Bonomy recommended that the bill

should identify a body with responsibility for ensuring the adequate provision of appropriate adult services. Amendment 249 would place such a duty on local authorities, which currently provide such services.

When the bill was introduced, it was considered that the appropriate adult system was working well and that a light-touch approach should be adopted—in essence, placing the referral process on a statutory basis but going no further. However, further evidence, including evidence submitted at stage 1, has persuaded me that the current model for appropriate adult services is not sustainable over the longer term. Concerns have been expressed about the accessibility and consistency of service provision, the exact remit of appropriate adults and funding for the service, all of which warrant further consideration.

I therefore appreciate the intention behind amendment 249 and I agree that action is required. However, if we are to put in place an effective and sustainable appropriate adult service, it is vital that we get the model right. To that end, we are leading work with local authorities, the health service, Police Scotland, the Mental Welfare Commission for Scotland and other interested parties to identify the best way to provide a sustainable service, taking account of Lord Bonomy's recommendation.

Workshops have been undertaken this year with key interests at national and local level, which have informed the development of potential service delivery options. We recently sought comments on those options, including from those who deliver the service on the ground. Over the coming weeks and months a more detailed analysis, including consideration of financial implications, will be undertaken.

Although I am sympathetic to the issues raised by the committee and others, it is important not to allocate responsibility for the appropriate adult service without completing the work under way and reaching a consensus with those who deliver and use the service.

I expect to be in a position by stage 3 to set out our preferred approach for the sustainable delivery of appropriate adult services across Scotland and, on that basis, I ask Alison McInnes to consider not moving her amendment 249.

Alison McInnes: As we have just heard, Lord Bonomy's post-corroboration safeguards review recommended

"that the Bill be amended to identify a body or organisation with responsibility for ensuring adequate provision of persons with appropriate skills or qualifications to provide support for vulnerable persons in custody."

He said that that is

"a vital safeguard for a vulnerable suspect."

I welcome the cabinet secretary's recognition of the need for that.

My amendment 249, which is intended to give effect to Lord Bonomy's recommendation, is supported by the Law Society. It proposes that we specifically enlist local authorities to provide that support. As we know, provision is patchy, there is little co-ordination and we do not necessarily know where to turn to in order to get it.

I am grateful for the cabinet secretary's response. Amendment 249 is, without a doubt, a probing amendment. It has done its job. If, by stage 3, we can have an answer on the way forward, I will be more than happy.

Elaine Murray: I do not quite follow the cabinet secretary's arguments on John Finnie's amendment 30.

First, I make clear that I do not like the term "mental disorder". I appreciate that that is defined in statute, but it is a slightly derogatory term for people who have mental health issues or learning difficulties. Under the bill, the only reason that a constable can decide that a person cannot be interviewed without a solicitor will be because they do not understand what is happening or cannot communicate effectively as they have a mental disorder. However, there are other circumstances when someone may not be able to do that. I am not just talking about someone being drunk or under the influence of drugs. For example, someone may not be able to speak English well and may have difficulty communicating, particularly under such stressful circumstances.

If John Finnie wants to press amendment 30, I am quite inclined to continue to support it.

John Finnie: I note what the cabinet secretary said about subsequent subordinate legislation. It is appropriate that we keep all legislation under revision. However, with regard to this specific issue, the problems are well known and documented. I have dealt with a number of cases and the police have dealt with the responsible adults very well.

The cabinet secretary talked about additional support to help people to communicate. We want informed decision making. That would legitimise the information that is obtained. There is ample case law to say that information obtained under duress is inadmissible.

I return to the wording in the Law Society's submission. Anyone unable to understand sufficiently what is happening or unable to communicate effectively with the police

"should not be interviewed without having a solicitor present."

That seems fundamental. I press amendment 30.

The Convener: The question is, that amendment 30 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)
Russell, Michael (Argyll and Bute) (SNP)

Abstentions
Mitchell, Margaret (Central Scotland) (Con)

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

In that case, I use my casting vote against the amendment. I heard what the cabinet secretary said about the matter, and I hope that there will be developments in that area.

Amendment 30 disagreed to.

The Convener: I remind members that, if amendment 58 is agreed to, I cannot call amendment 168 under the pre-emption rule.

Amendment 58 not moved.

Amendment 168 moved—[Michael Matheson]—and agreed to.

The Convener: I remind members that, if amendment 31 is agreed to, I cannot call amendment 169 under the pre-emption rule.

Amendment 31 not moved.

Amendment 169 moved—[Michael Matheson]—and agreed to.

Section 25, as amended, agreed to.

Sections 26 to 29 agreed to.

Section 30—Right to have intimation sent to other person

Amendment 59 moved—[Elaine Murray].

The Convener: The question is, that amendment 59 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)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

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

Amendment 59 disagreed to.

Amendment 60 moved—[Elaine Murray].

The Convener: The question is, that amendment 60 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)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

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

Amendment 60 disagreed to.

Amendment 246 moved—[Alison McInnes].

The Convener: The question is, that amendment 246 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
Mitchell, Margaret (Central Scotland) (Con)
McInnes, Alison (North East Scotland) (LD)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Russell, Michael (Argyll and Bute) (SNP)

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

Amendment 246 disagreed to.

Amendments 170 and 171 moved—[Michael Matheson]—and agreed to.

Amendment 247 not moved.

The Convener: Amendment 172, in the name of the cabinet secretary, is grouped with amendments 174, 175, 177 to 179 and 182 to 187. I remind members that amendments 184 and 185 are pre-empted by amendment 63.

Michael Matheson: These are minor amendments in relation to under-18s, which follow from the earlier consideration that the committee has given to the two groups of amendments on social work involvement in relation to under-18s in police custody and the rights of under-18s with reference to consent to interview without a solicitor present, the sending of intimation and the access to other persons and other support. The amendments complement and help give effect to the bill's provisions for the protection of child suspects while in police custody.

Amendment 172 is a minor technical amendment that clarifies that the person being referred to in section 30 is "the person in custody".

The effect of amendments 174, 175, 177 and 179, as well as being minor amendments as part of the group on social work involvement in relation to under-18s, is to add to the circumstances in which alternative arrangements to contacting the person requested may apply. Those are: where it is not practicable for the police to contact the person that they have been asked to contact; where the person contacted refuses to attend; or, where the local authority advises against contacting the person.

When any of those circumstances occur, the police do not have to contact the person or continue to try to contact the person, as the case may be. In such cases, intimation must be sent by the police to an "appropriate person" as defined in section 31(5). Minor amendments in the group of amendments on social work involvement in relation to under-18s—in particular, amendments 176, 180 and 181—are associated with that.

Section 30 sets out the right of a person in police custody to have another person told that they are in custody. Section 32 sets out the right of under-18s in custody to access the person sent intimation under section 30. It is possible that more than one person might be sent intimation under section 30. In that event, amendments 182 to 184 and 186 to 187 make it clear that the police must give only one person so intimated access to the child suspect at a time, though they may in their discretion give access to more than one at a time. The approach strikes an appropriate balance between facilitating support and not being unduly burdensome on the police to manage.

Amendment 185 provides that the issue of whether the person contacted can attend at the person in custody within a reasonable time does not prevent the person being contacted by the police.

I ask the committee to support the amendments.

I move amendment 172.

Amendment 172 agreed to.

Section 30, as amended, agreed to.

12:45

Section 31—Right to have intimation sent: under 18s

Amendments 173 to 178 moved—[Michael Matheson]—and agreed to.

Amendment 61 moved—[Elaine Murray].

The Convener: The question is, that amendment 61 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)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

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

Amendment 61 disagreed to.

Amendments 179 to 181 moved—[Michael Matheson]—and agreed to.

Section 31, as amended, agreed to.

Section 32—Right of under 18s to have access to other person

Amendment 62 moved—[Elaine Murray].

The Convener: The question is, that amendment 62 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)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

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

Amendment 62 disagreed to.

Amendment 182 and 183 moved—[Michael Matheson]—and agreed to.

The Convener: I remind members that, if amendment 63 is agreed to, I cannot call amendments 184 and 185 under the pre-emption rule.

Amendment 63 not moved.

Amendments 184 to 186 moved—[Michael Matheson]—and agreed to.

Amendments 64 and 248 not moved.

Amendment 187 moved—[Michael Matheson]—and agreed to.

Section 32, as amended, agreed to.

After section 32

Amendment 188 moved—[Michael Matheson]—and agreed to.

Section 33—Support for vulnerable persons

The Convener: I remind members that, if amendment 38 is agreed to, I cannot call amendment 32, under the pre-emption rule.

Amendment 38 not moved.

Amendment 32 moved—[Elaine Murray]—and agreed to.

The Convener: Elaine Murray has won one—she will be celebrating. The cake is on her at 3 o'clock.

Amendment 33 not moved.

Amendment 189 moved—[Michael Matheson]—and agreed to.

The Convener: I remind members that, if amendment 34 is agreed to, I cannot call amendment 190, under the pre-emption rule.

Amendment 34 not moved.

Amendment 190 moved—[Michael Matheson]—and agreed to.

Section 33, as amended, agreed to.

Section 34—Power to make further provision

Amendment 249 not moved.

Amendment 191 moved—[Michael Matheson]—and agreed to.

After section 34

Amendment 110 not moved.

Section 35 agreed to.

Section 36—Right to consultation with solicitor

Amendments 250 and 251 not moved.

The Convener: Amendment 252, in the name of Alison McInnes, is grouped with amendments 192 and 193. If amendment 252 is agreed to, I cannot call amendment 192 because of pre-emption.

Alison McInnes: Section 36 establishes that a person who is in police custody has the right to have a private consultation with a solicitor at any time. At present, the bill states that that consultation should be

"by such means as may be appropriate in the circumstances",

for example, by telephone.

I note that the cabinet secretary's amendments 192 and 193 are drafting improvements, which do not alter the meaning of the provision. In contrast, my amendment 252 would amend the definition of consultation to stress that it should take place in person, unless there are exceptional circumstances. It suggests that initial consultations can still take place over the telephone. My amendment highlights the importance of face-to-face advice.

Justice Scotland states:

"Solicitors are unable to adequately advise their clients by telephone alone since they are unable to assess the suspect's welfare and demeanour; nor does the solicitor have the same opportunity for access to information from the police concerning the suspected offence. Furthermore, the solicitor cannot readily make effective representations to the police concerning the decision to charge or further detain if they only advise their client by telephone."

I move amendment 252.

Michael Matheson: Amendment 252 seeks to amend section 36 to provide for solicitors to be physically present during police interviews except in exceptional circumstances. As members are aware, the bill extends the right of access to a solicitor to all suspects who are held in police custody, regardless of whether the police intend to question the suspect. That was welcomed by the committee in its stage 1 report.

While it is recognised that it is important for suspects to access legal advice in a timely manner, amendment 252 would require solicitors to attend police stations every time that a suspect

was to be interviewed, except in exceptional circumstances. It is not clear from the amendment what should be considered exceptional circumstances.

The Scottish Government has given extensive consideration to the appropriate means by which access to a solicitor should be provided to a person while at the police station, to enable advice and assistance to be delivered in an efficient and effective way. Lord Carloway recommended that

"subject to what can reasonably be funded by the Scottish Legal Aid Board or the suspect himself, it is ultimately for the suspect to decide whether the advice from the solicitor should be provided by telephone or in person."

Furthermore, Lord Carloway explained that, initially, the person would be expected to speak to a solicitor in private over the telephone, which would enable the solicitor to give immediate initial advice and to discuss whether the solicitor's attendance at the police station was necessary or desirable.

As members are aware, the current means by which suspects can secure legal advice is through the solicitor contact line. The contact line is administered by the Scottish Legal Aid Board, and legal advice to suspects is provided through a mixture of solicitors employed by SLAB and private practice solicitors. The line operates 24 hours a day, seven days a week. Suspects can receive legal advice either over the telephone or in person, if so required.

Not every suspect will want or require personal attendance by a solicitor. Solicitors are likely to want to consider what is in the best interests of their client—whether that is advice by phone or a personal attendance. The Scottish Government favours provisions that allow for the most appropriate means of securing legal advice and for the preferences and requirements of the particular suspect. A telephone consultation will be appropriate for some individuals and in some circumstances. However, it is acknowledged that it may not be suitable for everyone, which is why the Government has chosen the most flexible, cost-effective and efficient means for suspects to secure legal advice. As I have just explained, the choice of personal attendance lies with the suspect, in conjunction with the solicitor. I consider that to be a proportionate and fair approach.

Amendments 192 and 193 are technical, drafting adjustments to avoid the slight awkwardness of expressions in relation to consultation with a solicitor prior to interview.

As I said, the bill extends the right of access to a solicitor to all suspects who are held in police custody, regardless of whether the police intend to question the suspect. I consider that to be a significant step, demonstrating the progress and the commitment that is being made to safeguard the rights of suspects and detained persons.

I consider that there should be time for the new provisions in the bill to bed in before we make what could be unnecessary or potentially inappropriate changes. For the reasons that I have explained, I ask Alison McInnes not to press amendment 252.

Roderick Campbell: I emphasise what the cabinet secretary has just said: the choice really ought to be for the suspect, in conjunction with his solicitor. Furthermore, we have not heard anything from Alison McInnes about the cost of her proposals, but I suspect that it would be significant.

John Finnie: There is a cost associated with not having the highest standards of justice applied to people. If Mr Campbell, for instance, was given the choice of phoning someone or meeting them face to face and assessing the entire set of circumstances as laid out by my colleague, I know which option he would be likely to choose.

Of course there will be challenges associated with the proposals but, with the new legislation, we should start off with the best possible standards. For that reason, I will support Alison McInnes's amendment 252.

Alison McInnes: Amendment 252 does not specify what the exceptional circumstances would be. That is quite right, cabinet secretary. However, the term is used elsewhere in the bill without definition, so one must presume that the phrase is well known and can readily be interpreted.

Justice Scotland's briefing suggests that, without amendment 252, we would be

"condoning the provision of inadequate advice."

I have a great deal of sympathy with that argument.

As I noted in committee last week, a 2013 study by Police Scotland and an analysis of interviews conducted in the autumn of 2013 have both shown that 75 per cent of suspects waive their rights to a solicitor. We should all be very worried indeed by that. Amendment 252 would help to address that imbalance in the system. It is important that interviews are not only conducted fairly but are seen to be conducted fairly.

The Convener: The question is, that amendment 252 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Russell, Michael (Argyll and Bute) (SNP)

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

Amendment 252 disagreed to.

Amendment 192 moved—[Michael Matheson]—and agreed to.

The Convener: I hear groans coming from Mike Russell.

Amendment 193 moved—[Michael Matheson].

The Convener: The question is, that amendment 193 be agreed to. Are we—

Members: Yes.

The Convener: You are saying yes before I have even asked the question. Calm down, now.

Amendment 193 agreed to.

Amendment 253 not moved.

Section 36, as amended, agreed to.

Sections 37 and 38 agreed to.

Section 39—Common law power of search etc

Amendment 194 moved—[Michael Matheson]—and agreed to.

Section 39, as amended, agreed to.

Section 40 agreed to.

After section 40

The Convener: Amendment 254, in the name of Alison McInnes, is in a group on its own.

Alison McInnes: Amendment 254 seeks to update the definition of biometric information and to improve how the use of samples is regulated.

Members will recall my concerns about the use of facial recognition technology by Police Scotland, in conjunction with other forces around the United Kingdom. The effect of my amendment would be to ensure that the retention of individuals' images by the police is subject to the same law as the retention of DNA and fingerprints.

My amendment draws on the arguably more up-to-date definition of biometrics in the previous UK Government's Protection of Freedoms Act 2012 and extends the regulatory regime to a wider array of relevant physical data.

The law that governs the use of DNA was introduced in 2006 by the Scottish Liberal Democrats and it was extended to cover fingerprints in 2010, but new biometric technologies are being developed more quickly than primary legislation can keep up with. For example, gait and ear recognition software may soon be a real possibility.

13:00

The Convener: Did you say "ear"?

Alison McInnes: Yes.

The Convener: I did not realise that our ears could be recognised, but there we are.

Alison McInnes: Indeed. Amendment 254 is future proof, as much as it can be, because it provides that any new collection and use of biometric information and technology by the police must be subject to the Parliament's agreement through the affirmative procedure.

In England and Wales, the Biometrics Commissioner recently stated:

> "proper consideration should now be given to the civil liberties and other issues that arise as regards those newer technologies and urgent steps should now be taken to ensure that they are governed by an appropriate regulatory regime. In the absence of such steps there must be a real risk that the considerable benefits that could be derived from the use of these new technologies will be counterbalanced by a lack of public confidence in the way in which they are operated by the police and/or by challenges as to their lawfulness."

I am not aware of any evidence that Scotland is further forward than the rest of the UK in regulating the use of emerging biometric technologies. Those technologies could be a useful part of the police's toolkit, but they must be properly regulated to ensure that civil liberties and privacy are protected.

I move amendment 254.

Roderick Campbell: I do not remember this issue being discussed in the long-distant time when we considered the bill at stage 1, but it is important and I would be grateful to hear the cabinet secretary comment on it.

Margaret Mitchell: What Alison McInnes says makes sense. It is important that we keep pace with new technologies and that the proper protections are in place.

Michael Matheson: As Alison McInnes explained, amendment 254 provides for how biometric information is used, retained and destroyed. I support the intention behind it, but the

effects would be significantly wider than that. It would add significantly to the list of physical data that a constable can take from a person who has been arrested or detained by adding "other biometric information" to the list of physical data in section 18 of the Criminal Procedure (Scotland) Act 1995. The amendment's wide definition of "biometric information" includes

"any information ... about a person's physical or behavioural characteristics or features"

that could be used to identify someone. That would be a significant change and the implications could be far reaching. I am also conscious that we have carried out no formal consultation on the matter.

Amendment 254 covers the type of physical personal data that the police can take, the way it is used and the way it is disposed of. As always with such issues, we need to strike the right balance between the need to prevent and detect crime and the need to protect civil liberties. I believe that we have the right balance and that introducing the changes in amendment 254 without the necessary consultation and consideration could have the unintended consequence of altering that balance.

Alison McInnes will appreciate that we have had little time to consult stakeholders or consider the implications of her amendment. However, the limited discussions that we have been able to undertake have already raised a number of issues. I believe that we need to look at biometrics in the round to ensure that we have the right balance and that the necessary safeguards and oversight are in place.

As Alison McInnes is aware, I asked Her Majesty's inspectorate of constabulary in Scotland to consider including scrutiny of Police Scotland's use of facial recognition technology in its work programme. It is carrying out that review, and I expect it to publish its report in the next few months. The remit of the review goes beyond facial recognition and considers the wider policing and societal opportunities and threats that arise from the police's use of new and emerging biometric technologies.

I suggest to Alison McInnes and the committee that it is sensible to wait for that report. Once we have seen the recommendations, we will consider the options and we can look at the wider biometrics issues in the round. At that point, there might be a need, for example, for a full public consultation. I will be happy to discuss that with the committee once HMICS has published its report.

In summary, I support the intention that lies behind amendment 254, but I believe that its effects could be far reaching, that there is a high risk of unintended consequences, and that it would not be appropriate to embark on such a major change without full consultation. I ask Alison McInnes not to press amendment 254.

Alison McInnes: As the cabinet secretary said, HMICS is conducting an independent inquiry to look at biometric images. That was commissioned at the urging of the Scottish Liberal Democrats, of course, and I look forward to reading its findings.

We led the way in Scotland in governing the use of DNA, although the law was extended belatedly to cover fingerprints. We always seem to be playing catch-up, and I am anxious that we should not do that.

I am glad to have been able to air the issues and to have heard the cabinet secretary's views, but I will not press amendment 254.

Amendment 254, by agreement, withdrawn.

The Convener: Amendment 195, in the name of the cabinet secretary, is in a group on its own.

Michael Matheson: Amendment 195 will insert a new section into the bill, under which the police will be able to take drunk people who are suspected of having committed offences to a designated place where they can receive help to recover from the effects of their alcohol intake and their on-going alcohol issues can be addressed. That replaces a power that the police already have under section 16 of the Criminal Procedure (Scotland) Act 1995, which will be repealed through the effect of amendment 208.

I move amendment 195.

Amendment 195 agreed to.

Section 41 agreed to.

Section 42—Duty to consider child's best interests

Amendments 53, 41 to 45, 65 and 255 not moved.

Section 42 agreed to.

After section 42

Amendments 196 and 197 moved—[Michael Matheson]—and agreed to.

The Convener: Amendment 35, in the name of Elaine Murray, is grouped with amendment 36.

Elaine Murray: Amendments 35 and 36 relate to the change in meaning of the word "arrested" and how that might affect persons who are being questioned by the police but who have not been officially accused. Currently, such individuals would not be described as having been arrested, but once the bill is enacted they will be described as such.

As we discussed before, the public may not understand the new meaning. It will take some time for the change in the use of the word "arrested" to be understood by the general public and, indeed, the media. People are used to the word being applied to those who have been charged and are therefore suspected of having committed a crime. Any arrested person should be assumed to be innocent until they are proved guilty, even if charged, of course. However, reporting in the media about persons in England who have been arrested but not charged—some of those persons are quite high profile—suggests that it is sometimes assumed that a person who has been arrested is guilty, or at the very least is a suspicious individual.

Amendment 35 would require a constable not to disclose information that might allow a person who has been arrested but not officially accused to be identified, other than if that would be in the public interest. Any decision to disclose information would be made by a constable of the rank of inspector or above.

Amendment 36 would allow a constable to disclose information regarding the release of a person who has not been officially accused to victims and witnesses if that is in the public interest or if it promotes the safety and wellbeing of the victim or witness. Such information would be released by a constable of the rank of inspector or above.

I move amendment 35.

Michael Matheson: The purpose of amendment 35 is to protect the privacy and reputation of suspects during an investigation. I sympathise with the intention behind amendment 35, but I consider that such provision is unnecessary. The committee previously accepted Police Scotland's assurances that it does not and would not release a suspect's name to the media when they have not been formally charged with an offence. I have seen no evidence that runs counter to that and, like the committee, I am reassured by Police Scotland's approach on this subject.

In addition, we have always had a very strict contempt of court regime that applies after charge to cases that are progressing through the courts and prevents the release of information to the media. That regime will apply in relation to suspects who have been arrested and will continue to apply during the entire time of investigative liberation. The protection of the Contempt of Court Act 1981 is statutorily afforded to the accused from the time of arrest. No one will be released on investigative liberation unless he or she is in police custody after being arrested for an offence, at which point the protection of the 1981 act is in full effect. The same protections will apply in the case of someone liberated on a police undertaking, since they, too, will have been arrested.

Amendment 36 seeks to ensure the safety of alleged victims when a suspect is released on investigative liberation. Again, I am sympathetic to the intention behind the amendment. Upholding the rights of alleged victims and ensuring their safety is crucial to ensuring a fair criminal justice system. That includes ensuring that, where they might be at risk, alleged victims are informed of a suspect's release on investigative liberation and of any other conditions. However, amendment 36's proposal has to be considered in the context of existing measures to notify victims of the release of accused persons by the court on bail, which were recently put in place as part of work to implement the European protection order directive and the Lord Advocate's guidelines to the police on liberation. We are currently considering how investigative liberation will fit into that landscape and are discussing that with stakeholders to ensure that a consistent and proportionate approach to victim notification is put in place, taking into account the risk to and safety of such individuals.

I ask Elaine Murray not to press amendment 35 and not to move amendment 36. I would be more than happy to meet her to discuss the issues involved in more detail and to provide an update on our proposals as we approach the stage 3 process.

Elaine Murray: With respect to amendment 35, I appreciate that Police Scotland has given assurances, but assurances are no good if somebody actually releases information. Assurances do not help a person whose name might be besmirched by information being out there that they have been arrested, although they have never officially been charged. I am inclined to press amendment 35.

I appreciate that what amendment 36 proposes might overlap with provisions in the Victims and Witnesses (Scotland) Act 2014, so I will not move amendment 36. However, I hope that there will be some discussion prior to stage 3 on the issues that the amendment raises to clarify what is happening.

The Convener: The question is, that amendment 35 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)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Russell, Michael (Argyll and Bute) (SNP)

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

Amendment 35 disagreed to.

Amendment 36 not moved.

Section 43—Offence where condition breached

Amendment 198 moved—[Michael Matheson]—and agreed to.

Section 44—Sentencing for section 43 offence

Amendment 199 moved—[Michael Matheson]—and agreed to.

Section 45—Breach by committing offence

Amendment 200 moved—[Michael Matheson]—and agreed to.

Section 46—Matters for section 45(2)(b)

Amendment 201 moved—[Michael Matheson]—and agreed to.

Section 47—Matters for section 45(2)(c)

Amendment 202 moved—[Michael Matheson]—and agreed to.

Section 48—Evidential presumptions

Amendment 203 moved—[Michael Matheson]—and agreed to.

Section 49—Interpretation of Chapter

Amendment 204 moved—[Michael Matheson] and agreed to.

Section 50—Abolition of pre-enactment powers of arrest

Amendment 205 moved—[Michael Matheson] and agreed to.

13:15

Amendment 256 not moved.

Section 50, as amended, agreed to.

Section 51—Abolition of requirement for constable to charge

Amendment 257 not moved.

Section 51 agreed to.

Section 52 agreed to.

Schedule 1—Modifications in connection with Part 1

The Convener: Amendment 206, in the name of the cabinet secretary, is grouped with amendments 207 to 213, 215 and 216.

Michael Matheson: The amendments in the group deal with consequential amendments to other acts to ensure that they work consistently with the bill's provisions.

Amendment 206 will amend a special statutory form of citizen's arrest that is found in section 59 of the Civic Government (Scotland) Act 1982. It talks about a person who has been arrested by a member of the public under that power being delivered into the custody of a constable. The new general power for constables to arrest without warrant under section 1 of the bill means that there is no longer a need for the 1982 act to make that provision, so amendment 206 provides for repeal of that unnecessary provision.

Amendments 207 and 213 will amend respectively the Children's Hearings (Scotland) Act 2011 and the Road Traffic Act 1988 to remove from them certain references to arrest. The types of arrest in question are quite different in nature from the types of arrest that part 1 is intended to deal with. The word "arrest" will therefore be removed from the provisions in question so that the consequences of arrest that are provided for in the bill are not attracted by those provisions.

Amendments 208 and 215 are consequential on previously debated amendments that will move into the bill the rules about giving information to suspects in sexual offence cases from the Criminal Procedure (Scotland) Act 1995. Amendment 209 is a minor amendment to ensure consistency within the bill.

Amendments 210 and 212 provide for the repeal of provisions in the Criminal Procedure (Scotland) Act 1995 relating to the police's duties in relation to child suspects. That is in consequence of previously debated amendments that will move the rules about child suspects into the bill, so they are no longer required in the 1995 act.

Amendment 216 deals with the other side of the coin. It will amend the Children's Hearings (Scotland) Act 2011 to update its cross-references to procedures under the 1995 act so that they instead cross-refer to the equivalent provisions in the bill.

Amendment 211 is a set of consequential amendments to sections 18, 18D and 19AA of the Criminal Procedure (Scotland) Act 1995, which give powers to a constable to take samples and

prints. The amendment will remove references in those sections to "detention" because, as members know, the concept of detention under section 14 of the 1995 act is being dispensed with.

I move amendment 206.

Amendment 206 agreed to.

Amendment 207 moved—[Michael Matheson] and agreed to.

Amendment 259 not moved.

Amendments 208 to 213 moved—[Michael Matheson] and agreed to.

The Convener: Amendment 214, in the name of the cabinet secretary, is grouped with amendments 217 to 219.

Michael Matheson: The amendments in the group deal with the interaction between the provisions in part 1 and arrests that can be made under other enactments.

Generally, part 1 will not apply to people who are arrested under the Terrorism Act 2000. That is provided for by section 53. However, schedule 8 to the Terrorism Act 2000 cross-refers to the Criminal Procedure (Scotland) Act 1995 in order to apply certain protections under that act. Amendment 214 will update references in schedule 8 to the Terrorism Act 2000 to refer to the bill and its concepts instead of to the 1995 act. Amendment 218 is in consequence of amendment 214, and will put beyond doubt that disapplication of part 1 in relation to people who are arrested under the Terrorism Act 2000 does not mean that part 1 does not apply to the extent that was expressly provided for by schedule 8 to that act.

Amendment 217 provides that part 1 will not apply to people who are arrested for service offences under the Armed Forces Act 2006. That act sets out its own rules for treatment of suspects who are arrested for service offences.

Amendment 192 provides ministers with the power to use subordinate legislation to apply some or all of part 1 to arrests under the Terrorism Act 2000 and for service offences under the Armed Forces Act 2006 and, conversely, to disapply some or all of part 1 so that it does not operate in relation to people who have been arrested otherwise than in connection with an offence.

The Terrorism Act 2000 and the Armed Forces Act 2006 set out their own rules for people who are arrested under them; generally, the bill does not impinge on those rules. It may, however, be appropriate to apply some aspects of part 1 if arrests are not already covered by the procedures in those other acts. For example, for service offences under the Armed Forces Act 2006, it may be desirable to ensure that provisions relating to access to a third party or those relating to information to be recorded at the time of arrest apply for the short period that someone who is suspected of a service offence is in the custody of Police Scotland, before being transferred to the custody of the Royal Military Police.

Amendment 119 would also allow ministers to disapply some or all of part 1 using secondary legislation for arrests that are not in relation to offences. Many powers of arrest do not relate to a person being suspected of committing an offence. For example, under the Adult Support and Protection (Scotland) Act 2007 powers of arrest stem from the ability of a court to grant a banning order against a subject, prohibiting them from doing a variety of things, including being in specific places. There are other examples and it may not be appropriate in every case for part 1 to apply in its entirety. The addition of the power will allow the interaction between the bill and other legislation to be specifically tailored as is most appropriate.

I move amendment 214.

The Convener: I am glad to see that you are wearying, too. I think that you said amendment 192 and amendment 119 when you meant amendment 219, so I think that *Official Report* will be suitably amended. We forgive you; we understand.

Amendment 214 agreed to.

Amendments 215 and 216 moved—[Michael Matheson]—and agreed to.

Schedule 1, as amended, agreed to.

After section 52

The Convener: Amendment 258, in the name of Alison McInnes, is in a group on its own.

Alison McInnes: I know that members are tired, but I hope that they will bear with me while I speak to my final amendment.

Amendment 258 would introduce a code of practice in connection with identification procedures and interviewing of suspects, similar to that which was established by the Police and Criminal Evidence Act 1984 in England and Wales.

The post-corroboration safeguards review stated that the evidence

"points persuasively towards the inclusion in the Bill of a statutory requirement that there should be Codes of Practice relating to the interviewing of suspects and identification procedures."

The review went on to say that further regulation, through the introduction of codes,

"should be introduced regardless of the abolition of the corroboration requirement."

Amendment 258 would implement the draft provisions in the review. It would require the Lord Advocate to issue a code of practice on the questioning and recording of questioning of suspects, and the conduct of identification procedures. It would require the Lord Advocate regularly to review the code and to consult and lay a revised code before Parliament. In the event of a breach, the current common-law fairness test would apply in respect of admissibility of evidence.

The Lord Advocate last published guidance on the conduct of visual identification procedures in 2007. There are no such guidelines in relation to suspect interviews. Lord Bonomy observed that the standard operating procedures and practices that each of the legacy forces implemented were "not uniform" and that regional differences persist in Police Scotland. His review highlighted that practices are inconsistent, which is worrying, given how critical such aspects of an investigation are. ID procedures and interviews often provide crucial incriminating evidence.

Amendment 258 will ensure that interview and ID operating procedures across the country are predictable and consistent, as the public expect them to be, and it would improve standards.

I move amendment 258.

Michael Matheson: As Alison McInnes explained, amendment 258 is based on recommendations in Lord Bonomy's post-corroboration safeguards review. When Lord Bonomy's report was published, I said that we would consider whether any of its proposals could be progressed in this parliamentary session. On the whole, however, our preference was to take time to consider all the recommendations in detail and to carry out a more holistic review of the recommendations, alongside other reforms.

I have therefore advised the committee that we will this year take forward only a small number of Lord Bonomy's recommendations—for example, we have an amendment that will require the Lord Advocate to publish the prosecutorial test. I still consider that there is great value in many of the other recommendations. However, such substantive and important changes to our justice system require to be looked at in the round and alongside other potential reforms. For example, as members are aware, the Scottish Courts and Tribunal Service is currently conducting an evidence and procedure review. In my view, the work that we will start later this year should take account of recommendations from both reviews, to ensure that a future package of reforms is comprehensive and strikes an appropriate and fair balance.

I do not consider that there is a significant gap in the law while that wider package of reforms is being looked at. I understand that the Lord Advocate already issues guidance to the police in relation to identification procedures, and that the guidance is available to the public. The police produce guidance to officers for interviewing suspects and witnesses, with numerous safeguards built in to ensure that human rights legislation is adhered to. The interviewing of suspects already receives significant scrutiny during the judicial process, and police procedures are constantly updated on the basis of stated cases in the courts.

The police are in the process of collating an investigations standard operating procedures document, which will bring together various legacy documents on interviews and other matters that relate to investigations. The guidance will include specific guidance on interviewing children and vulnerable persons. Police Scotland's intention is that the guidance document will, when it is complete, become publicly available, subject to redaction for technical or security reasons.

The recording of interviews is a matter that requires careful examination in order to establish what measures are deemed to be appropriate and necessary. A recommendation of an increase in audio and video recording would lead to significant financial costs for upgrading infrastructure, for training and for retention facilities. Such issues should not be looked at separately but as part of the wider set of recommendations that Lord Bonomy made, alongside other relevant reform work.

Therefore, although I understand the good intentions behind amendment 258, I hope that members understand why at this time I do not think it appropriate to require that a code of practice be published. That substantive issue should be considered alongside the other outstanding Bonomy recommendations, as part of the wider criminal justice review project that is due to start later this year. It will also be considered in the context of the justice digital strategy.

I therefore ask Alison McInnes not to press amendment 258.

13:30

Alison McInnes: I am disappointed by what the cabinet secretary has said on amendment 258. He said that the Lord Advocate already publishes guidance on the conduct of ID procedures. That guidance has not been updated for eight years, so it is clearly not operating appropriately. The conduct of interviews and the conduct of ID parades are fundamental issues and are of a different order to many of the other things that Lord Bonomy recommended and which the

cabinet secretary said he will take together holistically.

Therefore, I think that the committee should agree to amendment 258, which sets out that there must be full consultation ahead of the code of practice coming into place. We have seen during the stop-and-search debate the importance of statutory codes of practice and the benefits that they can bring in terms of consistency, transparency and accountability. I believe that there is considerable scope for having interviewing codes governing how other procedures should occur without risking interfering in operational matters.

It is essential for the interests of justice that interviews and ID procedures are conducted fairly and in a uniform manner. There is evidence that that is not the case at present. Therefore, I will press amendment 258.

The Convener: The question is, that amendment 258 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)
Russell, Michael (Argyll and Bute) (SNP)

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

Amendment 258 agreed to.

Before section 53

Amendment 217 moved—[Michael Matheson]—and agreed to.

Section 53—Disapplication to terrorism offences

Amendment 218 moved—[Michael Matheson]—and agreed to.

Section 53, as amended, agreed to.

After section 53

Amendments 219 and 220 moved—[Michael Matheson]—and agreed to.

Before section 54

Amendment 37 not moved.

Section 54—Meaning of constable

Amendment 221 moved—[Michael Matheson]—and agreed to.

Section 54, as amended, agreed to.

Section 55 agreed to.

Section 56—Meaning of police custody

Amendment 222 moved—[Michael Matheson]—and agreed to.

Section 56, as amended, agreed to.

After section 56

Amendment 260 not moved.

Sections 88 to 91 agreed to.

Long title agreed to.

The Convener: Here are the words that you have been waiting for: that ends stage 2 of the bill. It does not say this in my script, but thank you all—we can now all go into a darkened room and lie down.

We are not away yet, however. The next meeting will take place on 27 October, when we will consider an issues paper on the Community Justice (Scotland) Bill before we finalise our stage 1 report. We will also consider a number of Scottish statutory instruments and discuss the work programme and options for budget scrutiny.

Meeting closed at 13:32.

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