The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 8 December 2015

Session 4

Tuesday 8 December 2015

CONTENTS

JUSTICE COMMITTEE
35th 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:

Graham Ackerman (Scottish Government)
Gavin Brown (Lothian) (Con) (Committee Substitute)
Rt Hon Lord Carloway (Lord Justice Clerk)
Sheriff Gordon Liddle (Sheriffs Association)
Craig McGuffie (Scottish Government)
Neil Robertson (Scottish Government)
Paul Wheelhouse (Minister for Community Safety and Legal Affairs)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Committee

Tuesday 8 December 2015

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Christine Grahame): I welcome everyone to the 35th meeting of the Justice Committee 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. No apologies have been received.

Before I move to the items of business, I want to make a comment about late papers. The committee is very busy and has a huge amount of work—there is a stage 3 debate this afternoon on the Criminal Justice (Scotland) Bill—and yet we receive papers on a Monday, or sometimes on a Tuesday morning.

I appreciate that in some circumstances there may be a reason that the papers are late—for example, someone may be ill and may not have managed to send something in—but it is becoming a regular habit. I say to those who submit late papers that most of the time we do not have time to read them and we therefore cannot do them any justice. They cannot be looked at on a Monday night or a Tuesday morning, and accordingly they are often too late. They are therefore a waste of people's time and of the committee's time. I wanted to put that on the record so that we do not have an epidemic of late papers from now on.

We move to item 1, under which the committee is invited to agree to consider in private item 9, which is a discussion on our approach to next week's public evidence session on the interception of communications by Police Scotland. Do members agree?

Members *indicated agreement.*

Apologies (Scotland) Bill: Stage 2

10:02

The Convener: Item 2 is stage 2 proceedings on the Apologies (Scotland) Bill. Members should have their copies of the bill, the marshalled list and the groupings of amendments.

I welcome Margaret Mitchell, the member in charge of the bill, and Scottish Parliament officials. I also welcome Paul Wheelhouse, Minister for Community Safety and Legal Affairs, and his officials. This is not an evidence session, so the officials are here not to answer any questions but just to give moral support where required.

Section 1 agreed to.

Section 2—Legal proceedings covered

The Convener: Amendment 2, in the name of the minister, is grouped with amendments 3 to 9.

The Minister for Community Safety and Legal Affairs (Paul Wheelhouse): The amendments in this group reflect the need to ensure that the bill does not have unintended consequences. As the committee will be aware, I have expressed concerns regarding the potential for restricting access to justice for pursuers and how the bill would interact with other legislation.

Based on further discussions with the member in charge and on further work such as engaging with the legal profession and listening to the views of key stakeholders—including survivors; we have all been concerned to hear from them—I am now satisfied that, if the bill is amended as Margaret Mitchell and I propose, it will strike an appropriate balance between promoting apologies and minimising any unintended consequences.

The amendments in this group, along with the amendments to the definition in section 3, are key to striking that balance. Amendment 3 excepts

"inquiries (including joint inquiries) which the Scottish Ministers cause to be held under section 1 of the Inquiries Act 2005 or which they convert under section 15 of that Act into inquiries under that Act".

The rationale for the amendment is the same as that which Margaret Mitchell provided for excluding fatal accident inquiries from the scope of the bill. As Ms Mitchell clearly outlined in the policy memorandum to the bill, such an exception would

"take account of the public interest in ensuring that all relevant evidence may be led".

An inquiry is not about liability; it aims to provide a complete picture of what has happened. The same reasoning can be applied to public inquiries in Scotland. It is for the inquiry chair to determine what information is relevant to the inquiry and to

examine that information to inform the recommendations and conclusions.

In that context, the giving of an apology is likely to be a pertinent piece of information, and the ability of the inquiry chair to consider that should not be restricted by the bill. That applies even if the bill is amended to remove fact and fault from the definition of apology, since information regarding whether a simple apology was made may be in the public interest.

When an independent public inquiry is established, it is often to ascertain what happened and why, and identify what can be done to prevent such an event happening again. In this context, the giving of undertakings is often critical to the considerations of the chair to an inquiry. Undertakings form part of the definition of an apology in the bill and would therefore be inadmissible as evidence in the inquiry. Such information may influence any recommendations resulting from an inquiry, and it is therefore important that the bill does not limit the information that the inquiry can draw upon in this regard.

Amendment 4 excludes proceedings under the Children's Hearings (Scotland) Act 2011, either before a court or a children's hearing, from the scope of the bill. As you may recall, in their written evidence to the committee, the Scottish Children's Reporter Administration strongly urged the committee to exclude proceedings under the 2011 act from the scope of the bill. They stated:

"If children's hearing court proceedings were not excluded from the bill's scope, there would be potentially significant consequences for the children's hearings system, in relation to both child protection and youth justice concerns".

They shared examples referring to an adult apologising during a police interview and an apology made by a child for committing an offence. If proceedings under the 2011 act were not excluded from the bill's scope, those apologies may not be available as evidence to establish grounds of referral. That might remove the legal basis to bring a child before a children's hearing or for a court to establish grounds of referral, and therefore the ability to impose appropriate measures of supervision and protection. That could have a direct impact on the children's hearings system in Scotland.

The SCRA has made the point that, when children committing offences are dealt with through a civil procedure, the standard of proof is that of beyond reasonable doubt. They are of the view that, for the same reason as criminal proceedings are excluded from the bill's scope, proceedings relating to offence grounds of referral under the 2011 act should also be excluded. The SCRA has written to the committee and confirmed that they remain of the view that proceedings under the 2011 act should be removed from the scope of the bill even if admissions of fault and statements of fact are removed from the definition of apologies.

Amendment 6 excludes apologies given in the context of the duty of candour procedure under the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill from the scope of the bill. As the duty of candour procedure is not itself a form of civil proceedings, the amendment inserts new section 2(1A), exempting such apologies.

The effect of the amendment is to remove apologies made in the context of the duty of candour procedure from the scope of the bill. As was discussed in the course of the stage 1 evidence and in the stage 1 report, the reason for the amendment is to remove the inconsistency that exists between the bill and the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill in terms of how apologies are treated as evidence.

An apology made in the context of the duty of candour procedure does not of itself amount to an admission of negligence or a breach of a statutory duty. The bill would sit at odds with the targeted legislation on the duty of candour procedure in the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill and therefore apologies made in the context of the duty of candour procedure should be exempted from the scope of the bill.

I understand that Ms Mitchell has been persuaded that there is a need to make this exemption.

Amendment 2 is a technical amendment to remove any ambiguity that may be created by the inclusion of examples of proceedings. I understand from Ms Mitchell that the wording was intended to provide clarity by indicating what types of proceedings would be covered by the bill. In my view, the inclusion of a non-exhaustive list of proceedings creates ambiguity and is unnecessary. Moreover, as noted earlier in relation to amendment 3, I am seeking to exempt inquiries from the scope of the bill and that is currently one of the categories of proceedings given as an example.

As noted in the explanatory notes to the bill, "all civil proceedings are covered", subject to the exceptions set out in section 2. On the basis that civil proceedings for the purposes of this legislation simply mean legal proceedings that are not criminal, there would not appear to be a need to set out examples of the proceedings covered.

Amendment 5 is a technical amendment which replaces the reference to the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 with what we expect will be the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016, the bill for which has passed stage 1.

Amendment 7 is also a technical amendment. It removes section 2(2). The provision is unnecessary since it is already clear that the bill applies only to civil proceedings. By removing superfluous information, the amendment provides clarity.

Amendments 8 and 9 are technical amendments that extend the power of the Scottish ministers to modify the exceptions to include modifying new section 2(1A), created by amendment 6. Amendment 9 does not otherwise extend the Scottish ministers' power under section 2(3) to make exceptions by way of regulations.

I move amendment 2.

The Convener: Thank you. Does any other member wish to speak?

Gavin Brown (Lothian) (Con): My only question is about amendment 7. Are there any downsides to the retention of section 2(2)? The upside seems to be that it provides absolute clarity and simplicity. The minister's explanation was that removing the section provides clarity, but it could be argued that retaining it would provide greater clarity. Perhaps the minister could comment on whether there are any downsides when he winds up.

Elaine Murray (Dumfriesshire) (Lab): Amendment 3 mentions the Inquiries Act 2005, which is a piece of United Kingdom legislation that specifies that inquiries may be set up by certain ministers, including UK ministers. Obviously, they are not subject to the bill, but the 2005 act also mentions the Scottish ministers, Welsh ministers and so on. Would the bill cover inquiries that the Scottish ministers set up under the 2005 act?

Roderick Campbell (North East Fife) (SNP): I put on the record that, as my entry in the register of members' interests states, I am a member of the Faculty of Advocates.

I support the comments of my colleague Gavin Brown. I would be grateful to hear the minister's response.

The Convener: Before I ask the minister to wind up, I call Margaret Mitchell.

Margaret Mitchell (Central Scotland) (Con): I take this opportunity to sincerely thank the minister and his officials for working constructively with me to reach this stage. I hope that the amended bill will, in the main, meet the aims that we both want to achieve.

Section 2 sets out the legal proceedings that are covered by the bill. Essentially, it applies to all civil proceedings subject to two exceptions, namely defamation and fatal accident inquiries. Amendment 5 updates the reference to take account of the most recent FAI legislation.

During stage 1 consideration of the bill, it became apparent that witnesses and respondents felt that the exceptions should be extended to include a number of other types of proceedings. I indicated at the time that I would be open to considering other exceptions where a case could be made for their inclusion. I will take each proposed exception in turn.

Amendment 3 relates to the minister's proposed extension to the original list of exceptions to include inquiries set up under specified provisions in the Inquiries Act 2005. My understanding is that the argument in favour of that is that such inquiries are held to establish the facts and not for any probative value. The minister has advanced the argument that such apologies should therefore be included in order to ensure that such proceedings are not undermined. I confirm that I accept that.

The Convener: I think that Elaine Murray now understands, so you have got a hit there.

Elaine Murray: Yes—my question has been answered.

Margaret Mitchell: All right. Thank you.

However, I would welcome a clarification from the minister of the intention behind the proposed exception. In particular, I would be grateful if he would give his views and an assurance on how it would operate in relation to the inquiry into historical child abuse. He will be aware that one of my key reasons for introducing the bill stems from my work with the cross-party group on adult survivors of childhood sexual abuse and the recognition of the benefits of an apology being given without the fear of it being used as a basis for establishing legal liability.

Amendment 4 exempts proceedings under the Children's Hearings (Scotland) Act 2011. Having had discussions with representatives from the Scottish Children's Reporter Administration, I recognise that children's hearings are complex in nature and are established for a range of purposes, some of which the minister covered this morning. I am therefore persuaded that court proceedings under the 2011 act should be added to the exceptions.

Amendment 6 provides that the provisions in the bill do not apply to apologies under the duty of candour procedure in the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill. Here, a different approach to apologies is to be legislated for. An apology that is made under the duty of candour procedure in that bill will not in itself amount to an admission of negligence or breach of statutory duty, but it would be admissible and could be founded on in legal proceedings.

Although I have reservations about how successful making an apology admissible there

would be, I recognise that the Government's intention is to proceed in that way and that, as the Justice Committee stated in its stage 1 report, it is difficult to see how the bill and the duty of candour provisions could co-exist without some form of exception. I agree and hence am also content with that exception.

10:15

The other amendments in the group—amendments 2, 5, 8 and 9—are in the main consequential amendments as a result of those exceptions, or tidying-up technical amendments.

It is to be hoped that, as the bill is established, the number of exceptions could be kept to a minimum in an effort to ensure that it remains as straightforward as possible. Some may even be removed using the power to do so that is provided in section 2(3), which allows the Scottish ministers to modify exceptions to the bill by means of regulations. That would clearly be some time in the future.

I note that amendment 7 would remove the reference to criminal proceedings. That provision was included in the bill for the avoidance of doubt and to make it absolutely clear that the bill does not apply to such proceedings. I fully appreciate the Scottish Government's position that section 2(2) is unnecessary and that it is not essential to set it out in the bill, but as the provision is in the bill, removing it may cause confusion. I therefore wonder whether there would be any harm in allowing it to remain there. At the very least, it would certainly be helpful to have confirmation on the record that there is no intention to cast doubt on the non-application of the act to criminal proceedings.

In conclusion, I confirm that I am content with amendments 2 to 6, 8 and 9.

Paul Wheelhouse: I have listened to the points that have been made by Gavin Brown, Roderick Campbell and Margaret Mitchell and am happy not to move amendment 7, if that would make members more confident about the clarity of the bill.

In response to Dr Murray's point and Margaret Mitchell's response, amendment 3 excepts

"inquiries (including joint inquiries) which the Scottish Ministers cause to be held under section 1 of the Inquiries Act 2005 or which they convert under section 15 of that Act into inquiries under that Act".

The purpose is to exclude inquiries that are held by the Scottish ministers under section 1 of the 2005 act, that they convert under section 15 of the 2005 act and that are held jointly by two or more ministers where the Scottish ministers are one party from the application of the legislation. The effect of that would be that an apology that was given in the context of an inquiry or a joint inquiry that the Scottish ministers caused to be held under section 1 of the 2005 act or which they had converted under section 15 of the 2005 act would be admissible as evidence in those proceedings. I hope that that puts on the record our understanding of what that amendment would mean in practice.

I want to address the point that Margaret Mitchell made about amendment 2. I appreciate that the issue is of great interest to Margaret Mitchell, who has had a long-standing interest in those matters. I understand the importance to many survivors of historical child abuse of hearing an apology—I have heard testimony to that effect—but as section 2(1) of the Inquiries Act 2005 states:

"An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability."

Instead, as members will know, an inquiry panel is on a fact-finding exercise to establish a full picture of events that have caused public concern. The aim of inquiries is to help to restore public confidence in systems or services by investigating the facts and making recommendations to prevent recurrence, not to establish liability or to punish anyone. Part of that function may include the hearing of an apology and an associated undertaking that may demonstrate that a person or a company has shown insight into past failings and has taken steps to prevent a recurrence. I do not take the view that it would be in the public interest to prevent such evidence being heard in the context of a public inquiry. Not exempting inquiries from the scope of the bill would limit the independence of the inquiry to make its own decisions on what is in the public interest and what can be used as evidence. The bill would still prevent a simple apology from being used in the civil courts as evidence of liability. For those reasons, the amendment is necessary at this point.

Amendment 2 agreed to.

Amendments 3 to 6 moved—[Paul Wheelhouse]—and agreed to.

Amendment 7 not moved.

Amendments 8 and 9 moved—[Paul Wheelhouse]—and agreed to.

Section 2, as amended, agreed to.

Section 3—Definition of apology

The Convener: Amendment 10, in the name of the minister, is grouped with amendment 1.

Paul Wheelhouse: As discussed at stage 1 and as reflected in the stage 1 report, there has been

an overriding concern that the benefit of hearing an apology may be outweighed by the inability to use it as evidence in any civil proceedings. In particular, the committee noted in its stage 1 report that

"the definition of apologies must be reconsidered".

I reflected on the stage 1 evidence and my officials and I undertook further work to try to ascertain whether removing the reference to "fact" and "fault" from the definition would alleviate concerns about any potential injustice to pursuers. I am of the view that amendment 10, which will remove "fault" from the definition of apology, is necessary because in our largely common-law-based adversarial system it is for courts to determine liability in actions for damages.

Making expressed or implied admissions of fault inadmissible because they are preceded by an expression of regret would not strike an appropriate balance. Some jurisdictions, including New South Wales, on whose legislation the bill is based, have largely replaced the common law of negligence with statutory no-fault compensation schemes. In such a context, apologies legislation does not present the same challenges. When fault is not at issue, apologising for causing injury does not put the person who caused the injury in a worse position. As I noted, making admissions of fault inadmissible as evidence in a largely common-law-based adversarial system presents concerns about access to justice for pursuers. That was clear from the evidence from the Faculty of Advocates and the Association of Personal Injury Lawyers at stage 1.

Ronald Conway of APIL explained that

"The first thing that any justice system has to do is to get at the truth."

If "admission of fault" was retained in the definition of an apology, it would, in his words, remove an

"extremely powerful and persuasive piece of evidence."—[*Official Report*, *Justice Committee*, 9 June 2015; c 5.]

He gave the example of a road traffic accident, but there are other scenarios where injustice could arise in cases where an admission of fault was the only means of demonstrating liability for the harm caused. A pursuer would be unable to succeed in an action for damages if "fault" remained part of the definition.

As I explained to the committee previously, one of my main concerns was about the evidential hurdles that survivors of historical child abuse can face when they seek to progress a court action. Preventing the use of an admission of fault in the way proposed in the bill could add to their evidential burden.

For those reasons, I remain of the view that there is a real risk that retaining "admission of fault" in the definition of an apology could cause injustice to pursuers. As we heard in evidence at stage 1, making admissions of fault inadmissible would take away from people rights that they currently have.

In its stage 1 report, the committee made it clear that it must be reassured that individuals who wish to pursue fair claims will not be disadvantaged by the measures in the bill. In an effort to work constructively with Margaret Mitchell, I have undertaken further inquiries into the impact of protecting a simple apology, which is what we would get if the definition was amended to remove references to "fault" and "fact". Having listened to stakeholders, I have been persuaded that, if the definition is amended to remove "fault" and "fact" and the necessary exceptions are provided for in section 2, the concerns about access to justice that have been raised will be addressed. I trust that, if amendments 10 and 1 are agreed to, they will provide the committee with sufficient reassurance that the concerns about access to justice that were voiced during stage 1 have been addressed.

I should make it clear that, along with amendment 1, which will remove "statement of fact" from the definition, which I support, amendment 10 being agreed to is key to my continued support for Margaret Mitchell's bill.

I move amendment 10.

Margaret Mitchell: Section 3 sets out the definition of an apology. As it stands, that definition is broad—my intention was to set out the fullest possible definition of an apology. Included within the apology could be an admission of fault, statements of fact or an undertaking to look at the circumstances that gave rise to the incident to which the apology relates.

Although all those elements are protected from being admissible in the proceedings to which the bill applies, I fully expected those provisions to be tested during the committee's scrutiny of the bill. In particular, I recognise that by including statements of fact in the definition of an apology, the bill goes much further than any other apologies legislation. The argument for their inclusion is that there is virtually always another way to prove such facts if necessary.

However, I fully accept that there may be occasions on which the statement of fact within an apology might be the only evidence available. During the stage 1 debate I confirmed that I was persuaded that the definition in the bill could be revised to remove the reference to "a statement of fact". Amendment 1 addresses that point.

Amendment 10 seeks to remove admissions of fault as one of the elements that is protected from being admissible and it addresses the minister's

concern that the bill as drafted could have the unintended consequence of causing injustice to some pursuers.

I have argued that to admit fault regardless of whether one is actually at fault is a natural thing to do in the context of giving an apology and that, furthermore, an admission of fault is not the same as an admission of liability, let alone an admission of negligence. However, I accept that that is a legal distinction and that the minister and many others who gave evidence were not persuaded that an admission of fault should be included in the definition of an apology. I previously indicated that I was open to being persuaded that the removal of the reference to "admission of fault" was required to address the fears that were expressed at stage 1. I now confirm that I recognise that to be the case and that I am therefore content with amendment 10.

The definition of an apology is of course an essential part of the bill. The only remaining element of it, beyond a simple apology, is a commitment to review matters, which will still go some considerable way towards providing closure for the recipient and encouraging the apologiser to make a more meaningful apology in the first place.

The Convener: Does any other member wish to comment?

Roderick Campbell: I have listened to what the minister and Margaret Mitchell have said and I think that the minister is wise to have taken on board the comments of not only Mr Conway of APIL but the Forum of Insurance Lawyers and the body of which I am a member, the Faculty of Advocates. I think that the amendments are the right way forward, although I am not fully persuaded that it is appropriate to leave section 3(c) in the bill—I want to put that on record because that subsection is not being amended today.

The Convener: I invite the minister to wind up.

Paul Wheelhouse: I am happy to leave it at that, convener. I note Mr Campbell's concern, but I believe that we have struck a fair compromise, which I hope will deliver the culture change that Margaret Mitchell seeks through her bill and protect any victims of abuse and other individuals who need to take forward a case from concerns about access to justice.

Amendment 10 agreed to.

Amendment 1 moved—[Margaret Mitchell]—and agreed to.

Section 3, as amended, agreed to.

Section 4 agreed to.

Section 5—Commencement

The Convener: Amendment 11, in the name of the minister, is in a group on its own.

Paul Wheelhouse: Amendment 11 will change the commencement of the act from a fixed period—six months from the date of royal assent—to commencement by way of regulations. The amendment is in line with Scottish Government policy.

The proposed change will allow flexibility with regard to when the act is commenced, which may be important if the Scottish ministers consider making regulations under section 2(3). Given that dissolution commences on 24 March, it is important that sufficient time is provided to enable parliamentary scrutiny of any such regulations.

Given the collaborative manner in which I have worked with Ms Mitchell, I trust that she will be content to work constructively to commence the bill by way of regulations.

I move amendment 11.

Margaret Mitchell: As the bill currently stands, the new legislation will automatically come fully into force six months after royal assent.

Amendment 11 provides for the act to come into force by way of regulations on a date to be appointed by Scottish ministers. I note what the minister says, and I look forward to working with him, but I should greatly appreciate a commitment from him that, if possible, the whole act will come into force within six months of royal assent and, if that is not possible, that it will come into force no later than a year after royal assent.

The Convener: I think I will just leave the two of you to agree things, as you are getting on so well. A collaborative, smiley approach is being taken. Minister, would you respond to Ms Mitchell, who is smiling again?

Paul Wheelhouse: I can assure Ms Mitchell that, if I am here in a year's time, I would hope that the legislation will have been implemented.

We have worked collaboratively on the issue, convener. I hope that it is just a matter of practicalities to avoid a clash with dissolution. I do not have a strict timetable, but I take Ms Mitchell's point. We want to see the culture change happen as soon as possible.

The Convener: Thank you very much.

Amendment 11 agreed to.

Section 5, as amended, agreed to.

Section 6 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the member in

charge, Margaret Mitchell—it was a successful outing for you, Margaret. I also thank the minister. I am sure that he and Margaret Mitchell have more happy little meetings ahead, because it all seems to be going swimmingly.

10:31

Meeting suspended.

10:33

On resuming—

Subordinate Legislation

Victims' Rights (Scotland) Regulations 2015 [Draft]

The Convener: Item 3 is consideration of the first affirmative instrument today. Remaining with us is Paul Wheelhouse, the Minister for Community Safety and Legal Affairs. With him from the Scottish Government are Neil Robertson, European Union criminal justice team; Graham Ackerman, victims and witnesses team; and Craig McGuffie, directorate for legal services. Good morning to you all.

I remind you that this is an evidence session, so the officials can speak if the minister wishes, but they cannot speak in the formal debate that will follow. The same will apply when we come to the next affirmative instrument. I know that you all know that by now, so I really should not teach my granny to suck eggs.

Because the regulations seek to transpose an EU directive on victims' rights and appear to create substantive new rights and obligations, the committee issued a targeted call for evidence on them. We are grateful to those who responded, and those responses, which have been published on our website, will inform our evidence-taking session.

I invite the minister to make a brief opening statement.

Paul Wheelhouse: The Victims' Rights (Scotland) Regulations 2015 will, in conjunction with the Justice of the Peace Courts (Special Measures) (Scotland) Order 2015, which the committee will also consider this morning, complete our transposition of directive 2012/29/EU, which is commonly known as the victims' rights directive. The directive establishes minimum standards on the rights of, support for and protection of victims of crime. It seeks to ensure that all victims of crime receive appropriate protection and support; can participate in criminal proceedings in accordance with national law; and are recognised and treated in a respectful, sensitive and professional manner.

The Victims and Witnesses (Scotland) Act 2014 goes some way towards fulfilling the directive's requirements. However, I will explain why further provision is required to implement the directive fully. When the Victims and Witnesses (Scotland) Bill was developed, we focused on key areas of the directive that required new procedures or extensive changes to existing procedures—for example, giving victims a right to certain

information; giving certain individuals a right to choose the gender of their police interviewer; and making extensive changes to the procedures whereby special measures are made available to vulnerable witnesses.

We were aware that further work to ensure full transposition of the directive would be required, but we considered that it could be done largely on a non-statutory basis. Many of the directive's requirements, such as the right to interpretation and translation, are already delivered operationally, and we were keen not to legislate unnecessarily.

However, following the passage of the bill, the European Commission published guidance. That guidance—the evidence that Scottish Women's Aid provided refers to it—outlines the approach that member states are expected to take in transposing the directive.

The guidance suggests that a specific legal framework that encompasses all the directive requirements and enables individuals to clearly recognise their rights and obligations should be put in place. In light of that, we came to the view that putting the remaining directive requirements on a statutory footing is necessary and—taking into account the Commission's view on clearly setting out victims' rights—desirable.

Together with the existing provisions in the 2014 act and the order that is to be considered shortly, the regulations achieve that purpose. They do so by amending the 2014 act to extend the rights of victims of crime by creating enforceable rights and by placing obligations on competent authorities such as the Scottish Courts and Tribunals Service, the Crown Office and Procurator Fiscal Service and Police Scotland.

As the evidence provided by the Faculty of Advocates indicated, many of those rights are already delivered in practice. For example, the regulations give victims the right to interpretation and translation, but those services are already routinely provided by the competent authorities.

In addition, the regulations provide for the Scottish ministers to publish an information booklet known as the "Victims' Code for Scotland", which will be published on the day that the regulations come into force. I am holding up the finalised draft here. We have produced the booklet in collaboration with criminal justice agencies and in consultation with victims' rights groups. The code provides important information for victims on their rights under the amended 2014 act—

The Convener: Can I stop you there, minister? You held something up just then—can we go back to it?

Paul Wheelhouse: We have not yet published the booklet that I held up, convener, so I apologise that you have not yet seen it.

The Convener: When will we see it?

Paul Wheelhouse: In about three weeks' time, once the regulations are in place. We did not want to be presumptive by publishing the booklet before the regulations were approved.

The code signposts victims to the relevant authorities, which can give them further help, support and advice. As the code's introduction states,

"By ensuring victims' interests remain at the heart of our criminal justice system, victims should feel supported and informed at every stage of the process".

The code is intended to be a living document that is subject to regular review. We have already discussed with Children 1st the creation of a child-friendly version, and we have discussed other aspects of the code through the victims organisations collaboration forum Scotland.

It goes without saying that the Scottish Government is committed to strengthening the rights and protection of victims, and our record backs that up. We believe that the regulations will enhance those rights and that protection. I look forward to taking the committee's questions.

Roderick Campbell: We have had representations from children's organisations that the draft victims code should be child friendly. Would you like to comment on that? You might also want to comment on the use of intermediaries.

Paul Wheelhouse: On the first point, we have had discussions with Children 1st. We hope that the full version of the code, which will mainly be used by adults, will be simple to read and understand, but we want to allow for the fact that we have to cater for the needs of children, who—sadly—present as victims of crime all too often. We want to ensure that they have a version that is easy for them to understand and absorb and we want to enable them to feel comforted that they have the support that they need.

Graham Ackerman might be able to give more detail on the discussions that we have had with Children 1st, which might aid Mr Campbell's understanding. I will then return to the issue of intermediaries.

Graham Ackerman (Scottish Government): In putting together the draft victims code, we have had extensive conversations with Children 1st, Scottish Women's Aid, Victim Support Scotland and others, as the minister said. We want to ensure that the code is as accessible as possible and that it can be read and understood by people.

Along those lines, we have been discussing with Children 1st how best to produce a child-friendly version of the code, and we have been looking at whether we need to produce an easy-read version for those with learning difficulties who might otherwise struggle to understand the code. We will take that forward over the next few months.

Roderick Campbell: What puzzles me slightly about a child-friendly code is what age group you would pitch it at. That could become quite complex.

Graham Ackerman: That is one of the issues that we would like to discuss with Children 1st, because there is clearly a difference between what a seven-year-old understands and what a 17-year-old understands.

The Convener: Will there be pictures? To be serious, that might be necessary to enable young children to understand the code.

Graham Ackerman: To be serious, child-friendly versions and easy-read versions quite often have pictures in them to aid understanding, particularly if we are talking about different stages of the justice process and different things that people might have to go through.

The Convener: Why are you not speaking to the Children and Young People's Commissioner Scotland, who has to put out child-friendly stuff all the time?

Graham Ackerman: We have been in touch with the commissioner.

Paul Wheelhouse: As for intermediaries, our focus to date has been on the effective implementation of other vital improvements to special measures under the Victims and Witnesses (Scotland) Act 2014, but we intend to consider intermediaries in due course, including as part of on-going work to look at the provision of support through the appropriate adult scheme to those who have communication difficulties.

Reference has been made to the barnehus model in Norway. That approach was recently discussed in the Scottish Courts and Tribunals Service's "Evidence and Procedure Review Report", which examined ways of improving how evidence, including evidence from children and vulnerable adult witnesses, is taken. Such a system would involve taking evidence early, which is the only time when evidence is required to be taken in the Norwegian model.

Following the publication of the review report earlier this year, the SCTS arranged a series of events to explore the implications of the report's propositions with relevant agencies and bodies. The events, which ran between May and August, brought together the Scottish Government, other justice agencies, the legal professions, victims groups, academics and others with an interest in criminal justice. Feedback from the events will be used in the preparation of a supplementary report that will shortly be submitted to the justice board for consideration. I hope that that helps members to understand what we are doing in relation to that aspect.

John Finnie (Highlands and Islands) (Ind): The EU directive encourages the police, prosecutors and judges to treat victims with respect and states that those individuals should be properly trained to deal with victims. Are you content that the regulations will adequately cover judges? What avenue of redress would a victim have if they felt that they had not been properly treated by a judge?

Paul Wheelhouse: Once the regulations come in, training will be essential for all who interact with vulnerable witnesses. As we have just been discussing, we are dealing with some particularly sensitive groups, such as children and those who have suffered serious violence, and it is important to understand and implement the latest thinking on how we manage the needs of those victims and witnesses sensitively. I hope that, through the work of the justice board in bringing together agencies that include the Scottish Courts and Tribunals Service and, through the SCTS, the judiciary, we can ensure that all are trained in how to implement best practice in relation to vulnerable witnesses. I am not sure whether I have picked up Mr Finnie's point correctly.

John Finnie: I do not know whether the minister is aware of the recent publicity regarding a court case in which comments were attributed to the initial trial judge, which surfaced at the subsequent appeal, that were really quite shocking. I wonder about the extent to which judges can be compelled to attend training, because there is a view that judges are—if you will excuse the pun—a law unto themselves when it comes to a lot of these matters.

Paul Wheelhouse: I assure the member that I can look into that. I am not aware of the specific case, but I am concerned to ensure that all those who are required to understand the latest regulations—if the regulations are passed by Parliament—are up to speed with what is required by the Government and by Parliament in passing legislation. I invite my colleague Neil Robertson to comment on anything that he is aware of in relation to the discussions on the role of judges.

Neil Robertson (Scottish Government): We have contacted the Judicial Institute for Scotland, which provides regular training to judges on the needs of victims and what is required in a court setting. Criminal justice agencies are carrying out a lot of work as well. For example, the Scottish Courts and Tribunals Service, in association with

Victim Support Scotland, has trained all its court officers in how to deal with victims, because they deal with victims who are giving evidence in court every day.

10:45

John Finnie: What redress, if any, would be available to a victim who was aggrieved by their treatment?

Neil Robertson: The regulations make provision for a complaints procedure, which we see as being the competent authorities' normal complaints procedure. That is normally a two-step procedure. If the victim is not happy with that, they can go to the Scottish Public Services Ombudsman or, in the case of the police, to the Police Investigations and Review Commissioner. Because the rights will be legally enforceable, judicial review could come into play subsequently.

We are trying to avoid a circumstance in which someone who, for example, did not get the expenses that they thought that they would get for turning up at court to give evidence has to go straight to raising a small claim action against the Crown Office to get their money back. We thought that using the complaints procedure would allow them to handle the situation more informally and would be more user-friendly from the victim's point of view.

The Convener: Is there a role for the Lord President if a judge says something untoward? I take it that people cannot complain to the ombudsman about a Court of Session judge. What would happen?

Paul Wheelhouse: There is a code of conduct for the behaviour of judges in the court system, and the Lord President has oversight of judges' activities. I am happy to come back, if this would be of interest to Mr Finnie, on the provisions that are available, and to discuss that with the Lord President when I next meet him.

Margaret McDougall (West Scotland) (Lab): Has the impact that the regulations will have on support services been considered? What measures have been put in place to ensure that there are enough services to meet the demand and that there are no barriers to accessing the services?

Paul Wheelhouse: We are conscious that there has been debate about support for organisations that represent and support victims through the court process. I fully accept Margaret McDougall's point that, for the system to work well, we must have well-supported organisations that do that. Often, they can provide a less intimidating way for a victim to get advice and support than can be provided by more formal channels and the justice partners.

We have had productive discussions with organisations that represent victims and support their rights. We believe that the regulations provide the legal framework for transposing the directive. Equally, however, through other channels, we can provide the appropriate support to those organisations, and we will continue to do so as required.

Graham Ackerman has had some discussion on the issue and can perhaps add to what I have said.

Graham Ackerman: As the minister said in his opening statement, the majority of the requirements in the regulations are things that various competent authorities already do. In that regard, I do not think that the impact on victim support services will be significant. We appreciate that those services provide a lot of support to victims across Scotland, and we are engaged with them to ensure that they are aware of what we are doing and that that support is in place.

Paul Wheelhouse: We are aware that victims can self-refer to Victim Support Scotland, regardless of whether they have reported the crime, and that might be their preferred way of approaching the issue. We are also placing an obligation on criminal justice agencies—the police, the Crown Office, the Scottish Courts and Tribunals Service and others—to refer victims to victim support services on request, so there will be signposting to make people aware of the services that exist. As Graham Ackerman said, mechanisms exist to support such organisations.

Margaret McDougall: Will the support organisations have the resources to deal with any additional services that they might be asked to provide as a result of the regulations?

Paul Wheelhouse: It is difficult to anticipate the level of additional activity, but there will be continuing dialogue with victim support organisations to ensure that they have the resources that they need and, where possible, to support them in doing their work, which I appreciate is vital. It is difficult to anticipate exactly what impact there will be; it depends on the prevalence of crime and the impact on individuals.

Margaret McDougall: Scottish Women's Aid's submission comments on a victim's right to receive information concerning an offender's release. Although it welcomes the proposed changes, which will enable a victim to obtain certain information—such as information about the release of a prisoner, including any licence conditions—it notes that there is nothing to say that victims will get such information when a

prisoner is released temporarily. Will you consider providing for that?

Paul Wheelhouse: I recognise the importance of providing timely information to individuals, but we believe that by enabling victims to receive information about prisoners who have received less than 18 months' imprisonment we are leading the way in the UK on victim notification services. In England and Wales, victim notification services apply to prisoners who serve sentences of more than 12 months.

We consider that, for prisoners who serve less than 18 months, a proportionate, lighter-touch approach should be taken, rather than extending the full VNS. For that reason, the scheme that relates to such prisoners will mirror more closely the directive requirements, such as not including information about the death or transfer of a prisoner.

In response to a question that Scottish Women's Aid raised, I would say that prisoners who are sentenced to less than 18 months are more likely to be released on home detention curfew than on temporary release. Temporary release of prisoners who are serving sentences of less than 18 months is infrequent, if not rare.

In considering whether a prisoner is eligible for temporary release, the Scottish Prison Service carries out a wide-ranging risk assessment, which involves community partners and the police. If there was an assessed risk to a victim, temporary release would not be permitted. Prisoners who are released on home detention curfew fall within the scope of the new VNS.

We are taking an approach that reflects the complexity of the situation and the need not to notify victims of the death or transfer of a prisoner in certain situations, which victims would not necessarily want to be contacted about.

Margaret McDougall: I understand what you are saying but, even if a prisoner who was released temporarily had been assessed as not posing a risk, if the victim met that individual in the street or on a bus, it would be a shock to them to have that confrontation. That is why it would be good to include that aspect.

Paul Wheelhouse: I will bring in my colleague Neil Robertson to explain the position.

Neil Robertson: There are circumstances in which the victim would be made aware of the release. I spoke to colleagues in Police Scotland about this. The victim is not necessarily made aware when the prisoner is released, whether temporarily or permanently, but each release is assessed case by case. A victim is updated and protective measures are put in place if the police think that there is a continued risk to them.

Paul Wheelhouse: I understand the concern that somebody might bump into an individual when they were not aware that they had been released. In certain circumstances, that could be quite upsetting, if not worse, for the victim.

The issue that we are dealing with is that the temporary release of prisoners who are serving sentences of less than 18 months is infrequent, if not rare. There are notification procedures for the release of prisoners who have received sentences of more than 18 months, which are more rigorous. In the case of relatively serious offences, more rigorous information would be provided to victims, which would reflect the increased risk to them. If there was an assessed risk to a victim, temporary release would not be permitted under the model for those who are serving sentences of less than 18 months.

Margaret McDougall: My issue is not the risk but how distressing it could be for a victim to meet the temporarily released prisoner. I do not see that it would be that difficult to include such provision in the regulations. If the victim is told when the prisoner is being released permanently, why cannot they be told when the prisoner is to be on temporary release?

Paul Wheelhouse: If that is for me, convener—

The Convener: This is not "University Challenge".

Paul Wheelhouse: Indeed. I will bring in Craig McGuffie to address that question. I take the very important point that Margaret McDougall has made. If I were a victim of a crime, I would feel very uncomfortable if I bumped into the offender without having known that they had been released.

Craig McGuffie (Scottish Government): Short-term prisoners, who are sentenced to 18 months or less, can be released unconditionally at the halfway stage of their sentence—at nine months or less. Many of those prisoners' first form of release is on a home detention curfew. If they are granted a home detention curfew, that is notified to the victim, if the victim has chosen to receive that information under section 27A of the 2014 act.

Temporary release is a strange beast, in that it is granted on a daily basis. Under section 16 of the Criminal Justice (Scotland) Act 2003, which is the main notification scheme, victims are informed only of the first point at which the person becomes eligible for temporary release rather than every time the offender is released.

An offender could be released for work daily—for example to stack shelves in a supermarket—and then return to prison. Informing the victim

every day that the person was being released would create an administrative burden.

Margaret McDougall: The victim would not have to be informed every day—they could be told that the person is now being temporarily released daily and would have to be told only once that the prisoner was in that position.

Craig McGuffie: Given that temporary release is relatively rare for offenders who are sentenced at that level, and the administrative burden that would be placed on the prison service, the decision was taken—

Margaret McDougall: If temporary release of such prisoners is very rare, surely it would not create an additional burden.

Craig McGuffie: It would involve checking of records to match up the people who were released with requests for information.

The Convener: It would be good to make further inquiries into that. Margaret McDougall has made the reasonable point that, rather than it being done every time the prisoner is released, the victim could be told once that the prisoner is on a temporary release scheme. The victim might wander into the supermarket in which the prisoner is stacking shelves. It is about managing victims so that they understand and are not out of the loop.

I would like to hear more about that point in writing. We need an explanation of what would be involved. If the prisoner is on a scheme of day release, tell the victim about it so that they know that: they would not need to be told every time.

On risk, it would be very disturbing and upsetting for the victim to bump into the prisoner when they were doing their shopping in Tesco, and round the corner comes the person who had been put in jail. There are issues.

Paul Wheelhouse: I take the point entirely and I am sure that my colleagues do, too. I repeat that we think that that would happen relatively rarely because the scheme applies only to those who have sentences of less than 18 months. I accept that that means that the resource implications might not be enormous. We will take the issue away and discuss it further with Scottish Women's Aid and others to see whether there is a way that we can deal with it through the procedures that apply in the regulations. We will try to address the point.

Margaret McDougall: Thank you.

Elaine Murray: You will be aware of Scotland's campaign against irresponsible drivers, which argues in its submission that the regulations do not meet the underlying principles of European Parliament directive 2012/29/EU in respect of victims of traffic incidents. It says that

"Victims injured and families bereaved by road crashes"

do not know when

"the penalty of disqualification imposed on offenders by the courts will not be fulfilled".

There is not an opt-in process for them to find out, for example, whether the person has applied to get their licence back early. Could that be addressed in the victims code?

11:00

Paul Wheelhouse: Dr Murray has raised an interesting point. First, I should mention that SCID's proposal is not a directive requirement and so is not directly relevant to the regulations. However, we are aware of the proposal and we gave it full and careful consideration earlier this year with Police Scotland, the Scottish Courts and Tribunals Service and the Crown Office and Procurator Fiscal Service. We have indicated to SCID that although we do not at present intend to pursue the establishment of a notification scheme on reinstatement of driving licences, we will keep the matter under review and consider it again if any future work is carried out in relation to the information that is provided to victims and their families more generally.

We have also initiated discussions with relevant justice organisations to explore what can be done to improve the information that is available in the circumstances that are set out in SCID's proposal. For example, ensuring that bereaved families are aware at the outset that offenders may have their licences returned, and the timescale within which that may happen, would mean that they would know what to expect, which would reduce the potential distress when families observe offenders driving again.

We are also looking at the matter in the context of on-going work to consolidate useful advice and assistance for victims and witnesses on our new website at www.mygov.scot. I hope that that helps to reassure Elaine Murray that we are aware of the issue. We are considering what we can do to find an alternative approach that might provide more information to families in advance, when they have suffered a bereavement or serious injury as a result of a road traffic accident, to avoid their becoming aware in a similar way to the case that Margaret McDougall referred to, in which the victim saw somebody driving when they were not expecting to, which can be quite shocking.

Elaine Murray: Is SCID aware of those discussions? Has SCID been involved?

Paul Wheelhouse: SCID has been involved not with me, but with officials.

Elaine Murray: It has been mooted at various times that there should be a victims commissioner to champion the rights of victims. What are your views on that?

Paul Wheelhouse: I am aware that a victims commissioner has been proposed in the past, and was discussed more recently in the context of the Victims and Witnesses (Scotland) Bill. The points that have been raised by stakeholder groups including Victim Support Scotland, in its published report on the Victims and Witnesses (Scotland) Bill, and Scottish Women's Aid, in its evidence to the committee on 16 April 2013, are the most compelling way to respond to that question. Money that might be spent on setting up a new commissioner's office could instead be used on front-line service delivery.

We believe that a victims commissioner would largely duplicate the role that is filled by Victim Support Scotland and other victim support organisations and we feel that the resources would be better used in supporting the immediate needs of victims. I would be happy to consider revisiting the issue, if the evidence and key stakeholders that work on the ground agree that such a role would add value.

Elaine Murray: The Faculty of Advocates said in its submission that

"there does not appear to be a recognised mode of redress; and there is no independent body to which complaint may be made."

If a victims commissioner is not the answer, is there some way in which existing organisations could be strengthened in order to achieve that?

Paul Wheelhouse: We believe that we have addressed that matter in the point that we made earlier to Mr Finnie, about the complaints procedure in relation to the judiciary and other parties—

The Convener: Except that the Faculty of Advocates said that

"there is no independent body to which complaint may be made."

It went further and suggested that a commissioner might

"deal with complaints ... review the Code; and enforce the Regulations."

A commissioner would do more than deal with complaints.

Paul Wheelhouse: I am informed that the SPSO would be able to review the quality of the services that are provided. We are happy to come back with further detail on that, if that would be helpful.

Gil Paterson (Clydebank and Milngavie) (SNP): Would you be prepared to monitor the effectiveness of the commissioner's work in England to see what fruit that bears? I understand what you are saying about it always being better to use the money in the best way we can, but there is such a commissioner elsewhere from which we might get evidence about whether our having one could be cost effective.

Paul Wheelhouse: That is a very reasonable point. I said in my remarks that we are open to persuasion, if stakeholders believe that a commissioner would add value. If we can look at the operation of the system in England and see that it is delivering for victims without taking excessive resources away from the front line, that is clearly something that we can reflect on in the passage of time and then come back with a proposal.

I suppose that our first focus is to ensure that key organisations such as Victim Support Scotland have the best resources that we can provide to meet the front-line and immediate needs of victims, and to ensure that they are given appropriate advice and support through a process that is, although traumatic, improving over time and, I hope, becoming more sensitive to victims' needs. However, as colleagues around the table have indicated, the importance of victim support services cannot be overstated; we want to ensure that we maximise funding for them at the front line from the resources that we have.

Christian Allard (North East Scotland) (SNP): I want to raise a couple of issues that have been highlighted by Scottish Women's Aid and others. First, we have heard that regulation 2 is missing some wording

"to the effect that the exercise of the rights under the Act and the provision of support is not conditional on a victim's residence status, citizenship or nationality."

Why has that not been included in the regulation?

Paul Wheelhouse: Neither the regulations nor the 2014 act restrict in any way, or impose conditions on, the rights conferred to a certain class of citizen based on residence status, citizenship or nationality. Accordingly, all victims of crime in Scotland, whoever they are and wherever they might be from, benefit from the rights and protections in the directive. Moreover, no victims organisations that are funded by the Scottish Government place any such restrictions on use of their services. I hope that that reassures Christian Allard that the intention of the policy and, we believe, the regulations as drafted will deliver, regardless of where an individual is from or their nationality. If the person is a victim in Scotland, they will receive support in Scotland.

Christian Allard: Recital 10 of the directive makes things a lot clearer, and I suggest that it

might be a good idea to repeat its wording in regulation 2.

Secondly, although regulation 3 contains a lot of very good things, including giving victims the ability to understand proceedings, it does not do as much to give people the right to be understood. Again, it does not follow the wording in the directive in respect of enabling a victim

"to make the complaint in a language that they understand".

Would you be minded to amend the regulation accordingly?

Paul Wheelhouse: Neil Robertson will comment on the wording of the regulation.

Neil Robertson: Any victim who uses the complaints process will be covered by further sections that the regulations will insert into the 2014 act, including proposed new section 3E, which covers the right to understand, and proposed new section 3F, which covers the right to interpretation and translation. That, coupled with the further general principle that the victim should be able to understand the information that they are given, and that the information that they provide should be understood, will ensure that when they make a complaint they will receive the appropriate language support. There is no need to make specific provision for that in the complaints process, because it is covered elsewhere in the regulations. If the individual is obliged to receive information, they can have it translated for them.

Christian Allard: I was just thinking that we spend a lot of time trying to translate what victims are saying instead of doing the contrary—in other words, simply hearing their own words and perhaps ensuring that the system has a much better understanding of the language of victims.

Paul Wheelhouse: I will add what I think is an important point. Clearly, it is critical for the victim to be able to understand their rights. Given that they are not likely to be sitting with a copy of the regulations, the victims code, which will be given out to the victims of crimes, will be crucial. We propose translating the code into the top 10 languages and then to do so, based on demand and as required, with other languages to ensure that we make, as far as we possibly can, the appropriate information about victims' rights and their ability to seek translation services and any other facilities that they need clear and understandable to them, and to ensure that they know their rights and responsibilities as a victim in Scotland.

Christian Allard: I understand the point that you are making, minister, but my point is not about victims being able to follow a language or about translating what they are saying into legal language, but about allowing them to express themselves in their own words and ensuring that people are trained to understand them.

Paul Wheelhouse: I take the point. I think that Craig McGuffie would like to make a comment here.

Craig McGuffie: Proposed new section 3E of the 2014 act, which is in regulation 5, goes some way towards addressing that issue. It says that a competent authority must take measures to assist the person

"to understand the information given to the person by the authority",

and to help the person

"to be understood in the person's interaction with the authority".

It is a two-way process. The authority has to take measures to understand the victim and to help the victim to understand the authority.

Christian Allard: It is helpful that it goes both ways. When we talk to victims, we need to ensure that we use their language as much as possible.

Paul Wheelhouse: There is a point in the regulations that might be worth reading out verbatim, so that it is clear. Proposed new section 3E(4)(b) says that an authority has to

"take into account any personal characteristics of the person which may affect the person's ability to understand the communication and be understood in responding to the communication."

We recognise that people communicate in different ways. One of the concerns that we all have about people who end up in institutions such as Polmont young offenders institution is about the communication problems that such people have. We need to understand people and how they communicate so that they do not get frustrated. That applies equally to victims. We need to understand how people express themselves, in what will be very emotional situations, and be able to reflect on that.

Margaret Mitchell: The Faculty of Advocates and Scottish Women's Aid raised a concern about regulation 13 and proposed new section 9A, which is on "Victims' right to protection during criminal investigations". The faculty said:

"We consider that the meaning of a 'criminal investigation' in the Directive—using a purposive interpretation—is wider than set out in ... 9A".

Scottish Women's Aid put it another way: it stated that

"Article 20 ... does not limit such protection to interviews carried out solely by the police."

Both organisations cite various things that should, perhaps, come under the regulations, including identification parades, searches and seizure of

property, and locus visits. In all solemn cases and sexual offence cases, the victim should be able to be accompanied when they have meetings with the Crown.

Paul Wheelhouse: In regard to the perceived narrow definition of "criminal investigations", the focus of article 20 is protection during criminal investigation and in particular interviews. That is backed up by the European Commission's guidance, which makes it clear that the right to be accompanied relates solely to interviews with the police. Accordingly, we are legislating for the right of victims to have support during police interview, but the article calls for support during criminal investigations. In Scotland, there is already a well-established approach of drawing a line between criminal investigations and proceedings—namely, that criminal proceedings begin when the police lodge a report with the Crown Office and Procurator Fiscal Service. It follows that precognition, as part of criminal proceedings, would not be covered by the directive. That is our understanding of what is required by article 20, and it is reflected in the regulations.

Margaret Mitchell: I think that those organisations, especially Scottish Women's Aid, were looking for the victim to be able to be accompanied by a person of their choice at any meetings with competent authorities unless there is a very good reason not to allow that, because of a possible contrary interest or prejudice to the proceedings, for example. The provision should be amended to reflect that.

Paul Wheelhouse: I will bring in Neil Robertson on that.

Neil Robertson: As the minister has stated, in compliance with the directive, the measure covers only interviews as part of criminal investigations. We have spoken to the competent authorities to ask them what would happen beyond that. For example, the police would consider allowing somebody to be accompanied at an identification parade, if that was appropriate, and the Crown Office would allow a victim to be accompanied at the precognition stage, if it felt that to be appropriate.

The directive does not oblige us to provide a right to those things, and we cannot do that without going beyond our powers. However, it is not the case that as soon as the first interview is over support drops away; support follows through and is provided on a more bespoke basis. The individual needs of each victim are considered and someone who needs and wants support will be allowed it.

Margaret Mitchell: As long as there is discretion attached, there will be some doubt. That is possibly not the best way forward. That may be something to note.

11:15

The Convener: In its submission, Children 1st expresses concern about the definition of "parent". It states:

> "Although we understand that the definition of 'parent' in the regulations refers to any person holding parental responsibilities for that child within the meaning of the Children (Scotland) Act 1995 it would be helpful to clarify the rights of informal kinship carers who do not have (or do not yet have) parental responsibilities in this context."

That embraces quite a lot of people. Can you advise what rights such informal carers would have? They include many grandparents.

Paul Wheelhouse: As I understand it, there is a power for competent authorities to extend the victim's right to other appropriate persons, including kinship carers, if it is in the child's best interests to do so. I hope that that covers what you meant, although I appreciate that you may be making a slightly different point.

The Convener: My point is that kinship carers do not have a statutory position; they do not yet have, in statute, parental responsibilities, although they may have applied for them. Some may have ended up with responsibility for the children within days of something happening. Parents may be part of a prosecution. Can something be done to give kinship carers, or informal carers, such rights? It would have to be quickly done.

Paul Wheelhouse: I will bring in Neil Robertson to speak on proposed new section 29A.

Neil Robertson: Proposed new section 29A of the 2014 act will allow the parents to come in, if that is appropriate. However, there are circumstances in which, as the convener has identified, it may not be appropriate for a parent to be there to support a child. For that purpose, proposed new section 29A(4)(b) will allow the function to

> be exercisable in relation to, or at the request of, such person as the authority considers appropriate having regard to the age, maturity, views, needs and concerns of the child.

That is a provision whereby, if a parent is not the suitable person, somebody else can be brought in to support the child.

The Convener: If a child was a victim of the parent, could someone be put in place almost immediately? How quickly can that be done?

Neil Robertson: There are steps to go through. First, it is asked whether it is in the interests of the child to be there by themselves. For example, somebody who is 16 or 17 could be living away from home and be employed. Would it be

appropriate in such circumstances to involve their parents? Perhaps for a younger child it would be, but at 16 or 17 people can make that decision.

You also asked whether it is appropriate that a parent—

The Convener: I am talking about cases in which the parents have committed the offence against the child. Unfortunately, that happens.

Neil Robertson: It is asked whether it is in the best interests of the child for the parent to be involved. If the answer to that is immediately no, proposed new section 29A(4) provides for another appropriate person, which would cover kinship carers and a range of other people.

The Convener: I am talking about informal or kinship carers, who are not statutory carers, and who have had to take in children in an emergency. Such things can go at a rate of knots. How quickly can such individuals—who are often grandparents or sisters—be put in that role? Are you saying that there is not a gap in them becoming statutory carers?

Neil Robertson: No. Obviously, background checks and the like may have to be done to ensure that the person is appropriate. However, that happens as the authority considers appropriate. The authority will take into account—

The Convener: The authority being?

Neil Robertson: The competent authority is most likely to be the police when the child is up for interview after the offence is—

The Convener: Okay. I did not think that such situations were covered.

I am sorry. I did not realise that Alison McInnes was waiting.

Alison McInnes (North East Scotland) (LD): That is okay. I indicated some time ago that I wanted to come in.

I want to return briefly to resourcing. The regulations will place duties on the police and the court services in relation to provision for individual assessment of victims in criminal investigations and, of course, for protection of victims, including specially designed interview rooms, specialist interviewers and separate waiting rooms for victims in court buildings. What assurances can you give us that the competent authorities will prioritise capital spend on some of those issues?

Paul Wheelhouse: I am happy to come back to the committee with detail on that. Having responded to parliamentary questions and read briefings on the matter, I am aware that significant work has been done to improve the experience of victims in the court estate. My colleagues on the justice board have made it a high priority to address that issue, given the increase in the number of domestic violence and sexual abuse cases that are coming before sheriff courts, which are becoming a more important part of those courts' work. They are increasing their focus on minimising the trauma of victims' experience of coming to court. I can come back to the committee with some practical examples of what has been done to date, if that would be helpful. We are treating the issue as a high priority—particularly given the First Minister's focus on tackling violence and sexual abuse.

Alison McInnes: I would be grateful for that.

The Convener: I know that the minister has a commitment at another committee and we also have another item of business, so I ask Roddy Campbell to be quick.

Roderick Campbell: I will keep it short. The regulations are intended to transpose the directive, but it is clear to me, from both the regulations and our 2014 act, that victims are a movable feast. What assurances can you give us that the Government will monitor closely how victims are treated in the system, and review that to see what further steps are needed?

Paul Wheelhouse: I give a personal commitment that the matter is something that I take very seriously, as I know the cabinet secretary does. As I have just said to Alison McInnes, it is a high priority for both the Government and the Opposition parties; we want to ensure that the experience of courts for women in particular, and men occasionally, who have suffered domestic violence or sexual abuse, is improved. We are all concerned about the welfare of children and vulnerable witnesses in the court system. It will remain a high priority for the Government.

The European Commission will also maintain a focus on the issue; it has been taken on as a priority of the Dutch presidency, which will be assumed next year. Over the next six months, there will be a focus on what jurisdictions in member states are doing to address the issue. There is growing momentum at European and domestic levels to tackle the issue.

The Convener: That ends the evidence session, which has been very full. It might be useful for us to write a report on it, so that we can review the position and monitor it, should the regulations be approved in the next item of business. The discussion has raised some interesting issues. Are members content for us to produce a short report?

Members *indicated agreement.*

The Convener: We now move to the motion on approval of the instrument.

Motion moved,

That the Justice Committee recommends that the Victims' Rights (Scotland) Regulations 2015 [draft] be approved.—[*Paul Wheelhouse.*]

Motion agreed to.

Justice of the Peace Courts (Special Measures) (Scotland) Order 2015 [Draft]

The Convener: So that the minister can keep to his schedule, we move straight on to the next item of business, which is consideration of another draft instrument that is subject to affirmative procedure. I invite the minister to make a brief opening statement—he knows his own timetable.

Paul Wheelhouse: Thank you, convener. I will keep it brief.

The draft Justice of the Peace Courts (Special Measures) (Scotland) Order 2015 is the second instrument to contribute to our transposition of European Parliament directive 2012/29/EU—the victims' rights directive. I have already set out the background to our transposition approach, but it might be useful to outline briefly the purpose of the order.

The order will allow special measures to be used for the benefit of vulnerable witnesses who give evidence in the justice of the peace courts. Special measures include, for example, enabling vulnerable witnesses to give evidence from behind a screen to prevent their seeing the accused, or via live videolink so that they do not have to be present in court.

Such special measures have been available for some time in the sheriff courts and the High Court, and their provision was recently expanded through the Victims and Witnesses (Scotland) Act 2014.

We consider that the extension is required to ensure compliance with the victims' rights directive. In principle, it is right that the same protections should be available to vulnerable witnesses who give evidence in JP courts.

I look forward to taking the committee's questions.

Roderick Campbell: Will you clarify for the record why JP courts were not included when special measures were first introduced?

Paul Wheelhouse: We are bringing the process in the JP courts up to date with the remainder of the estate. It is not for me to speak for the previous Administration, but I understand that during the passage of the Vulnerable Witnesses (Scotland) Act 2004, the then Scottish Executive set out two reasons why it considered that extending special measures to the district courts was not considered necessary. First, the need for extension had not been demonstrated, and secondly, the future of district courts was unclear, pending the outcome of the review of summary justice that was being carried out by Sheriff Principal McInnes.

Now that the uncertainty of the district courts has been resolved, with the unification of the JP courts having been completed in 2010, with the progress of the implementation of the 2014 act and with compliance with the EU directive on victims' rights to the fore, the Government considers that now is the time to commence the provisions in the Criminal Procedure (Scotland) Act 1995 and to make special measures available in the JP courts as well.

Motion moved,

That the Justice Committee recommends that the Justice of the Peace Courts (Special Measures) (Scotland) Order 2015 [draft] be approved.—[*Paul Wheelhouse*].

Motion agreed to.

The Convener: As members are aware, we are required to report on all affirmative instruments. As I already mentioned, we will write a more lengthy report on the previous instrument. Is the committee content to delegate authority to me to sign off reports on the two instruments that we have considered today?

Members *indicated agreement.*

11:26

Meeting suspended.

11:36

On resuming—

Abusive Behaviour and Sexual Harm (Scotland) Bill: Stage 1

The Convener: Item 7 is an evidence session on the Abusive Behaviour and Sexual Harm (Scotland) Bill. I welcome the Rt Hon Lord Carloway, the Lord Justice Clerk; Edward McHugh, deputy legal secretary to the Lord President; and Sheriff Gordon Liddle, vice-president of the Sheriffs Association.

I thank Lord Carloway for his statement, which will go on the Justice Committee website. Although the Sheriffs Association did not respond to the committee consultation, it did respond to the Government's consultation, so I take it that it has not changed its position since then.

Sheriff Gordon Liddle (Sheriffs Association): No, there is no change.

The Convener: Excellent. That makes it simple for us. I go straight to questions from members.

Margaret Mitchell: The bill introduces for the first time in Scotland two statutory jury directions, which must be given by the judge when certain evidence is led. Do you consider that statutory jury directions represent an unacceptable precedent with regard to the independence of the judiciary?

Rt Hon Lord Carloway (Lord Justice Clerk): I would not quite go that far. As you know, statutory jury directions have been introduced in other jurisdictions of the Commonwealth. What I am trying to say is that it could be done but it is not what we would see as the best way of doing it. In other words, it was suggested that, if what is wanted is for these facts to be accepted by the courts, the better way to do that would be to declare that they are within judicial knowledge, which would enable a judge in any given case to give these directions without the necessity of there being any evidence. It would then be left to the judge to decide in exactly what cases these directions ought to be given, the position being that jury directions are intended to be real conversations between the judge and the jury, and the bill is introducing a degree not exactly of artificiality but of a quite mechanistic way of doing things. A requirement to tell the jury those facts without more is going to be problematic.

Margaret Mitchell: Thank you. That is very helpful.

The Convener: You are a bit tougher about that in your written statement, Lord Carloway. You say:

> "what is proposed is that the judge should essentially take on the mantle of the prosecution in making statements of fact dressed up as law."

That is a bit tougher, is it not?

Lord Carloway: Yes, I think that that is fair. The bill would require the judge to state facts as law; in other words, the law would say, "These are facts", and those facts would be designed to be in favour of the complainer in the case. Traditionally, that has come under the mantle of the prosecutor, who argues such matters before the jury, and the defence makes such submissions as they wish to make in response and the judge acts as the arbiter between them.

The Convener: Do you wish to comment, Sheriff Liddle?

Sheriff Liddle: Yes, convener. I have to say that I do not think that there is any difference between us here. The view of the Sheriffs Association is that there are dangers involved in legislating for something that goes in a jury speech. Just about every jury speech contains a repetition to the jury of the fact that its members are the masters of the facts and that they need not take into account anything that the judge says in charging it—or, indeed, anything that the prosecutor or the defence says. They are there only to indicate that the evidence exists and should be taken into account—or may be taken into account, depending on what the jury makes of it.

Depending on the evidence that comes out in trials, this sort of suggestion could well find its place in a number of them. However, no two trials are the same, and there might equally be circumstances in which, if this sort of thing were to be made mandatory in a jury speech, something would be needed to dilute it to ensure that a jury was charged fairly and that there was no encroachment on the jury function. After all, the function of the judge with the jury is entirely different.

In fact, I could see this proposal having an effect that was almost adverse to what would appear to be the desired effect. If it were necessary for such words to be used in every case and you had assessed that, because of circumstances, you really had to say to the jury, "However", you could, for one thing, confuse a jury, whose members would be wondering, "Why are we being told one thing and then told another?" Another risk that you always run with juries is that, despite a judge stressing that anything he or she says need not be taken into account, jury members are looking for indicators from judges, and we have to go out of our way to avoid influencing a jury in any way whatever as a result of what we might say.

What I am really saying is that these are live situations and no two jury charges are ever the same. I think that the place for such suggestions would be the jury manual, which is a dynamic volume of suggestions and recommendations, and judges dealing with a certain array of facts and evidence could look at that and decide whether such things should be included in the charge.

On the back of that, I point out that we also have the High Court and that if a judge at first instance—which is what it is with a jury—makes an error, it will be correctable.

Margaret Mitchell: What about the role of expert witnesses in giving the same information?

Lord Carloway: As I mentioned in my submission, there is provision in the Criminal Procedure (Scotland) Act 1995 for the Crown to lead evidence, basically to the same effect as is stated in the bill. However, it would be very expensive for the Crown to do that in every case. On the other hand, that evidence is, in many cases, agreed, because ultimately it is not controversial. The Crown will have an expert report, and it can go to the defence and say, "Will you agree that, for example, there can be good reasons why a person has not reported an incident for a year, two years or 20 years?" The joint minute in which the evidence is agreed is usually much more expansive and will contain greater explanations than what will be covered by the provision in the bill.

11:45

Following on from what Sheriff Liddle said, one can envisage a situation in which a judge gives the jury the direction that is stated in the bill and, as Sheriff Liddle was saying, the judge immediately goes on to say, "However, in this case you will have to consider whether the delay in reporting is significant or not." The same thing would apply in the other proposed direction. There is a danger of achieving exactly the opposite of what is intended by the bill, by focusing on something that is not an issue. In other words, if nobody has said in the jury speech that the delay in reporting is significant, why focus on it?

Margaret Mitchell: I want to make a small point about the minute of agreement. It will not be the first time that a very skilled defence lawyer has brushed over the minute of agreement and then made a lot of some other points to put doubts in the minds of the jury. I am always very sceptical about just using the minute of agreement.

Lord Carloway: I agree with that. Even if those facts were agreed, the fact that there can be good reasons why a person would not report does not preclude the defence from saying that in a given case it should be regarded by the jury as significant. The question is whether it is perceived that a judge stating those directions will achieve the object of the bill, which is intended, I think, to reverse perceived misconceptions in the minds of the jury members. It would be odd for that to happen when set against what Sheriff Liddle has said is our standard introduction, which is, "We are the masters of the law. You must pay attention to what we are saying about the law. You are the masters of the facts. It is a matter entirely for you, the jury, to decide what to make of the evidence."

The Convener: Gil Paterson has a supplementary question, but the trouble is that everybody is going to be asking about jury directions, so there really are no supplementaries on this. He will be next after Christian Allard. We will all be focusing on jury directions.

Christian Allard: Good morning. My question is on jury directions. I want to ask the panel whether they are aware of the evidence that Professor Vanessa Munro has given us about research using mock juries. We have heard from Lord Carloway this morning that other jurisdictions are already using the proposed kind of procedure. Do you know about the evidence that is out there?

Lord Carloway: We are aware of the research that was carried out by Professor Munro and her colleague, which is referred to in the consultation paper. I have not looked at the research myself, but I am aware of what it is suggesting, which is that there is a view that some members of the jury may have preconceived views about the matters in the bill. That is accepted, which is why the Crown leading evidence to rebut such things may well be a good idea. As I said in the written statement, the idea that those facts should be regarded as judicial knowledge may be a good one, to enable the judge to give those directions in a suitable case.

Christian Allard: Have any other members of the panel looked at the research?

Sheriff Liddle: I have read what is said about the research in the Scottish Parliament information centre briefing but not the research itself. I do not want to be critical of the research, but it involved only a very small sample and three scenarios that were set up. It can well be imagined that each juror, as an ordinary member of the public, brings with them—and I mean this in the most anodyne way—certain prejudices. They bring with them their own feelings and views on things. Those views will cover all manner of things and not just this single aspect. Short of abolishing juries, I do not see how that can be addressed.

Christian Allard: We heard about that evidence and how these misconceptions are very much present not only in juries but in society at large and how the bill would be a way to address those.

When we talk about how to address those misconceptions, if we are talking about your time being spent on that at the start of the procedure in such cases, it will be the same for all cases attributed to this subject. I was a bit surprised when I read some of the submissions saying that directions should be given only at appropriate times and for appropriate cases. That seems to miss the point of the evidence that it should be done for every case and at the start of the procedure.

Lord Carloway: The directions would be given in the charge to the jury at the end of the case. It is suggested in some of the documents accompanying the bill that it would remain for the judge to decide exactly what was said. I am not sure that that is right, because if an act of Parliament says that

"the judge must advise that"

and then states exactly—

The Convener: Actually, Lord Carloway, new sections 288DA and 288DB of the Criminal Procedure (Scotland) Act 1995, as introduced by section 6 of the bill, each contain an opt-out. In each of those sections, subsection (3) states that subsection (2), which is mandatory,

"does not apply if the judge considers that, in the circumstances of the case, no reasonable jury could consider the evidence, question or statement by reason of which subsection (2) would otherwise apply to be material to the question of whether the alleged offence is proved."

There is still some judicial discretion.

Lord Carloway: There is judicial discretion as to whether to give the directions, but if you decide that a case is one in which subsection (2) applies, you must give that particular direction. I do not think that the bill in its present form allows the judge to vary it in some way; that would seem to be contrary to what Parliament would state. It will remain the case that, when the judge in a given case is giving a charge to the jury, he will say, "I am required to advise you that there can be no good reason why a person" et cetera, and then will be free to give such other directions as he thinks are appropriate to achieve the appropriate balance of fairness in the case. That is what would cause me concern. In certain cases, the bill is going to focus on an issue for the jury that is not really in dispute.

The Convener: I understand.

Lord Carloway: I do not think that any of us has a problem with this type of direction being given in appropriate cases. We think that there may also be force in the view that some judges might be reluctant to give these directions in the absence of evidence to support them—that is to say, evidence in the case—but the way round that is to state that they are judicial knowledge, which enables the judge to state them as fact.

The Convener: Do judges say that just now? Do they say that as a general statement, or do they make a specific statement on a case? What do judges say at the end if someone has delayed reporting and did not show signs of violence? What would a judge or a sheriff say just now, if anything, in directions to the jury?

Lord Carloway: The answer is that it is variable, as I think is recognised. Imagine that there has been a delay in reporting. There can be different types of delay. There could be a delay of a week, a year or 20 years. Imagine the dynamic of the trial. Somebody is going to ask the complainer why there was a delay in reporting, and the complainer will give a response to that and the response could be a number of things. If there is an explanation from the complainer as to why there has been a delay in reporting, which could be to do with embarrassment or with not wanting to go through the trial process, the judge will listen to what is said about that in the speeches from the Crown and the defence and will then try to balance the two things up.

However, in the situation that we are envisaging here, many judges will say, "Of course, ladies and gentlemen, you will appreciate that just because someone has not reported an incident for a period of a week"—or a month, a year or whatever it is—"it does not mean that the incident did not happen. You have to listen to what the complainer said about why she did not report, and you have to appreciate that there may be many reasons why somebody might not report an incident. On the other hand, you have the submission of the defence counsel to the effect that this is significant, and that is something that you will have to bear in mind when assessing the credibility and reliability of the complainer." That would be relatively commonplace. On the other hand, some judges would not go into the issue and would just leave it for the jury to determine.

Sheriff Liddle: One of the things that we all say, in every charge to a jury, is that, on the one hand, depending on what the jury has made of the evidence, they may draw certain inferences from it, but on the other, they must not speculate—they are given a specific warning against speculation. If such a thing arose in a trial that I was dealing with—and I think that the same would apply for all my colleagues—a warning against such speculation might well be given with specific reference to a piece of evidence, in order to illustrate to the jury where they could be entering into the realm of speculation rather than drawing a reasonable inference from the evidence.

The Convener: Thank you, that is very helpful.

Gil Paterson: How would panel members react if they became aware that an individual jury member had preconceived ideas?

Lord Carloway: Do you mean if it came to light during the course of the trial that a juror had views that a person could not be considered guilty of rape if there was no use of violence, for example?

Gil Paterson: Yes, something like that—maybe if you were aware that, before the trial started, someone had preconceived ideas.

Lord Carloway: I am not sure that we would ever know that.

The Convener: Unless they put it on Facebook or something.

Lord Carloway: If we did know, someone would object to that juror sitting on the jury.

Gil Paterson: The evidence from Professor Vanessa Munro suggests that the public—never mind juries—have preconceived ideas about how someone should react. In other words, if someone claims rape, the public believe that that person should not be calm and should act in a particular way, and that they should have automatically resisted and been injured in some fashion. As we know, that does not always happen.

There is other evidence, mainly from women's groups, that suggests the same thing. That is anecdotal evidence, but people engaged in that area talk about it all the time. The evidence stacks up. If you would react to one jury member having preconceived ideas, then, given that the evidence suggests that a good part of the general public have preconceived ideas about how people should perform and act in such cases, should we not do something about it?

Lord Carloway: We are not in any way suggesting that what is contained in the bill should not be said to juries in a given case. Rather, we are suggesting that what is proposed is not the best way to go about it procedurally and nor is it the best approach in practical terms. To some extent, we must trust judges to act in an appropriate way in an appropriate case. That is why, if a suggestion of the nature that you raise is made during the course of the trial by, for example, defence counsel, I would expect the judge or sheriff to react to that comment and to correct it. It would be part of his or her job to do that. However, to make it a mandatory direction in almost all cases is what causes the problem.

I am repeating myself to some extent, but if you imagine the dynamic of the trial as it happens, and we give the jury the direction that is required by Parliament, that would be fine, but then the judge would go on to say that the jurors must consider the case before them and the evidence in that case. We give juries direction specifically to deal with general prejudices in the case. We give jury directions that they must decide the case purely on the evidence that has been led before them. One would expect, again in the dynamic of the jury room, that if someone had a prejudice of some description, the other jurors would attempt to address that in their deliberations—they may not, but I would expect them to.

12:00

Gil Paterson: How would you overcome the issue that, if the evidence on this is correct, a percentage of the public do not see that as prejudice? If the people who are involved in these cases do not conform to a particular way of acting, reacting or composing themselves, they are automatically not believed. The evidence would suggest that that attitude is held by members of the public and people on juries, so in every trial there will be jurors who have preconceived ideas. They are not bad people; they just think that the woman, or man, in the case must be lying because they are not acting in the way that they expect them to act, so they think that the offence did not happen.

If that is the case, as the evidence suggests, how do we overcome it, other than through education by the Scottish Government? I suggest that the court is the best place to do that. People are there to listen to the evidence presented, but they might be wrong at the start. Should all that be explained or is there a good reason not to do that?

Lord Carloway: You have raised an interesting point about the way that people think generally in society. We are trying to look at this from a practical point of view. We are not in any way suggesting that efforts should not be made to correct misconceptions among juries. In any given case, the judge will be expected to do that—if those misconceptions are detected.

I return to what I have said already: we the judges direct the jury on the law that is to be applied to the case. That is our primary purpose. We tell juries at the beginning that the facts are for them and that it is for them to assess the witnesses and make up their minds, applying their collective common sense. That is the jury's function. If a judge is seen to dictate, or attempt to dictate, to a jury on what facts should or should not be found, that would be in the realms of counterproductive.

I do not think that I can answer the question about how to deal with the problem other than to say that we have offered an alternative solution, which we think would be more practical and would fit in with our system rather better than what is proposed in the bill. If we go back to approaching these facts as judicial knowledge, we can go back

to the Judicial Institute for Scotland and ask it to devise some model directions along the lines of what has been done in England.

John Finnie: If I noted this correctly, Lord Carloway, you used the phrase "appropriate manner", but not all judges act in an appropriate manner. I refer in particular to the Court of Appeal's ruling in the past couple of weeks where criticism was made of the judge, who was quoted as saying that the victim of multiple rapes had acquiesced in those rapes. Comment was made about delayed reporting and the fact that the victim had continued to cohabit with the accused. I am trying to understand the difference between comment and direction and where there is an overlap. Will you give me some guidance on that, please?

Lord Carloway: In the case to which you refer the important thing to bear in mind is that there was no criticism whatever of the judge's directions to the jury, nor indeed of his conduct of the trial. The convictions followed quite an unusual trial. I am not aware of there being any criticism of a judge's directions to the jury on the particular points with which the bill is concerned.

John Finnie: What about the relationship between comments that a judge would make and directions that they would give? You said that directions are given on the specifics of the law.

Lord Carloway: There has been no criticism of the judge's conduct—

John Finnie: Could you set aside that case and respond in general terms, please?

Lord Carloway: I wonder whether you could repeat the question.

The Convener: What is your general question, John?

John Finnie: Judges will presumably make comments in the course of their direction on what has been heard and they will comment specifically in relation to their position on the legal issues that that gives rise to.

Lord Carloway: In the course of directions to the jury, a judge will be expected to direct the jury in accordance with our well-known principles and practice. Again, I am unaware of any criticism of a judge's directions to the effect that they would contradict or in any way affect what was contained in the bill. I think that what you are referring to are not directions to a jury—nor, indeed, any statements made in the course of the trial—but certain comments made by the judge at the point when he is reporting to the appeal court on the reasons for his sentencing. Those reports are released to parties and may be mentioned during the appeal proceedings.

It is important that a judge should feel free to state exactly why he has selected a particular sentence and be given free rein to explain his reasoning. If in the course of that reasoning he says something that the appeal court determines is wrong, we will say that, as we did in that particular case, and we will expect the judge to take into account the appeal court's view and to act accordingly.

In sexual offences generally, as I am sure the committee will appreciate, in relation to the matters that have been raised—and I hope that Mrs McInnes has got my reply—about the prosecution and sentencing of sexual offences, the law is progressing. It is moving from a certain position, where it was 20, 30 or 40 years ago, into the modern era. We are trying to keep the law, so far as approaches to both directions and sentencing are concerned, in tune with modern thinking.

Reference has been made to something called acquiescence, or condonation, as is sometimes said. That was mentioned because a particular case in the late 1980s, which was the first case in which a husband had been prosecuted for the rape of his non-estranged wife, and in which it so happens that I was the advocate depute at first instance, went to the appeal court, where the Lord Justice General made remarks of that nature, primarily in relation to whether a person should or would be prosecuted for the rape of his wife with whom he was continuing to live where the wife had, as it was put, forgiven the act.

We are sitting on an appeal court decision of that nature where those words have been used. Those or similar words have also been used in the sense of whether the fact that someone is continuing to live with someone should be taken into account not in relation to the rape, which would be proved—and there is a conviction—but in deciding whether that is a significant feature in sentencing. The issue of continued cohabitation with someone and its effect on sentencing is something that most jurisdictions are wrestling with, and different views are being expressed in the Commonwealth as to how significant that is, not in relation to whether the person was raped and not in relation to conviction, but simply in relation to the appropriate sentence in that type of case.

John Finnie: I am grateful for that detailed explanation. It is not everyone who gets the Lord Justice Clerk's personal explanation in that way. Public perception is very important and there are reports of some terms being used—I will not repeat them—that people would find deeply offensive. I want to maintain an open mind, and that is why I am trying to understand to what extent freedom is afforded to a judge to make

comment in general terms, away from the specifics of direction in law.

The Convener: I will try to clarify John Finnie's point. A judge gives the jury specific directions after all the evidence has been led. However, if the judge at any point makes a highly inappropriate remark that might affect the jury's decision but it is not part of the jury directions, the question is what impact that would have on the jury's decision. I think that John Finnie is separating remarks that are made in the process of the trial from jury directions. Is that right?

John Finnie: No, not entirely. In the totality of summing up, presumably a judge can say things that might be determined as legal direction, and there will be comment allied to that.

Sheriff Liddle: May I comment on this matter?

The Convener: Yes, please.

Sheriff Liddle: I am sure that committee members understand how a jury trial unfolds, but it might be important just to lay it out. The judge sits and listens to all the evidence, takes notes on it and reviews it when it comes to charging the jury. First, there is a prosecution speech to the jury, in which the prosecutor will probably suggest what the jury should make of the evidence; then there is a defence speech, in which the defence will probably suggest what the jury should make of the evidence. The judge listens to all that and, according to what they have heard, might modify what they intended to go into the charge to the jury.

The charge is dynamic and deals with everything—the evidence in the case and what was said in the speeches. At the point of charging the jury, the judge will be at pains to say that the judge is the master of the law, and will give the jury what assistance it requires in understanding the law that has to be applied but make it clear that the facts are for the jury. If necessary, the judge will draw attention to parts of the evidence but only because the jury has to know what to do with it—how to take it into account and where to place it, if the jury makes something of it.

The situation is very dynamic and every case turns on its own circumstances. The biggest danger from the proposed mandatory jury direction would be possible unintended consequences. The mandatory aspect could take prominence to such an extent that I as a judge might be required by law to interfere to an extent with the jury function, which I never do. It is hardwired into judges that they do not interfere with the jury function, which is consideration of the evidence.

John Finnie: With respect, do you resent lawmakers suggesting the kind of approach that is proposed? As we have heard from Mr Paterson, there is genuine public concern about matters in rape trials. As I have said, I am probably more minded to support the prosecution leading an expert witness. However, is there resentment on the part of the judiciary that politicians are interfering?

Lord Carloway: No. I would not describe it as resentment. We are all members of a democracy and we respect Parliament's legislative function. We do not get upset in the way suggested. If Parliament wants to tell judges to give the jury the directions proposed in the bill, we will give them.

John Finnie: Good.

Lord Carloway: We will certainly do that. However, we have stated that it is traditionally the role of the judge, rather than Parliament, to decide on jury directions. That is the way that it has been in the division of constitutional responsibilities, but that takes us only so far. In any jurisdiction in the Commonwealth, it is very rare for a Parliament to dictate to judges what they should say in jury directions, although it has been done in a couple of jurisdictions. If you want us to say something specific in jury directions, we will do so. However, we are just saying that what is proposed is not necessarily the best way of doing that.

John Finnie: Okay. Thank you.

The Convener: Thank you. We appreciate that if we make that law, you will not break it.

Lord Carloway: Absolutely.

The Convener: That is handy to know, even though there will be a bit of difficulty for you.

12:15

Alison McInnes: I have a follow-up question before I go on to my main question. I am concerned that if a judge, in giving an appeal court his reasons for sentencing, has views that are so significantly out of step that you describe them as "pithy", those strong views would be present all the time in that judge's consideration and so would influence whether he gave a direction to a jury about any particular thing. Is that not the case?

Lord Carloway: Again, I am anxious not to stray into a particular case. We said all that we wanted to say about it in the opinion of the appeal court. As I have written, the word "pithy" was not intended to be pejorative—it means that those were succinct remarks that the judge made in certain areas of sentencing. The particular directions in that case, so far as we are aware, were impeccable. There is no sense of the judge's remarks being—

Alison McInnes: It is the absence of direction. I do not want to talk about that particular case, but I draw from that that some judges give directions in

some areas in relation to some of the things that Gil Paterson spoke about and some do not. We are trying to get to the bottom of why they do not give such direction. Is it due to their beliefs?

Lord Carloway: No. The reason why there is a problem in this area is that some judges take a very strict view of what they can tell the jury. In other words, if we take the proposition that there can be good reasons why a person may not tell others of an incident for a while, some judges will take the view that in a particular case there is no evidence to support that proposition and therefore that they should not give a jury such a direction. Of course the Crown may lead evidence that the proposition is correct, in which case the judge will give the direction. Other judges may be more proactive in what they say to juries and may give the directions contained in the bill, without there being an evidential base for it. If they do so, they risk the appeal court stating to them that they should not have given the direction because in that particular case there was no evidence to support it. There is that difference of view between different members of the judiciary and that is the problem area, which is why the legislation is in contemplation.

Alison McInnes: Thank you. I turn to the jury manual, which Sheriff Liddle described as a "dynamic document". How is that document changed over time? How and when is it amended and why have model directions for the situation that we are discussing not yet been developed?

Lord Carloway: The jury manual is a fairly substantial document. It is online, if you wish to view it in its entirety.

The Convener: There is a challenge for you, Alison.

Lord Carloway: I mean that you can see what it looks like online. We have created it over the past 20 or so years, and before that there was essentially nothing but word of mouth. First, it contains statements of what the law is thought to be and secondly, it contains model directions to the jury. Judges do not have to follow those directions and, depending on the particular circumstances of a case, they will not follow them. Many judges have their own speaking styles, which are not consistent with the model in the jury manual.

The jury manual is under the auspices of a committee, which is headed by one of the High Court judges, who will revise its terms on a roughly annual basis—it is in a position of constant revision. If a judge has a particular problem with a direction or some new case arises—or if Parliament decides that a direction must be given—the jury manual will be amended. The amended manual is then sent out to all judiciary.

Have I missed anything?

Alison McInnes: Yes. Earlier, you said that the law was moving and that things were changing, particularly in relation to sexual cases. Women would say that the progress is glacial. I am trying to understand at what point someone might be able to suggest that something is what you referred to as "judicial knowledge" and so would make its way into a model direction. Is that what would happen or is that separate?

Lord Carloway: If it were judicial knowledge, it would enable a judge to give a direction because there would then be no fear that there was a lack of evidential base. Judicial knowledge is basically a statement of things that are universally acceptable, such as the basic rules of mathematics or geography. If Parliament said that X and Y are facts that are judicial knowledge, the judge would not have to worry about giving the jury a direction that had no evidential base, because they would be able to state those things without fear of contradiction.

Alison McInnes: Okay, so that is separate.

Lord Carloway: You asked why that in particular was not in the jury manual. I understand, having spoken to the Judicial Institute for Scotland, which tends to deal with such matters, that it was put on hold. This is not a criticism, but when the institution's consultation came out, that area was left to see what was going to happen. Maybe we should have proceeded to develop model directions at that point.

Alison McInnes: Until then, people might not have been aware that there should be model directions. That is what I am trying to get at. How do judges, or the people in charge of the jury manual, say, "We need to update things."?

The Convener: Not the jury manual.

Alison McInnes: Sorry. I mean the judicial manual.

Lord Carloway: No—it is called the jury manual.

The Convener: Is it really? I beg your pardon. I drifted there.

Lord Carloway: That area has been under contemplation for some time, in the sense that the amendment to the 1995 act that was made in 2004 and which enabled the Crown to lead evidence was made because of the same concern that we are discussing now—that some jury members may have a preconception. The intention was to allow the Crown to lead evidence that would previously probably have been regarded as inadmissible because it is evidence that is directly about somebody's credibility, which we tend to exclude as collateral. The issue has

been under contemplation, and it may be that we should have followed the English line sooner and got some model directions out. I accept that.

Sheriff Liddle: I would like to add a piece of information, because I had the benefit of hearing from the director of the Judicial Institute very recently. The jury manual has recently gone exclusively online for the first time. It used to be published annually, as Lord Carloway said, but it is no longer published. My understanding is that that means that the manual is now continually updated and that, when something happens such as a decision from the High Court or a recommendation, updating it is a continuing process because it is easier to do that online.

The Convener: There is a little debate going on here about judicial knowledge and jury manuals, which we will save for later. I turn now to Roderick Campbell.

Roderick Campbell: Most of my questions have been answered, but I wanted to put something to you, Lord Carloway, that was suggested in evidence by Mr Meehan, who represents the Faculty of Advocates. He said that, if matters were in the jury manual, there would still be a danger of a direction on which no evidence had been led. Do you think that that is a real danger?

Lord Carloway: Yes. Although I do not have the precise name of the case, I understand that, south of the border, where there are model directions, there have been instances—or at least an instance—where the judge has gone off piste, so to speak, and has given a direction that goes a little further than that and which has been criticised as not having an evidential base. People are quite capable of challenging the jury manual directions as not being correct in law, or there could be a challenge on the basis that a particular direction in the jury manual did not have an evidential base in fact. That is a possibility, and we would have to decide whether it was well founded or not. Does that answer your question?

Roderick Campbell: Yes, I think so.

Lord Carloway: Mr Meehan was basically asking whether, if the direction was not statutory and was just in the jury manual, it would be possible for a conviction to be overturned because a judge had given a direction that was in the jury manual but which did not have an evidential base. The answer is possibly. From time to time, we get challenges to the contents of the jury manual. It is not law; it is guidance.

Roderick Campbell: Mr Meehan went on to discuss what would happen if there were mandatory directions in this area, which would set a precedent. In the absence of jury research, he was not sure whether the jury would find that helpful—if there was a pressure to be considered across the board. What view do you take on the issue of precedent? Would jury research assist? We are now embarking on an era of jury research.

Lord Carloway: I do not think that the cabinet secretary has given us the full scope of the proposed research, but this area would be an obvious one for ascertaining whether the research carried out by Professor Munro and her colleague is valid—correct is not quite the right word.

I am not quite sure how to answer your question.

The Convener: I am trying to discern the distinction between “valid” and “correct”.

Roderick Campbell: I take the point that this would be an ideal area for jury research. What is your view on whether the measure sets a precedent on its own, if we were to proceed with mandatory directions?

Lord Carloway: That relates to the general constitutional position, although, with reference to Mr Finnie’s comments, I am anxious not to talk about us resenting it or getting upset. Yes, it sets a precedent. If Parliament dictates what should be said to juries by a judge in this area, other people will no doubt seek to extend that to other areas and will wish other directions to be given, and that is where we get into the constitutional divide.

The Convener: I take it that that point relates to concerns about that becoming the politicians’ role, breaching the very clear and important line between the judiciary and politicians.

Lord Carloway: Yes.

The Convener: That is not good news, is it?

Lord Carloway: No, we would not think so. Mutual respect is very important, and I think that we have it in this jurisdiction.

The Convener: Would it not be important also to retain the tensions between the judiciary and the politicians—tensions that are useful for democracy? Would you subscribe to that view?

Lord Carloway: I would. The balance is very important: that form of tension should remain, as long as it does not drift into resentment.

The Convener: I was not suggesting that for a moment.

What is your view on that, Sheriff Liddle? I have concerns about section 6, as is obvious from what I am saying.

Sheriff Liddle: I entirely agree with what Lord Carloway has said on the matter. Those tensions are important, and the distinction is important. If there is a clear and defined line and that line is

crossed, it often disappears—we look back, and it is gone.

Margaret McDougall: I have some questions about sexual risk orders. One of the features of the sexual risk order is that, according to the bill as introduced, the order may be imposed on a person who has not been convicted of any offence, but who has

"done an act of a sexual nature".

However,

"an act of a sexual nature"

is not defined in the bill. Could the panel give me their understanding of what

"an act of a sexual nature"

is, as provided for in the bill?

Lord Carloway: That is not something that the judges have expressed any views on. We regarded that as primarily a matter of policy for Parliament. We did not really have any views on it at all. It is entirely a matter for Parliament to determine. We would address that in a given case. I am sorry that I cannot help further on that; we thought that that was policy.

Margaret McDougall: Okay. Maybe you will not wish to answer any of the questions on the issue, because it is not in your remit.

Lord Carloway: It is not a question of not wishing to answer them; we thought that we would be straying into policy.

The Convener: It is not appropriate for the witnesses to comment on that.

12:30

Margaret McDougall: Okay. Are you concerned about the fact that sexual risk orders could be imposed on an individual who has not committed an offence?

Lord Carloway: The judges have not made any comment on the validity or otherwise of that proposed legislation, on the basis that it is Government policy and a matter for Parliament to rule on, rather than for the judges to comment on.

The Convener: Is it an issue, however, under the European convention on human rights, that a person on whom such an order is to be imposed will not have the right to appear before the sheriff to prevent it from being imposed on them? Can you comment on that, from a legal point of view?

Lord Carloway: The matter is judicially determined by the sheriff, so it would be—

The Convener: Our briefing paper states:

"where an application is being made for a sexual risk order under section 26, the person against whom the order is being sought would have the right to make oral representation to the court before a sexual risk order is imposed."

Can you clarify whether, in a case where an application is being made for a sexual risk order, the person will have a right to address that—it is not just discretionary?

Lord Carloway: Yes, as I understand it.

The Convener: They will have a right—it is absolute.

Lord Carloway: The application is to go to the sheriff. I am not in a position to address that particular section. I did not think that I was going to be asked about it.

The Convener: Forgive me for a moment while I find the section in the bill.

Sorry, I phrased it wrongly—it has been a long day. Maybe I am reading it too quickly, but section 26 does not actually say that, procedurally, the party has a right to appear before the sheriff. Am I right or wrong? Section 26(2) just says:

"An appropriate sheriff may make a sexual risk order only if satisfied that the respondent has ... done an act of a sexual nature",

and so on. It does not at any point say that the party has a right to be heard.

Lord Carloway: As I said, I have not applied my mind to that. We may be called on to rule on that if there is a problem of that nature. Obviously, Parliament has obtained the usual certificate about ECHR compliance. It would depend on the procedural rules that surround the matter.

The Convener: There is a right of appeal, but it would be better if the person had an opportunity to make a representation at the first hearing, rather than go through the appellate procedure.

Lord Carloway: The sexual risk orders will replace existing orders—the risk of sexual harm orders.

The Convener: I will move on to my last question, unless Margaret McDougall is not finished.

Margaret McDougall: I was going to ask a question on another issue.

The Convener: Please do.

Margaret McDougall: Are the witnesses able to comment on the reasons for the very low numbers of risk of sexual harm orders that have been granted by the courts in Scotland to date?

Lord Carloway: I cannot comment on that. I have done no research at all on that matter. I am terribly sorry, but I did not anticipate answering questions on chapter 4 of the bill, as we regard that as a matter of policy.

The Convener: What about Professor Liddle? That is a matter for the courts, surely.

Sheriff Liddle: I am afraid—

The Convener: Did I call you "Professor"? Sorry—I meant "Sheriff".

Sheriff Liddle: I thought that I could hang on to that for a while.

I am really sorry, but there is nothing that I can add. I did not come prepared to answer that sort of question. It is a policy matter and therefore something that we should not comment on.

Lord Carloway: If you want us to take the issue away and think about whether we can make a comment, I am happy to do that and write in if—

The Convener: That would be helpful, if you feel it appropriate.

I will ask a final question, although I am probably going to regret this, because I have already got muddled up with professors and whatnot. How does something become judicial knowledge and how do we know that it is judicial knowledge?

Lord Carloway: Judicial knowledge is something that grows over time. There are certain things that do not have to be proved, such as the fact that there is a railway between Edinburgh and Glasgow.

The Convener: So it is basic stuff.

Lord Carloway: Yes, it is basic stuff that everybody ought to know and it is accepted as fact.

The Convener: So is the fact that somebody might not report something of a sexual nature for a long period of time judicial knowledge? Does that fall into that category? As you say, it could be a month or years. Is the fact that that sometimes happens judicial knowledge, just like the fact that there is a railway line?

Lord Carloway: Personally, I think that the propositions in the bill may well be judicial knowledge, because I do not think that what is stated is controversial, as a matter of fact. I think that what is stated is correct. Therefore, in that sense, it is judicial knowledge. However, I do not think that every member of the judiciary would necessarily share that view. It goes back to how confident the judge feels about stating things to juries with no evidential base.

The Convener: So judicial knowledge is not shared by all judges.

Lord Carloway: It ought to be shared by all judges. However, there comes a point where, say, a principle of mathematics requires expert evidence. There is an issue about exactly where the line is drawn. We might know that there is a railway line between Edinburgh and Glasgow but we might not necessarily know the composition of the points at Winchburgh. What is or is not within people's knowledge is a matter of degree.

The Convener: Okay. I knew that I did not want to ask that question, but I asked it.

We have to move on, because we have much more to do. I thank the witnesses very much for an intriguing evidence session, some of which was quite pithy—I am allowed to use that word now, because you have defined it for us, Lord Carloway.

Lord Carloway: Thank you very much indeed.

The Convener: I suspend the meeting for a couple of minutes to allow the witnesses to leave.

12:37

Meeting suspended.

12:38

On resuming—

Subordinate Legislation

Sheriff Appeal Court Fees Order 2015 (SSI 2015/379)

The Convener: The next item is consideration of four negative Scottish statutory instruments. The first sets out those persons who are exempt from paying fees and specific fees exemptions relating to particular proceedings. The Delegated Powers and Law Reform Committee did not draw to our attention any concerns on the order.

As members have no comments, are you content to make no recommendation in relation to the order?

Members *indicated agreement.*

The Civil Legal Aid (Scotland) (Miscellaneous Amendments) Regulations 2015 (SSI 2015/380)

The Convener: The regulations adapt the framework and arrangements in existing legal aid regulations to accommodate the changes that will come into force in January 2016 relating to civil proceedings in the new Sheriff Appeal Court.

Again, the DPLR Committee did not draw any concerns to our attention. Members will see from their papers that we had a couple of written submissions on the regulations. We also have a late submission from the Faculty of Advocates, which has been tabled.

Do members have any comments on the regulations?

Roderick Campbell: I refer to my registered interest as a member of the Faculty of Advocates. I find the timescale a wee bit concerning, although I do not understand it fully. The faculty's point is that the regulations that are before us now for consideration are not the regulations that it saw previously. The Government's comment on the matter is dated the beginning of November. From my understanding, the timetable is very unfortunate.

The Convener: Well, I think it is very unfortunate for the faculty as well, as it should pay more attention to what we are doing. It is not without sufficient legal brains to come back to the committee sooner rather than later. Therefore, I am moving on. That is on the record now, and I think that members are content to leave it at that.

Members *indicated agreement.*

The Convener: Are members content to make no recommendation in relation to the regulations?

Members *indicated agreement.*

Scottish Tribunals (Eligibility for Appointment) Regulations 2015 (SSI 2015/381)

The Convener: The regulations create eligibility criteria for ordinary and legal members of the first-tier tribunal and legal members of the upper tribunal. Again, the DPLR Committee did not draw any concerns to our attention.

As members have no comments, are you content to make no recommendation on the regulations?

Members *indicated agreement.*

Act of Sederunt (Fees of Solicitors in the Sheriff Appeal Court) 2015 (SSI 2015/387)

The Convener: The act of sederunt regulates the taxation of accounts of expenses between parties in relation to proceedings in the Sheriff Appeal Court. Again, the DPLR Committee did not draw any concerns to our attention.

As members have no comments, are you content to make no recommendation in relation to the instrument?

Members *indicated agreement.*

The Convener: We now move into private session.

12:40

Meeting continued in private until 12:53.

Published in Edinburgh by the Scottish Parliamentary Corporate Body

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

Information on non-endorsed print suppliers
Is available here:

www.scottish.parliament.uk/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk