The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 1 March 2016

Session 4

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JUSTICE COMMITTEE
8th Meeting 2016, 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:

Neil Findlay (Lothian) (Lab)
Andrew Flanagan (Scottish Police Authority)
John Foley (Scottish Police Authority)
Chief Constable Philip Gormley (Police Scotland)
Michael Matheson (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Committee

Tuesday 1 March 2016

[The Convener opened the meeting at 10:00]

Police Scotland

The Convener (Christine Grahame): Good morning. I welcome everyone to the eighth meeting of the Justice Committee in 2016. I ask everyone to switch off mobile phones and other electronic devices, as they interfere with broadcasting even when they are in silent mode. No apologies have been received.

Item 1 is an evidence session on Police Scotland's internal communications and on its policies and procedures in relation to the protection of staff who report wrongdoing or malpractice within the organisation. The session is intended to build on the committee's recent evidence gathering on the interception of communications while moving the debate on to related matters of public interest concerning the work of Police Scotland.

I welcome Chief Constable Philip Gormley to the committee for the very first time and possibly the last time in this session—no, you are coming to the Justice Sub-Comittee on Policing.

Chief Constable Philip Gormley (Police Scotland): I will be there next week.

The Convener: This is your penultimate appearance. I also welcome Andrew Flanagan, the chair of the Scottish Police Authority, who has been here before, and John Foley, the SPA's chief executive, who has been under long-term service with us—we have seen him many times.

John Foley (Scottish Police Authority): Indeed, convener.

The Convener: When a member asks you a question directly, your microphone will come on automatically. Otherwise, if you indicate to me that you wish to respond, I will call you and your microphone's light will come on. You do not need to bother pressing anything.

We will go straight to questions.

Christian Allard (North East Scotland) (SNP): Good morning. I would like some clarification. For the life of me, I cannot understand why we do not have a whistleblowing policy but have instead decided to deal with that issue differently from other organisations. A whistleblowing policy should be specifically about whistleblowing and not about disclosure, for example.

Chief Constable Gormley: I am happy to answer that question. We have a range of what are called standard operating procedures, and, in preparation for this meeting, I had a look at them. They all deal with support that is provided to staff in a range of circumstances, including when they raise issues of concern or conscience. They are all fit for purpose.

The Convener: How long is the list?

Chief Constable Gormley: Would you like me to read it, convener? It contains about 12 SOPs.

The Convener: Do committee members want to hear the list?

Members: Yes.

The Convener: We want to hear the list.

Chief Constable Gormley: We have standard operating procedures around attendance management; business interests; complaints about the police; discipline; equality, diversity and dignity; equality impact assessments; gifts, gratuities, hospitality and sponsorship; grievances; notifiable associations; the Police Service of Scotland (Conduct) Regulations; stress management; suspension from duty; transgender people in employment; and trauma risk management. We have a range of SOPs that touch on or support staff officers who have issues relating to their personal position or other issues that cause them concern.

Although those SOPs are perfectly respectable and, I think, fit for purpose in large part, do they add up to our developing a culture that enables staff to step forward with confidence? I have commissioned a review that will look at and understand the culture within the service and the key issues and dilemmas that staff face. It will look outside our organisation at best practice, whether in the international business world, in law enforcement or in the third sector. What I have found—particularly in the National Crime Agency, which I think has parallels for us—is that we are asking staff to operate in an increasingly complex environment. Some of the threats that they are now being asked to deal with take them into slightly different spaces, particularly around privacy and issues of conscience and concern. In fairly quick time, I want to understand whether there is any learning that we can incorporate into our approach.

There are other police services to look at, the most obvious being the Metropolitan Police in London because of the similarities of scale and complexity. The Police Service of Northern Ireland works in a very complicated environment and, post Snowden, as we ask staff to work in difficult and

sensitive environments, there are issues over how they ventilate their views and make us aware of them.

The final piece, for me, is what we can learn from the national health service. We can look at the issues that the NHS has confronted in enabling staff to make known their views and concerns on policy, practice and procedures. I want to get not just a list of sensible SOPs but a feel for whether they add up to an approach that will develop a culture in which staff are prepared to come forward and in which they feel supported and confident in doing so.

Where does that lead us to? I will wait to see what comes back from the review, but I want us to be the best in class in developing that culture. I do not rule out developing within the organisation an ethics committee or an ethics council—other approaches are taken elsewhere. As we move into this more complicated world, it is not simply about having distinct SOPs that deal with specific issues, although those are part of it; it is about the overarching culture of the organisation. Does it add up to the sort of environment in which staff are able to speak up with confidence, and what can we learn from elsewhere?

Christian Allard: One thing that we could have learned from elsewhere is, first, to answer the question and, secondly, to answer the question about whistleblowing. Thank you very much for your comprehensive answer. However, in your whole answer I did not hear the word "whistleblowing". I do not understand why an organisation that wants to encourage whistleblowing is not using the word "whistleblowing" in its language.

Chief Constable Gormley: I am very happy to use the word "whistleblowing", although there are some issues around that term and some people take exception to it as a description.

The real issue is how we enable staff who have issues of conscience or concern around law, practice or procedure to raise those issues within the organisation. As the chief constable, I want to understand that. I want to know whether there are unintended consequences of the approaches that we are taking on issues. For example, there may be issues around how performance management is implemented at a middle or more junior level of management. If staff feel under pressure, are not clear about what is expected of them or have issues, I want to hear about it.

I have commissioned a comprehensive piece of work to look outside the organisation at how staff are supported when they want to raise issues of concern—at whistleblowing, to use the vernacular. What can we then do with that information? How can we develop our service? How can we develop the sort of internal culture that is about continuous improvement?

There is some really good practice in Police Scotland. We have been recognised by Stonewall as being in the top 100 employers for our responses to people with transgender, transsexual and gay issues. There is some really good work within the organisation, but I want us to be the best in class.

All the SOPs that I listed provide elements of support. My question to the organisation, and therefore to myself, is whether they add up to the sort of position that we need to adopt. I want to look externally for what is the best possible whistleblowing—to use Mr Allard's term—policy. The issue is not just the policy; it is how we use the information that comes back from staff—how we hear their voice and reflect on the ethical dilemmas and legal challenges that they are confronting to make sure that we provide the best possible service to the public.

Christian Allard: I put it to the SPA that the issue is about encouraging whistleblowing, and we have heard from the chief constable about what happens afterwards, once people have made the commitment to be a whistleblower. Does the SPA have any views on how the policy should concentrate on encouraging whistleblowing?

Andrew Flanagan (Scottish Police Authority): The authority conducted an internal audit of whistleblowing policy in the first half of 2015, and there are three issues that I think need to be looked at further. Within the police service the policy is referred to as integrity matters although the audit found that, to all intents and purposes, it is a whistleblowing policy by any other name. There has been some resistance from Police Scotland to using the term "whistleblowing"—the chief constable can comment on that. However, if you put "whistleblowing" at the top of the policy and read it, you would see that it is a normal policy such as could be found in most walks of life.

The first of the three issues is that the policy is drawn more narrowly in terms of professional standards and criminal acts than would be expected in a more general whistleblowing policy.

Secondly, there are issues about how the policy has been communicated and rolled out and about its use as a policy—it could be better embedded. Within the staff survey, we saw issues about internal communication with staff, which I think could be improved. A small example of that is the fact that there are many posters encouraging people to report complaints—the integrity matters posters can be seen up on the wall in any police office—but those posters do not have the phone

number on. That is a simple thing that should not happen.

The third area in which there is a weakness is that the policy does not deal with complaints or whistleblowing that might arise as a result of the work of those in professional standards or the counter-corruption unit. It is unclear—it is not specified—how someone should report a complaint if it is against the people who would conduct the investigations. The only alternative to going through the specified channels is for someone to go to their staff association or to Crimestoppers. I think that the SPA should, potentially, have an identifiable role in dealing with complaints or whistleblowing of that nature.

Christian Allard: That is the policy. Can you tell us the number of whistleblowers—or whatever you want to call them—that there have been or the number of disclosures that have occurred since the inception of Police Scotland?

Andrew Flanagan: I do not have that information.

Chief Constable Gormley: I am not sure that I can answer that specific question about the total numbers since Police Scotland was established. However, in response to the points made by the chair about integrity matters, which was introduced in March 2015 and superseded a system that was called—as I understand it—Safecall, I can say that there have been 133 referrals to integrity matters from members of staff.

The Convener: Can you explain to me what the referrals to integrity matters were about? Can you give some examples?

Chief Constable Gormley: I do not have specific examples, but 29 of them related broadly to issues of potential criminality and 104 were more general concerns.

Christian Allard: Were they all of the whistleblowing type, or were they general comments?

Chief Constable Gormley: I have not reviewed all 133 of them, as I am sure you would understand, but they involve issues that staff wanted to bring to the attention of the organisation. As I said, 104 involved general concerns—non-criminal concerns—and 29 were about criminal issues. Some of those referrals have led to misconduct proceedings and some have led to reports going to the Crown. There is a broad mixture of serious and not-so-serious issues.

Christian Allard: Do you have any feedback on how the people who did that whistleblowing have been protected after making the disclosure?

Chief Constable Gormley: I have no direct evidence on that. I have a relationship with the unions and the police staff associations, but no concerns have been brought to my notice in the past two months about how supported people have felt.

That goes back to the broader point that I made at the start of the meeting. We have some good initiatives and some good SOPs—integrity matters and the others that I went through with you. As we go forward, I need to understand how we can ensure that the organisation is in the best possible position to support staff and enable them to come forward. There are a range of routes for that: there are line managers, there is integrity matters, there are the staff associations and unions, and there is third-party reporting.

In taking integrity matters forward, we must build on the points that the chairman made. Does it deal with the totality of concerns? I need to reassure myself that we are in that position. Can we introduce a third-party element to it? That may or may not involve the Police Authority or a third party that staff can connect with. If staff do not trust the organisation to the extent that they do not feel able to connect with it on such matters, they must be able to connect elsewhere so that we are able to respond to those issues.

The organisation that I want to lead is one in which staff feel engaged, supported and confident in coming forward. It is one that is fair both to the individuals who raise issues and to those about whom issues are raised, and it is one in which we address systems and processes where we are potentially not getting it right.

Christian Allard: Thank you very much for that evidence.

The Convener: I am going to let somebody else come in, Christian, and you can come back in later. You have had quite a whack.

The potential introduction of third parties is interesting. I think that many of us on this committee—and, no doubt, members who are not on the committee—will have messages in our inboxes from officers who feel that, if they open their mouths, they are victimised. Either they have opened their mouths and they are alleging that they have been victimised or they will not open their mouths because they think that they will be victimised within the organisation. I am sure that you will be aware of that. In order to make people feel secure, how far down the road of that idea of introducing a third party have you got? People feel that, if they say something, they may not be promoted or things—subtle and not so subtle—will happen in their office, such as their getting moved.

Chief Constable Gormley: I agree. It is difficult to deal with the issue anecdotally. There will be

staff who feel like that, and individuals may have issues because they believe that they are being managed in a way that is inappropriate although we feel that the management is appropriate. There are a broad range of situations.

Sorry, convener—could you repeat the thrust of your question?

10:15

The Convener: It goes back to your point about involving a third party that is external to the police. You have given a whole list of procedures—

Chief Constable Gormley: Yes, I have.

The Convener: Those procedures are in place, but I suspect that there are officers out there who will say, "So be it, but I'm not going to say anything because I've seen what happened to someone else." Whether or not that is true, the feeling is there.

I am sure that other members of the committee will have received emails on the issue in their inboxes, with briefings and stories from serving officers who are not happy but who will not say anything because they feel that there will be some comeback for them. For example, they may feel that they will not get promoted or may find themselves at the end of a complaint that is aimed at them. That can happen in all big organisations.

Chief Constable Gormley: Yes, it can.

The Convener: I am asking about the third party element, which is an interesting idea that you are considering.

Chief Constable Gormley: That is an area that I want to look at. In the eight weeks in which I have been in post, I have seen some good practice and some areas in which we need to reassure ourselves that we are in the best possible position as an organisation.

We should aspire—as I do—to be the leading police service in the UK. That involves ensuring that staff are confident and feel supported. If members of staff are feeling the way that you have described, whether that is reality or perception and whether or not it is justified, there is a real issue. I recognise that, which is why I have said what I have said. I am not trying to present the organisation as being in the perfect place. This is the sixth police force or law enforcement agency that I have worked in, and some of those organisations have gone through enormous upheaval and change. Such things cause issues for staff but we need to ensure that we develop the best possible response, and that is what I hope to do.

Margaret Mitchell (Central Scotland) (Con): Staying on the issue of whistleblowing, I want to tease out the unease with the term itself. The word "whistleblowing" resonates with the public, as people tend to think that it ensures transparency in an organisation. My understanding is that such an action is referred to as making a disclosure or blowing the whistle. For a worker who makes such a disclosure to be covered by whistleblowing law, they must believe two things. First, they must believe that they are acting in the public interest and, secondly, they must reasonably believe that the disclosure tends to show past, present or likely future wrongdoing. There are various categories within that.

If we were to establish that definition as the grounds for use of the term "whistleblowing", can we accept that we are happy with the term and that it can be used?

Chief Constable Gormley: I do not want to overstate the position at all. I am simply aware that there are a range of views on the term "whistleblowing". It does not offend me, but some people would say that it has a pejorative context.

The real issues are the ones that the committee has raised. We need to ensure that staff who feel that way can exercise their voice and are heard and that they feel safe and secure and are confident that the organisation will act on the matter when appropriate. I want to be in a position to do that.

Margaret Mitchell: I turn to the SPA audit and risk committee and the SPA's review—

The Convener: Before we get to that, can we go back to whistleblowing? I think that Gil Paterson's question is on that subject.

Margaret Mitchell: My questions are all on whistleblowing, because I took a particular interest in the issue in 2014 after receiving a complaint during the Commonwealth games from an officer who was very reluctant to express his concerns. At that time, I wrote to the then Cabinet Secretary for Justice and got some interesting and useful information. I was somewhat surprised to hear that there is not really a policy for whistleblowing. The officer to whom I referred was certainly of the opinion that there was in place a function or process—I think that Safecall was mentioned earlier—by which police officers could raise their concerns.

That was followed up with a freedom of information request from my office. I can tell the committee—I am surprised that this has not come out in the SPA's review—that, in 2013, there were 15 referrals through Safecall, which is run in the north-east of England, that referred to or affected Police Scotland, and 12 of those cases were concluded. In 2014, there were 18 referrals, 10 of which were concluded.

If there have now been 133 referrals, that is a good-news story, which begs the question why the SPA did not in its review do something as elementary as examining the data to determine where we are now and where we have progressed from.

The Convener: Mr Foley looks as if he wants to respond to that.

John Foley: Yes, thank you, convener. Mrs Mitchell's figures are indeed correct. At that time, Police Scotland operated the system known as Safecall, which was in effect for whistleblowing. The numbers were low, as Mrs Mitchell suggests. The reason for the review of Safecall and the implementation of integrity matters was to improve the opportunities that people had to make referrals. People were encouraged, through integrity matters, to make more contact over issues that presented within Police Scotland, and that is what happened.

Integrity matters papers were presented and discussed at the SPA board and at the audit and risk committee on a number of occasions. As recently as January this year, Police Scotland took away some actions to review elements of it and come back—

Margaret Mitchell: Can I stop you there, Mr Foley? My point is that I have the figures here, but you were asked for them just a few minutes ago and you seemed unable to produce them.

John Foley: I did not have the exact figures with me, but the numbers that you have given are broadly in line with my recollection.

Margaret Mitchell: It would have been helpful if, when replying to the question, you had said that, although you did not have them with you—

The Convener: Well—

Margaret Mitchell: No, this is an important point, convener.

The Convener: Yes, but I think that the point has been made.

Margaret Mitchell: It is an important point. The police—

The Convener: Just a moment, please. The point is made, and it is a good point, but let us go on.

Margaret Mitchell: If we are to have a good analysis of where Police Scotland is falling down and where it is improving, it is important for the witnesses to come to the committee with such information, so that the committee can make decisions.

I also wish to ask Mr Gormley how decisions on policy that affect operational policing are communicated to staff.

The Convener: That is on communications.

Margaret Mitchell: It is on operational policy.

The Convener: Yes, but a couple of members want to come in on whistleblowing. We will have Gil Paterson and Rod Campbell and then we will move on to communications.

Gil Paterson (Clydebank and Milngavie) (SNP): My colleagues have asked most of the questions that I originally wanted to ask.

I very much welcome your review, which I think is a good idea, but I suggest to the panel that we all know what whistleblowing means, and it would be a good idea to actually use the term. Everybody in public life knows exactly what it means, so we should be able to refer to it in that way.

On the question that Margaret Mitchell asked, if you have the figures, could you provide them—even if not now—as that would give us a good steer and would put some flesh on the bones so that we know what we are talking about? In particular, it is always good to know whether progress has been made.

Are there any historical figures on what happened under the previous model with the eight boards? I am sure that you will not have those figures with you, but are they available? They would allow us to make a comparison and to see whether things are getting better or are just the same as before.

Andrew Flanagan: We will provide the figures that we have so that there are exact numbers for the record. Going back beyond the creation of Police Scotland has been challenging when it comes to getting data from the original eight legacy forces. However, we will attempt to do that, and we will see whether we can get some trend information. As I say, however, that has proved challenging on previous occasions.

It is encouraging that there is a greater number of referrals. However, I am not sure that 130 referrals from a workforce of 22,000 necessarily reflects success. We should be encouraging more responses through whistleblowing lines. We might reach a situation in which we have a large number of cases that are not worth pursuing because they are not appropriate. For example, sometimes whistleblowing lines are used for human resources grievances, rather than for the purpose for which they are intended. However, we should encourage a higher number of disclosures through the process, and we can then work through them and monitor trends.

As I said, it is encouraging that the number has gone up, but I am rather cautious as to whether 130 is what we should be seeing, given the size of the workforce.

The Convener: I think that it was 133 for the period. It would be useful if you could let the committee know the breakdown of the figure in writing. I have taken a note that 29 cases were related to criminality, but Philip Gormley said that the others were of a general nature. It would be useful to know what the grievances are. Could you send that information to the committee? It could obviously be anonymised, but the data would be useful, and I think that the committee would appreciate that. I am looking around for support, but I am not getting any. [*Interruption*.] Now I am. That is good.

Roderick Campbell (North East Fife) (SNP): I just want to clarify a small point of detail. Police Scotland was incepted on 1 April 2013, and I presume that Safecall was still going at that time. It would be useful to know when Safecall ended and integrity matters started. I have not heard that information this morning. Can anybody answer that?

Chief Constable Gormley: I think that I can. I was not here at the time, but the briefing that I have been given stated that the principles of Safecall were replaced by integrity matters—which is in effect the whistleblowing policy and process—just under a year ago, on 2 March 2015. Since then, as has already been alluded to, there have been 133 referrals: 29 in relation to some form of criminality and 104 that are more general.

I would absolutely be prepared to provide a more detailed breakdown of the sorts of issues that have been raised, because those are the sorts of issues that I am interested in. They relate to organisational learning and development. That is about us understanding officers' concerns, how they make their voices heard and how we respond to that, when it is appropriate to do so.

Margaret Mitchell: Mr Gormley, how are decisions on policy that affect operational policing communicated to staff?

Chief Constable Gormley: Forgive me, but I have a flow chart that I can take members through.

A lot depends on the complexity of the issue. A major legislative change that would require the whole workforce to be reskilled or retrained—there are examples of that—is clearly a very different process from a more discrete change in guidance, which would have a much more limited impact on staff. There is a broad range, from a discrete change to a policy or procedure on a very technical element of policing through to a generic requirement to retrain officers in relation to a fundamental change in a legal process.

In essence, we are notified about a proposal for updated legislation or guidance, which is then considered by the strategic leadership board, which is made up of myself and senior chief officers. The board then identifies an individual to respond to that proposal. The proposed change is normally relevant to the individual's portfolio responsibilities. If the proposal fundamentally affects officers in local policing, it will go to Rose Fitzpatrick. If the proposal is in the area of crime, it will go to Iain Livingstone. That individual is then responsible for identifying the organisational implications and with whom we need to engage—internally and externally—to understand the impact of a decision. For example, changing our response, either investigatively or procedurally, may have knock-on implications for other agencies and stakeholders such as the Crown, Victim Support or the third sector. We need to understand what the impact of our proposed response to that change in guidance will be on a range of people, and we need to offer advice to them.

Historically, I have been involved in a lot of mental health issues, in which we developed training and guidance for staff on how to respond to people in crisis. We are not mental health professionals, but mental health professionals—in the third and statutory sectors—help us to develop procedure, policy and responses to people in crisis, from which we develop guidance and training material. The nature of that material depends on how many people the change will affect and on the type of change. If something affected a very narrow group of individuals, it could probably be managed with face-to-face briefings. If it was a fairly transactional piece of legislation that did not require a fundamental response, approaches such as e-learning and distance learning might be appropriate. We set up intranet mini-sites to allow officers to train themselves. The approach taken depends largely on what the issue is.

The issuance of force memoranda, standard operating procedures and internal guidance—

10:30

The Convener: Let us look at a big issue. We can go back to the issue of armed police and stop and search. When those two issues were raised, instructions were given to officers about how to behave in certain circumstances—what to do and not to do. Yet some officers still did it, because apparently the communications did not get through. We are not just talking about small things; that has happened with really big issues that were

causing Police Scotland a lot of trouble. That is what we are asking about.

One issue that was raised by officers' representatives was that, because so much comes through in emails and there is such a plethora of information, serious and important communications get lost among it. How are you addressing that? Busy officers do not have time to read every email that comes through from headquarters.

Chief Constable Gormley: No, and I do not expect some issues to be dealt with by email from headquarters generally. We need to recognise where we have come from and where we need to get to. The amount of work that has been required in the first three years—the earliest stages of Police Scotland—to bring together an enormous range of approaches, policy, procedure—

The Convener: We have lived that.

Chief Constable Gormley: I am sure that you have.

The Convener: We have lived that with Police Scotland for the past three years. I am just saying that those are the big issues around communication that my colleague is asking about.

Margaret Mitchell: I can give an example. It was Police Scotland's criminal justice division's policy to issue on-the-spot warnings for the possession of cannabis rather than reporting it to the Crown Office and Procurator Fiscal Service. Obviously, that was before you were in Police Scotland, Chief Constable Gormley. When I visited local commanders, it was clear that they were not aware of the policy. Worse still, they were just embarking on an operation to crack down on drugs. Clearly there was a huge disconnect.

Chief Constable Gormley: I am not for one moment challenging that as a description of what happened, but I simply do not know. However, that is not where we need to be.

One issue that is significant for us going forward is understanding how national policy decisions impact locally. As I have gone around the country talking to staff, officers and local authority civic leaders, one of the issues that is coming out is not specifically about training but about asking us to hear local views about the impact of national decisions—

Margaret Mitchell: Can I stop you there? The example that I gave was about a decision by Police Scotland's criminal justice division. When I queried some of the senior management about it, they said that the real motivation for the policy was that, because the Crown Office and Procurator Fiscal Service was so overwhelmed, it was faster to give warnings.

Chief Constable Gormley: I genuinely cannot comment on that. The point that I was making, perhaps clumsily, was in response to the issue that the convener raised about communication of national decisions on things such as stop and search, the arming of officers and how they are deployed. The issue is our ability to understand how a decision lands locally and its impact on some very diverse communities, because what people in Glasgow and Edinburgh regard as normal and acceptable is very different from what people in the Highlands and Islands regard as normal. That has been made very clear to me.

The Convener: The decisions that I am talking about were national, not local.

Chief Constable Gormley: That is my point. The arming of officers in Scotland was a national decision.

The Convener: The arming was not the issue; it was the being in public places. There was a big stooshie, which I am sure that you are aware of, and then Police Scotland said that the issue had been remedied and everybody knew where they were, but they did not. That was a big issue that all officers should have been aware of, as was the issue about stop and search and the so-called voluntary stop and search, but it continued to happen despite a couple of the members of this committee having a good go at the issue for a long time.

It is to do with communication—we are back to that.

Chief Constable Gormley: I think that we are violently agreeing.

The Convener: It is nothing to do with local issues, such as whether—

Chief Constable Gormley: The broader point around communication is in the point that I am attempting to make but am not making very well. When we make national decisions on national functions, we need to understand how they will affect local communities that have very different policing demands. The culture, practice and relevance of the policing approach in Glasgow will be very different from that in the Highlands and Islands—

The Convener: Please, chief constable, let me stop you there. I perfectly understand the difference between a rammy in the Grassmarket and a rammy in a wee village and what people would expect in the Grassmarket at 2 o'clock on a Sunday morning after the clubs get out. That is not what we are talking about.

To go back to the issue of armed police being in the supermarket or wherever else in public and the issue of stop and search, those policies and the way that they were used had to be sorted,

wherever the officers were. The policies did not need to be tweaked for different areas, but the information did not get through to certain officers on the beat. That is the bit about communicating. We understand the stuff about different policing cultures in different areas.

Chief Constable Gormley: Okay.

The Convener: Is that sorted now? If we get a big decision, is the process sorted so that the same thing will not happen again?

Chief Constable Gormley: I would be foolish to sit here and give a 100 per cent guarantee. In an organisation with 23,000 people, and given the complexity of what we deal with, will we make mistakes in the future? I suspect that we probably will.

Is our ambition to ensure, when we introduce new pieces of legislation or significant changes in working practice, that we have a thought-through process, that we identify a lead and the right means of communication and that staff have the right guidance and training and understand what they are going to do? Yes, we have a policy and process in relation to that.

Margaret Mitchell: I hope that the examples that we have given have been helpful.

Chief Constable Gormley: They have.

Margaret Mitchell: I know that you will go back to look at them and see where communication can be improved.

The Convener: Frankly, some of the problems in Police Scotland were of the police's own making. That is historical now, but that is what we are asking to be addressed so that it does not happen again.

Elaine Murray (Dumfriesshire) (Lab): I welcome the new chief constable. He maybe wishes by now that he had not taken the job.

Chief Constable Gormley: I am very pleased that I did.

The Convener: He knows that we are running out of time. We only have a few weeks: he is safe.

Elaine Murray: Her Majesty's inspectorate of constabulary in Scotland is conducting an inquiry into the breach of the "Acquisition and Disclosure of Communications Data Code of Practice 2015". We have been told that it was due to an oversight that the changes in the code did not get to the single point of contact in the counter-corruption unit. Have you been apprised as to why that was? Are you confident that there are now procedures in place to ensure that that type of oversight in relation to that specific type of information—or indeed other important decisions—will not happen again?

Chief Constable Gormley: Yes, I am. I am being briefed on the circumstances around that breach. You have heard evidence from Assistant Chief Constable Nicolson and, before him, Deputy Chief Constable Richardson. We accept absolutely that mistakes and oversights were made. On that specific set of issues, there is an action plan. We have responded to recommendations emanating from the learning from that oversight, and I am confident that that set of issues will not be repeated. HMICS will report back in the spring. Clearly, we will reflect very carefully on the recommendations and I will take them forward.

Elaine Murray: We were advised that one officer had raised concerns about the application but somehow their concerns were not taken forward. Again, can we be confident that, if in future an officer raises concerns about a particular issue, the channels of communication are such that their concerns will be taken seriously?

Chief Constable Gormley: My ambition is exactly that. We have two processes in train at the moment. One is the HMICS review that will look at the circumstances of the case and come back with observations and recommendations that we as an organisation will take seriously and act on.

We have an investigatory powers tribunal, which is a quasi-judicial process. Again, some judgments will come out of that. At the end of that process, I do not rule anything in or out in terms of what we will subsequently need to do as an organisation.

Actions have been taken, and a robust action plan has been commented on favourably by the Interception of Communications Commissioner's Office regarding our response to that set of circumstances.

We have the broader review by HMICS into the counter-corruption unit and the circumstances that led to that apparent breakdown of communication, misinterpretation and mistakes. We have an IPT, which will come to a conclusion. At the end of that, there will be lessons to be learned on an individual and an organisational basis. You have my absolute commitment that we will respond to those.

Elaine Murray: As the convener is reminding me, we were advised that the conduct had been reckless.

Chief Constable Gormley: That was the determination by the IPT.

The Convener: It was not just mistakes; it was reckless.

Chief Constable Gormley: I do not dispute for one moment what IOCCO said.

Elaine Murray: We will not survive much longer, but a future Justice Committee will be interested in returning to those issues once the reports have been published.

The Scottish Police Federation has raised with the committee concerns about aspects of the counter-corruption unit; in particular, it is aware of members being ordered or invited to interviews that have a status that appears to sit outside criminal procedure or misconduct investigations. Has the Scottish Police Federation raised any of those concerns directly, either with you as chief constable or with the SPA?

Andrew Flanagan: Yes. The SPF has raised those concerns with us and that is a focal point of the HMICS investigation and review.

To clarify things in relation to your earlier question, HMICS is looking at the broader aspects of counter-corruption, rather than the issues that IOCCO raised; looking at those is IOCCO's role. There is a linkage between the two, in relation to the overall operation of the unit and how those things may have come up, so there may be lessons to be learned around the IOCCO issues to come out of the HMICS report. However, its work is more focused on the issues that the SPF has raised with us.

Elaine Murray: That is interesting, because we get the impression that the counter-corruption unit is a standalone policing unit that is developing its own particular culture.

The Convener: A wee bit of a law unto itself, in fact.

Elaine Murray: Again, I know that you will not be able to comment fully until HMICS has reported.

Andrew Flanagan: Not until we see the report. The fieldwork is on-going, and until we see that report we cannot comment on what it will—

The Convener: No, but surely you are not doing nothing while you are waiting for the report. The report is important, but I hope that Police Scotland and the SPA are doing something just now about the CCU.

Andrew Flanagan: I leave the chief constable to comment on the actions that are taking place just now.

Chief Constable Gormley: The review from HMICS is critically important to us understanding whether those perceptions and observations from the SPF have a basis. I am not saying whether they do or they do not, but I need to understand how HMICS sees the issue. The federation has not raised that matter directly with me yet; I am sure that it will, subsequent to this committee meeting.

The Convener: So you are waiting for the report and then you will do something. I am just trying to understand.

Chief Constable Gormley: A range of issues have been raised—

The Convener: I know they have.

Chief Constable Gormley: I am just trying to help the committee; forgive me. A range of issues have been raised by IOCCO—a broader view about the proportionality of how counter-corruption units operate, nationally and locally. The review will give us the basis to understand what is actually going on, and I will respond to that review. That is what is happening. HMICS is looking at the culture, practice and approach of the counter-corruption unit. If that independent review raises issues that support the SPF's description, we will act.

Elaine Murray: Once you have seen the review, what is your aspirational timeline, if you like, for the actions that you will take thereafter?

Chief Constable Gormley: It depends what the recommendations are, clearly. If HMICS delivers the review in the spring—I have no reason to suggest that it will not—they could range from the need for a fundamental rethink of the approach to the view that the CCU is in reasonable shape. Between those two parameters lies a set of decisions. If a fundamental shift in our approach or our response to those issues is required, that will take longer. Until we see the recommendations, it is very difficult to understand what the response needs to look like, but I will move as quickly as I can.

The Convener: Will you involve the various professional bodies as well—the likes of the SPF and so on—and engage with them once the review has been published?

Chief Constable Gormley: Yes. Again, I need to understand. It is very difficult to speculate—

The Convener: Absolutely, but in principle you would engage with—

Chief Constable Gormley: My in-principle position is always to engage with staff associations and the unions. That is my rebuttable presumption, because that is good leadership and good management. If we do not have the SPF, staff associations and other representative bodies helping us to shape and make the right decisions about issues around communication, they are unlikely to be the best decisions. Subject to the view that there may be some technical issues that are outwith the federation purview, what I want is for the federation, staff associations and unions to have confidence in our response. That is the position that I want to get to, and that will, of course, involve consulting them.

The Convener: I recollect that the SPF took the view that the counter-corruption unit was a law unto itself—it operated out on a limb and nobody really knew what it was doing. That, putting it in blunt terms, was the SPF's position.

Chief Constable Gormley: I do not agree with that characterisation.

The Convener: No, but it was the SPF's position. Mr Flanagan, what is the role of the SPA in all this? What is your remit when the report comes out? Do you have one?

Andrew Flanagan: Yes. The SPA commissioned HMICS to do the review, and the report will come to us. We will be in a position to work on the recommendations, with an action plan on Police Scotland to address them within an appropriate timescale. We have a central role regarding the outcome of the review.

10:45

The Convener: Does someone else want to come in? John, you are down on my list on this subject.

John Finnie (Highlands and Islands) (Ind): I was hoping so.

The Convener: Off you go—the floor is yours.

John Finnie: Thank you, convener. Good morning, gentlemen. First, well done on the review, chief constable. It is welcome that systems are being looked at.

I have a question that is first and foremost for the Police Authority. We know that the systems changed on 2 March 2015. Your report was published in June 2015. Presumably that report was about the previous system.

Andrew Flanagan: I will leave Mr Foley to answer that, as I was not there at the time.

John Foley: No—that was actually a report on the current system. The processes had changed on 2 March, and the review was carried out after that. It was on the new system.

John Finnie: There cannot have been much time to gain an understanding of the experience of the new system with that turnaround.

John Foley: Some of it was in relation to the operation of the new system, and some of it was a review of the documentation that had been produced. The new documentation also came into effect on 2 March 2015. A review was carried out in relation to that.

John Finnie: The report concluded that the increased effectiveness of the Police Scotland and SPA whistleblowing process within the wider CCU role should be significant for increasing awareness among officers and staff. So, the role of the CCU is key to the progress of whistleblowing, or officers having confidence, as far as the authority is concerned.

John Foley: Yes.

John Finnie: Chief constable, I know that you are inheriting a situation, but people might be surprised that, while the gentleman acting prior to your appointment, who is not also the disciplinary authority, is aware of the serious accusations made by the Scottish Police Federation, you will await the outcome of a third party's report before acting. Do you know whether Mr Richardson initiated anything on the basis of the comments that were made by the federation that the CCU had

"scant regard for the rules of fairness or proportionality",

which, after all, the CCU is supposed to be the custodian of ensuring?

Chief Constable Gormley: I do not specifically know the answer to that question. What I would say in response to the question that I think you are asking me—forgive me if I am getting this wrong—is that we need to review and understand whether there is anything in the allegations that are being made. "Allegation" is a strong word—I do not mean it in that sense. The question is whether there is anything in the issues that the federation is raising with us.

The way to address that is to get an independent review of the operation of the counter-corruption unit. That is what HMICS is doing, and that is what I need to understand as a response. That is the appropriate body to provide us with the information to understand whether we need to amend our approach, and in what way.

John Finnie: I am commending the role of an independent body. Do you see any line management issues connected with that, pending the publication of a report? That might mean that malpractice has continued for several months prior to the publication of the report.

Chief Constable Gormley: I have seen no evidence or information to suggest to me that malpractice is occurring. I will take a view when I get the report on whether there are any line management issues.

John Finnie: Did Police Scotland have a say on the terms of reference of the inspectorate's report?

Chief Constable Gormley: Yes. In my first week here I was provided with a copy of the terms of reference by Mr Penman. I had no comment to make. They looked fit for purpose from my point of view.

John Finnie: Mr Flanagan, is it unlikely that the authority will revisit the situation? My colleague

Elaine Murray spoke about a high-profile instance when a senior officer expressed concerns. That was known to chief officers in Police Scotland. The Scottish Police Authority would not be visiting that matter again prior to the publication of the report, would it?

Andrew Flanagan: If a specific complaint was raised with us, yes we would. However, at this stage, I am not aware of such a complaint.

John Finnie: The challenge for elected representatives is that we have regular contact with police officers who are constituents. They know—quite appropriately in many instances—that action is taken on fairly flimsy evidence.

When any report, allegation or complaint is made—if those may reasonably be inferred as the terms—a report must go to the fiscal. Here, however, we have a very high-profile public hearing, where serious accusations are made, yet we are to understand that we must wait several months before the people to whom the public might look, namely the Police Authority and the chief officer, will act on them.

Chief Constable Gormley: If there is a specific allegation that the federation wants to make to me on behalf of a member, I will act on it—of course I will. I will take a view, depending on the nature of the complaint and who is being complained about, as to whether it is to be appropriately investigated by our professional standards department, the CCU, the Police Investigations and Review Commissioner or an external third party. There are a range of responses.

As I sit here, I have not had that formal complaint from the federation regarding a specific set of allegations. If it has those concerns, I ask it to come to me and raise them with me.

On the more general issue, as described by committee members, of an organisation within an organisation setting its own rules, I have seen nothing to support that broad characterisation. HMICS will take a view on that issue regarding the operating context and the way in which the CCU discharges its duty.

If the federation or members of the federation have specific complaints to make against officers of any rank in any part of the organisation, they need to make them to me, and I will deal with them.

John Finnie: In the long term, is the CCU the appropriate recipient of complaints from officers? What is the role connected with? Is it HR or your professional standards department, for instance?

Chief Constable Gormley: There are a range of issues in organisational life, including cases of people who are unhappy or who do not understand what they are being asked to do and issues of grievance, with tensions between line managers and staff that do not fall under conduct or disciplinary matters. It depends where things are on that spectrum of organisational issues.

There is good line management, and there are grievance issues. There is then whistleblowing, which is more about concerns relating not to an individual's treatment but to a practice, custom or response that is regarded by the person raising it not to be in the public interest. There is then conduct in terms of professional standards, through to high-end corruption. Let us be clear: there is not a police service in the UK that does not need to have a very robust response to corruption. It is a live issue in every law enforcement agency.

We need a proportionate response. We should not be launching CCU investigations against inappropriate pieces of behaviour any more than we should be attempting to deal with serious corruption through an informal line management conversation. It is about understanding the nature of the complaint, the position of the complainant regarding their potential vulnerability within the organisation and what they need to be supportively wrapped round them as they go through a process, be it a grievance, a conduct matter or a corruption allegation.

I am sorry if I have answered your question in a slightly rambling way, but it is absolutely determined by the nature of the allegation.

John Finnie: People will understand that clear procedures would apply in criminal matters and in misconduct matters. The issue is to do with matters outwith those circumstances. Would you confirm that a police officer who is the subject of the attention of the CCU can only be a witness, a suspect or an accused, and that they cannot have any other status?

Chief Constable Gormley: Instinctively, I would say that that sounds right. A witness, a suspect, an accused or a complainant, actually. Sorry—I am just trying to think it through.

John Finnie: Yes, indeed. Thank you very much.

The Convener: I want to follow up on the business of cases that are referred to the Crown. This may be anecdotal, but passing through my inbox are cases where officers have been reported to the Crown and have waited a considerable period of time to find out whether they are going to be prosecuted. Those officers are suspended in no-man's-land: there is a cloud hanging over them, and they are just given paper jobs and so on to do at work. I would like to know the figures on that, the length of time involved and how many instances proceed to a criminal prosecution. I am simply recounting what I have been told—I know

no more than this—but there is sometimes a whiff of procedures being used in a vengeful way by somebody whose face does not fit. Matters might be referred to the Crown and then lives fall apart, yet nothing happens at the end.

I put that to you because you are probably aware of it already. Let us take the 29 cases that were mentioned earlier. I would like to know the statistics on how long it took the Crown to decide whether to prosecute in those cases and how many prosecutions followed.

Chief Constable Gormley: I do not have those figures with me, but I am very happy to provide them to the committee. I share your concern about the impact—on officers, on the public purse and on the service that we should provide to the public—of a number of officers being on restricted duties or suspended for long periods. Throughout my career, I have seen how damaging that can be for officers, some of whom have not been found to have committed the offences that they were accused of. There is a range of issues here, and I will happily get those figures for you.

The Convener: There is also the underlying issue, which is that—not always, but sometimes—it is a form of revenge.

Chief Constable Gormley: I would be very concerned about that. That is a serious matter—

The Convener: It is indeed.

Chief Constable Gormley: I will take it seriously.

There is a broad issue about public confidence in how effectively the police deal with their own when complaints are made. I have seen it from that perspective, which is where there is a complete absence—well, not a complete absence, but there can be a lack of confidence on the part of the public that allegations of misbehaviour by police officers, either internally or externally, are dealt with robustly and appropriately. There is a balance to be struck between public confidence and treating staff fairly.

The Convener: I appreciate those points about balance and perception.

Margaret McDougall (West Scotland) (Lab): My question is on the general issue of communication within the police service.

The report on the staff survey came out in September last year. In the survey, issues were raised about internal engagement, including the heavy reliance on cascading information by email and through the intranet, when personal methods, such as through line management or team and shift briefings, were preferred. What has been done to address that? Have things changed since September?

Chief Constable Gormley: Things are in the process of changing, and I recognise the issues that came out of the staff survey. Since the survey was delivered to us—and I take no responsibility for this, as it is the responsibility of those who went before me—there have been 43 chief officer-led staff engagement exercises to try to understand the issues that sit beneath the survey. That represents a significant effort, on behalf of the organisation, to follow up on and really understand what sits behind the high-level headlines.

As I embed myself in Police Scotland, as part of my personal learning, I have carried out seven staff engagement exercises to understand how it feels from the point of view of staff and what we need to do. I have found that the staff are hugely motivated and passionate, and that they are delivering a brilliant service for the people of Scotland, both day and night. It is enormously humbling to see the quality of the staff in the organisation and those that are joining the organisation. They are doing fantastic work.

Four broad themes have come out of those workshops. The first theme is improving leadership across the whole organisation. When you bring that number of organisations together at that speed, and with that level of grit, an overreliance on email is probably understandable to a degree. I think that we are now in the position where we need to understand what good leadership is. That is about listening to and talking to people, and recognising when information is best provided through email. Transactionally, that will have to be the way in a national organisation in which the visibility of senior leaders will always be a challenge.

We need to support leadership at every level of the organisation, so that our leaders are confident and are provided with the sort of information that they need in order to brief their staff. We also need to have a conduit back, so that we can hear and understand what staff are saying.

The second issue is about engaging with and valuing one another. For me, that touches on our approach to performance. How do we spot people who are doing things right? What are our reward and recognition processes? How do we celebrate great work? What are the sorts of things that we say are important for staff to enable them to deliver on their sense of vocation and professional judgment?

The third piece concerns our voice. It is about the staff being heard, and it probably goes back to where we started. At its most serious, it is about staff being able to escalate—with confidence—issues around conscience or conduct that are causing them concern. More importantly, it is about how we make sure that they are involved in

designing the service. What I have seen are staff who are massively committed.

We are now at the next stage of the evolution of Police Scotland. It has landed and now we need to transform it. We need to understand, within the limits of what can be done in a 23,000-person organisation, how staff can contribute, because they know the answers to the problems, particularly in local communities. From Stirling, I will not know the answers.

11:00

The fourth element is what the staff have described as exciting experience: this is a brilliant job to be in and it provides enormous opportunities to make a difference to people's lives in the community when it really matters. It is about enabling staff to deliver on that set of excitements.

We are now at the stage of the process where we have gone through 43 workshops, I have done some triangulation personally since I have been in post and we have four broad areas of work. We keep coming back to action plans, but are going to develop approaches around all those areas, which will move Police Scotland on from the staff survey.

It is actually about being a bit humane, having a degree of humility, being prepared to listen and recognising that we may not have got it completely right. It is also about enabling staff to be prepared to make mistakes, within parameters, and encouraging them to innovate and deliver locally in a way that makes best sense to them and their people.

We need to move on from being an organisation that is heavily reliant on compliance through to being one in which the ambition is around discretionary effort, in which people know the values of the organisation and are able to respond and deliver.

Margaret McDougall: Would you say that there has been a reduction in the number of emails that are sent to officers since the survey was done?

The Convener: After all that! [*Laughter*.] Do not bamboozle us—she wants to know about emails.

Chief Constable Gormley: The short answer is that I do not know. I would not dream of trying to bamboozle you. I am too old and hoary to do that.

The simple answer is that I do not know about the number of emails.

The Convener: That was wonderful!

Margaret McDougall: There is a preference for the one-to-one briefings.

Chief Constable Gormley: I do not have a preference for email.

Margaret McDougall: The preference is for briefings.

Chief Constable Gormley: Yes—absolutely. One of the things that we are doing is strengthening our internal communications department. We need to provide staff supervisors and leaders with good briefing material. There should be a set of core messages or issues that we are able to distil out each month so we can say, in accessible, plain English, "These are the issues that your individual guys and girls need to know about, and actually we need to hear back from you what the issues are."

It is very easy for me to come in and do this, but the visibility of the chief officer team is important, as is how we develop an on-going programme of staff engagement, so that, instead of responding on the back of an unhelpful or difficult survey, this becomes something that is to do with how we lead the organisation through our own visibility.

We are a relatively small chief officer team in a 23,000-person organisation. Everybody has a responsibility to step forward into a leadership role from sergeants up, and the higher up someone is, the bigger the responsibility. We need to move away from a transactional email-driven organisation, if that is where we are, to one where what I have just described—in an attempt to bamboozle you, convener—is where I wish us to be.

The Convener: It was just delicious. It was a delicious moment—admit it. After all that, you get asked how many emails are sent.

Chief Constable Gormley: I admired the way the ball was crossed, and how you headed it home, convener.

The Convener: I will never forget that one, Margaret. That is going down in history.

I am afraid that I can take only one more question—I am sorry—and I have another committee member waiting. I did say that this is the one and only chance for members to ask questions and we have a stage 2 straight after this. The cabinet secretary is waiting.

Roderick Campbell: I wanted to follow through briefly on—

The Convener: It has to be brief.

Roderick Campbell: It is brief, convener. My question follows on from some of the questions that Margaret McDougall has asked about the staff survey. We have heard a lot about the steps that you have been taking to improve internal communication. In the staff survey, under the heading of commitment, 33 per cent of all respondents indicated an intention to leave for a whole variety of reasons. To be fair, when they

were asked about the factors that were adversely affecting their commitment to the organisation, 49 per cent said that it was about changes to pensions.

Can you remind me when the next staff survey will be undertaken? Is it your view at the present time, after two months in the job, that morale is much better now than it was in September?

The Convener: Right. That was a long question, but please give a short answer.

Chief Constable Gormley: It would be a very brave chief constable who sat here two months into the job and said that everything is fixed and morale is great. All I can give you is some anecdotes, just as you have provided anecdotes to me. As I go out and speak to staff, I do not see the workforce that is reflected in that survey—I see passionate and committed individuals who want to make a difference.

On the repetition of the survey—

Andrew Flanagan: Can I deal with that specific part of the question? When we sent out the first survey we said that we would repeat it in two years' time, but that we would take a temperature check within 12 months. The temperature check is a more focused, narrow testing of opinions around the key issues that came out of the first survey. That will take place through the late summer of this year. The intention is that we will have completed some of the actions early enough so that when the results of the temperature check come back we are beginning to see some reaction to the things that have been done to address the issues.

The Convener: I am sorry—I have to stop you. We have overrun. I thank you for attending.

Neil Findlay (Lothian) (Lab): Can I ask a question?

The Convener: I apologise, Mr Findlay, but I did warn that the session was very—

Neil Findlay: On a point of order—

The Convener: There are no points of order in committee. I suspend the meeting for three minutes.

11:05

Meeting suspended.

11:11

On resuming—

Abusive Behaviour and Sexual Harm (Scotland) Bill: Stage 2

The Convener: Item 2 is the Abusive Behaviour and Sexual Harm (Scotland) Bill. I will try to ensure that we get through all the amendments today, so speeches should be short and sharp. Members should have copies of the bill, the marshalled list and the groupings of amendments.

I welcome to the meeting the Cabinet Secretary for Justice, Michael Matheson, and his officials. I do not need to tell members that the officials are in a supporting capacity and cannot speak during the proceedings. They know that and you know that.

Section 1—Aggravation of offence where abuse of partner or ex-partner

The Convener: Amendment 69, in the name of Margaret Mitchell, is in a group on its own.

Margaret Mitchell: Amendment 69, which was lodged on behalf of the Law Society of Scotland, would restrict the test for the domestic abuse aggravation to intent rather than intent or recklessness to cause a partner or ex-partner to suffer physical or psychological harm. It was lodged as a probing amendment to generate further discussion about the inclusion of recklessness.

In its submission to the Justice Committee prior to stage 1, the Law Society expressed concern about the inclusion of the aggravation provision, which it stated would in practice be "difficult to prove" because of the requirement to establish intent or recklessness. It thought that that in turn would risk having the perverse effect of limiting the application of the domestic abuse aggravation, which is supposed to help to ensure that such acts are treated by the courts with the seriousness that they deserve.

Furthermore, it was established during stage 1 scrutiny that there is no requirement for a past pattern of abusive behaviour to be set out in the charge. In other words, it would apply to a first offence.

Although I believe that the intent test is robust and objective, I have concerns that the adoption of the recklessness test for a first offence, as opposed to a second offence or subsequent offences where a pattern of behaviour has been established, is potentially more subjective. I am less concerned about the technicalities of the amendment, which may, I readily accept, be faulty. The point of lodging the amendment and raising the matter is purely to generate more discussion

about it and to hear the cabinet secretary's comments on it, particularly on the first offence and recklessness issues.

I move amendment 69.

Elaine Murray: I oppose amendment 69. I think that it would provide abusers with a defence that they did not mean to do what they did. I listened to what the Law Society had to say in its evidence to us, but I am afraid that I do not accept it. It would be dangerous to remove the recklessness part, because that would provide that defence to perpetrators.

Roderick Campbell: I concur with Elaine Murray's views about the wideness of the provision. From looking back at its evidence, I think that the Law Society seemed to be instinctively of the view that domestic abuse cases are currently given a lot of special attention in the courts and that adding an aggravation would somehow be a step too far. I am not sure in many respects that I understand its position beyond that, and I would be grateful for further comment from the cabinet secretary on the issue of recklessness.

11:15

The Convener: And, on cue, cabinet secretary.

The Cabinet Secretary for Justice (Michael Matheson): Amendment 69 relates to the domestic abuse aggravator in section 1.

The bill provides that, where an offence is committed against an offender's partner or ex-partner, it is sufficient to prove that the accused was reckless about whether, in committing the offence, they would cause their partner or ex-partner physical or psychological harm in order for the aggravator to operate. Amendment 69 would restrict the circumstances in which the aggravator would operate so that it would be only offences that involved abuse of a person's partner or ex-partner where it was proven that the accused intended, in committing the offence, to cause their partner or ex-partner to suffer physical or psychological harm.

We have taken the approach in the bill because we consider that where, for example, a person commits a sexual offence against their partner or ex-partner, or assaults them, it should not be open to them to argue that the aggravation should not apply because it was not their intent to cause their partner physical or psychological harm. We consider it appropriate that in circumstances where it is a foreseeable consequence of someone's actions that their partner or ex-partner was going to suffer physical or psychological harm, the aggravation should operate. That means that recklessness should be included.

We do not consider that it should be open to offenders to argue that the aggravation does not apply because, though they were reckless about whether, in committing an offence against their partner, they might cause them physical or psychological harm, it cannot be proven that that was their intention in committing the offence. Therefore, we would invite members to oppose amendment 69.

Margaret Mitchell: It is clear that amendment 69 is a probing amendment. What the cabinet secretary has not addressed in his comments is the issue of recklessness when it is a first offence. I would ask him at least to consider that at stage 3. I would have no difficulty with recklessness for a second offence, with a pattern established. However, it is worth teasing out the matter with the intention of making the legislation as robust as possible and giving the best protection to those people who suffer from domestic abuse.

Amendment 69, by agreement, withdrawn.

Section 1 agreed to.

Section 2—Disclosing, or threatening to disclose, an intimate photograph or film

The Convener: Amendment 70, in the name of Margaret McDougall, is grouped with amendments 72 to 82.

Margaret McDougall: The aim of these amendments is to expand the disclosure section in the bill. The bill only covers the disclosure of photographs and film. The amendments, which are supported by Scottish Women's Aid, seek to broaden that to include a photograph or film of an intimate situation, sound recordings containing intimate content or an intimate written communication, which is the purpose of amendment 73.

If we cover disclosure only of photograph or film, there will be a loophole in the bill. When it comes to sharing, for example, screenshots of intimate text-based conversations or the sharing of intimate content in the form of texts or sound on the internet or social media, as Scottish Women's Aid stated, by specifying photographs and films the bill excludes the sharing of private and intimate written and audio communications. The exposure of the threat of sharing those has the same outcome—it is designed to humiliate and control the victim. Sometimes, text and images are sent at the same time. Will we criminalise the image but not the abusive and threatening text? For example, the sharing of an intimate image on Facebook without consent would be a prosecutable offence under the bill. However, if someone were to share an intimate conversation or a screenshot of an intimate conversation, that would not be covered. I would argue that the

sharing of that type of content could have the same effect as sharing intimate images without consent; it could cause just as much fear, alarm or distress to the victim and arguably would be designed to do so.

Amendment 70 is a technical amendment that updates the bill to reflect the expansion of the definition. In effect, amendment 70 removes the text

"A discloses or threatens to disclose, a photograph or film which shows, or appears to show, another person ('B') in an intimate situation"

and replaces it with a reference to

"an item",

which is defined in the subsection that amendment 73 introduces,

"that involves another person ... in a way mentioned in that subsection".

Amendment 72 and amendments 74 to 79 are all technical amendments that replace references to "photograph or film" throughout the bill to "item". What we mean by "item" is defined in amendment 73.

Amendment 80 is a further technical amendment that adds a reference to the new section 2(1A)(a) that was created by amendment 73. Amendment 81 is again a technical amendment adding further reference to the new subsection that is created by amendment 73.

Finally, amendment 82 clarifies what we mean by "intimate" conversations, messages or communications. They need to include references to an act that is considered sexual or content that, taken as a whole, is considered to be of a sexual nature. Further to that, the content must not have been expected to be distributed or there was an understanding that it would be kept private.

These amendments are supported by Scottish Women's Aid and Victim Support Scotland.

Police Scotland also gave evidence to the committee in support of including written and audio communication of this type in the bill. It said that the offence should take

"cognisance of all forms of communication and distribution."

Although I understand that the sending of abusive messages is a criminal offence, the same does not always apply to the sharing of intimate material. These amendments ensure that the sharing of any intimate material without permission is covered under one bill. That cuts down on repetition and leads to a more streamlined and easier system. It also means that all offences are dealt with in the same manner.

The current offence under section 127 of the Communications Act 2003 is not an appropriate offence for dealing with this behaviour as, first, it sets a very high threshold of the content of the message or other matter being

"grossly offensive or of an indecent, obscene or menacing character".

Unlike the proposed offence in the Abusive Behaviour and Sexual Harm (Scotland) Bill, the offence under section 127 of the 2003 act can be tried only under summary procedure, not solemn procedure. That limits the overall custodial and financial penalties. The proposals allow for offences under this section to be tried under either summary or solemn procedure.

Further, the maximum term of imprisonment under the summary procedure in section 127 is limited to six months, as opposed to the 12 months in the bill, meaning that women or men who are abused by having private written and audio communications shared without their consent would have a lesser protection, and perpetrators may well tailor their behaviour to accommodate that gap in the law.

With advances in technology making it easier to distribute information with or without consent, it is vital that the law keeps up to ensure that those who wish to cause harm are dealt with appropriately and consistently by the justice system.

I ask the committee and the cabinet secretary to support my amendments.

I move amendment 70.

John Finnie: I have to say that I have changed my position on this matter. The intention of this section of the bill is very clear. Margaret McDougall talked about those with criminal intent tailoring their conduct. I think that the term "displacement" might be more appropriate. I am concerned that the bill is not future proofed. I think that the support of Women's Aid is important, and I think that the comments from the police are also important. For all those reasons, I support the expansion of this disclosure section of the bill, and all the other amendments that go with it.

Roderick Campbell: I recognise that there are different opinions from various groups about whether the section should be extended. I take on board the point that Margaret McDougall made about section 127 of the 2003 act, but it still provides a punishment. Also, we should all bear in mind section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, which criminalises behaviour that causes fear and alarm. However, as Professor Chalmers said, it does not extend as far as distress.

We should not forget that we have alternative ways to deal with these issues. I am still on the side of academics such as Professor McGlyn who

do not recommend that the law should cover text messages. We included a big section in our report about unintended consequences, and I think that those issues are still relevant. For the moment, I oppose the amendment.

Alison McInnes (North East Scotland) (LD): I will not say very much, because I do not have much of a voice. I suggest that we proceed cautiously. I agree with what Roddy Campbell said, and I do not support this group of amendments.

The Convener: Some people will wish that I would get that affliction occasionally. [*Laughter*.] The cabinet secretary is smiling in agreement at that comment, which is not a good thing to do.

Michael Matheson: Amendments 70 and 72 to 82 would expand the scope of the intimate images offence at section 2 to cover intimate sound recordings and written communications.

As I set out in the Scottish Government's response to the committee's stage 1 report, we took a decision to restrict the offence to the sharing of intimate images because almost all the cases that we are aware of have involved the sharing of images. Unfortunately, we are all too aware that there are far too many websites set up specifically to enable people to post intimate photographs or films of their partners or ex-partners. I am not aware of similar websites on which people post voice messages or emails written by or to their partner or ex-partner.

The sharing of images that may enable a complete stranger to identify the victim is, in our view, a betrayal of trust and a breach of privacy, which is especially likely to cause distress. That is, of course, part of the justification for the new offence.

It is worth remembering that it will remain possible for prosecutors to use existing laws in relation to the sharing of written or recorded material—in appropriate cases—by using, for example, the Communications Act 2003 offence, or the offence of threatening or abusive behaviour.

The committee's stage 1 report noted that a majority of the committee support restricting the scope of the offence to photographs and films, and that the committee is mindful of the risk of unintended consequences if the bill takes too wide an approach in this area.

On the question of unintended consequences, I note that these amendments apply not only to intimate recordings—written or spoken by the victim—but also those directed to or left for the victim. A perverse effect of that is that a person could face criminal liability for publishing or disclosing a communication that they themselves had written, or a voicemail message that they had left.

More generally, although it is hard to envisage circumstances in which someone would have legitimate reason to share intimate photographs or films of their partner or ex-partner with a third party without their consent, it is easier to imagine circumstances in which they might wish to share a written message or voice message with a friend. They may, for example, be confused or even fearful because of what they might consider to be disturbing sexual content in a message sent to them. They may wish to seek advice about what to do about that and, if these amendments are agreed to, they could be criminally liable in those circumstances. It may be helpful if I give the committee an example of how that could apply in our understanding of Margaret McDougall's amendments—how they could criminalise behaviour in the following circumstances.

11:30

Two 13-year-olds exchange messages about a celebrity. During the exchange, one of the teenagers indicates that they fancy the celebrity and would like to have sexual relations with them. The other teenager decides to share that text with other people in their class at school. In that situation, a communication has taken place that a reasonable person would consider to be sexual in nature and a reasonable person would expect to be kept private. The person who shared the text has committed a criminal offence if it can be shown that they were reckless about whether sharing the message would cause the other person fear, alarm or distress. However, although it would probably be embarrassing and distressing for the person whose message has been shared, our view is that the person who has shared the message should not be committing an offence. It is our understanding that Margaret McDougall's amendments would criminalise such behaviour.

As we said in our response to the committee's stage 1 report, we are happy to monitor the issue as the offence is implemented to assess whether we need to reconsider the scope of the offence in the future. However, we consider that the scope of the offence that is contained in the bill takes the right approach and therefore ask members not to support amendments 70 and 72 to 85.

Margaret McDougall: I understand that amendment 70 might introduce unintended consequences, but you have to show criminal intent to break the law and be charged with a crime. As the amendment has been written, it will still be in line with the aims of the bill and it should be included.

The cabinet secretary gave an example of two 13-year-olds. Tam Baillie, the children's commissioner, gave evidence that young people should not be exempt from the bill, because their age is taken into account; they would go before the children's panel and be dealt with in that way.

If the cabinet secretary is not inclined to accept these amendments, would he be happy to work with me to ensure that the expanded definition goes into the bill in some form? If it does not go into the bill, the system will be left open to abuse as too many loopholes exist that allow the law on the sharing of photographs and films to be circumvented. If an offence exists under the Communications Act 2003 and the act has been used without any unintended consequences, the Scottish offence is perfectly capable of being defined in similar terms to meet the lack of suitable penalties under the 2003 act. I am going to move—

The Convener: You have already moved it and, because you have asked the cabinet secretary to respond, I will allow him to do so.

Michael Matheson: The first thing that I should say is that recklessness is not the same as intent, and the test is less onerous in those cases.

I am always willing to have discussions with members, but I have set out the potential unintended consequences of taking the route of expanding the offence. I am not minded to do so, but I am more than happy to discuss that with the member if she chooses to do so prior to stage 3. However, that is not a commitment to look at extending the scope of the offence.

The Convener: It is decision time, Margaret.

Margaret McDougall: I note what the cabinet secretary says, but I will press amendment 70.

The Convener: The question is, that amendment 70 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against

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

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

Amendment 70 disagreed to.

The Convener: Amendment 71, in the name of Margaret Mitchell, is in a group on its own.

Margaret Mitchell: Section 2 will create a new offence of disclosing, or threatening to disclose, an intimate photograph or film. Under section 2(1), an offence will be committed if, among other things, person A

"intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress".

Amendment 71, which I have lodged on behalf of the Law Society of Scotland, is a probing amendment that seeks to limit the offence to being proved if person A had intended to cause fear, alarm or distress to person B, as opposed to having been reckless as to whether B would suffer fear, alarm or distress as a result of the disclosure of or threats to disclose an intimate photograph or film.

During stage 1, the Faculty of Advocates and the Law Society expressed concern about the inclusion of recklessness within the mens rea of this offence. The faculty provided the example of a person who comes home to find his flatmate asleep on the sofa wearing only his boxer shorts and takes a picture of the flatmate, finding it amusing. He has no intent to cause fear, alarm or distress, but is reckless in that regard. The faculty pointed out that in such a scenario, if the person showed the picture to someone else, he would, under the bill, be guilty of an offence, and the bill would offer no defence. Similarly, the Law Society said:

"There should be intention to cause harm or humiliation, rather than recklessness. The term 'recklessness' is too wide."—[*Official Report*, *Justice Committee*, 17 November 2015; c 39.]

I would therefore welcome the cabinet secretary's comments, especially in view of the comments that he has just made to Margaret McDougall about the unintended consequences of including an intimate voice recording or written communication.

I move amendment 71.

Elaine Murray: I oppose amendment 71, for many of the reasons why I opposed amendment 69. As I said during the stage 1 debate, I have no sympathy for the flatmate who takes a picture of his flatmate in his boxer shorts and posts it round the world. That is completely unacceptable, and I cannot see why there should be any sort of defence in such circumstances.

The Convener: Boxer shorts are featuring highly in today's conversation. I know we are going to have more of this.

Roderick Campbell: Perhaps I should refer to my interest—

The Convener: I thought that you were going to refer to your boxer shorts for a moment.

I beg your pardon—that was very silly of me.

Roderick Campbell: That would be too much information, convener. I was referring to my entry in the register of members' interests and my membership of the Faculty of Advocates.

I take a contrary view to that of Mr Meehan, and I remind people that Catherine Dyer, from the Crown Office and Procurator Fiscal Service, talked about the important test being the impact on the victim. People do not regard themselves as victims unless something has happened to them, and in the scenario that was described, it is hard to see that the person would regard himself as a victim.

The Convener: Thank you, and I apologise for my frivolity. I must take my pills.

Gil Paterson: I agree with Rod Campbell. The issue is what happens to the victim, rather than the perpetrator.

Michael Matheson: On amendment 71, which relates to the intimate images offence in section 2, the bill provides that where a person discloses or threatens to disclose an intimate image of another person, it is sufficient that they were reckless as to whether they would cause the person who was featured in the image fear, alarm or distress for the offence to be committed. Amendment 71 seeks to restrict the circumstances in which the offence could be committed to ones in which it was proven that the accused had intended to cause the person featured in the image to suffer fear, alarm or distress.

The reason why we have taken the approach that we have taken in the bill is that we consider that it should not be open to an accused to escape criminal liability because, although they might have been well aware that the disclosure of an intimate image would cause the person who appeared in the image to suffer fear, alarm or distress, that was not their intention. Instead, they might have disclosed the image for, say, financial gain, for a joke or to show off to friends.

We consider it appropriate that the offence is committed in circumstances in which it is a foreseeable consequence of someone's decision to disclose or threaten to disclose an intimate image that they will cause the person who appears in the image to suffer fear, alarm or distress. That is what the bill provides by having recklessness as well as intent as the mens rea of the offence. We do not consider that it should be open to offenders to argue that they are not guilty of the offence because, although they were reckless as to whether, in disclosing an intimate image, they might cause the person to suffer fear, alarm or distress, it cannot be proven that that was their intention.

I therefore invite members to oppose amendment 71.

Margaret Mitchell: Clearly, a balance has to be struck. I think that today's discussion has been useful in highlighting the issue and teasing out the intention behind the inclusion of recklessness with regard to not only the impact on the victim but the powerful warning that it sends to individuals posting images to always stop and think about the potential consequences, unintended or otherwise, of doing so.

With that in mind, I seek leave to withdraw amendment 71.

Amendment 71, by agreement, withdrawn.

Amendment 72 moved—[Margaret McDougall].

The Convener: The question is, that amendment 72 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against

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

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

Amendment 72 disagreed to.

Amendment 73 moved—[Margaret McDougall].

The Convener: The question is, that amendment 73 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against

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

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

Amendment 73 disagreed to.

Amendment 74 moved—[Margaret McDougall].

The Convener: The question is, that amendment 74 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against

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

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

Amendment 74 disagreed to.

The Convener: Perhaps I should remind the committee that these are technical amendments. The member may wish to consider that. I will just leave it at that.

Gil Paterson: Can I ask a question, convener?

The Convener: No. I have said that they are technical amendments. It is up to the member who is moving the amendments.

Gil Paterson: Are they competent?

The Convener: Of course they are competent, but the matter is for the member to consider.

Amendment 75 moved—[Margaret McDougall].

The Convener: The question is, that amendment 75 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against

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

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

Amendment 75 disagreed to.

Amendment 76 moved—[Margaret McDougall].

The Convener: The question is, that amendment 76 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against

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

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

Amendment 76 disagreed to.

Amendment 77 moved—[Margaret McDougall].

The Convener: The question is, that amendment 77 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against

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

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

Amendment 77 disagreed to.

Amendment 78 moved—[Margaret McDougall].

The Convener: The question is, that amendment 78 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against

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

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

Amendment 78 disagreed to.

Amendment 79 moved—[Margaret McDougall].

The Convener: The question is, that amendment 79 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against

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

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

Amendment 79 disagreed to.

Amendment 80 moved—[Margaret McDougall].

The Convener: The question is, that amendment 80 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against

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

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

Amendment 80 disagreed to.

The Convener: Amendment 4, in the name of Elaine Murray, is in a group on its own.

Elaine Murray: One of my colleagues was contacted on behalf of Professors Clare McGlynn and Erika Rackley, professors of law at Durham University and the University of Birmingham, in connection with this bill, to which they had submitted written evidence. They welcomed the proposal to introduce a new offence that criminalises the disclosure of an intimate photograph or film. Not only do such actions constitute a fundamental breach of privacy, dignity and sexual autonomy and a serious form of harassment and abuse, they are a form of cultural harm, impacting not only on the individuals involved but on society as a whole.

11:45

However, the professors also consider that the bill does not make appropriate provision for the distribution of private sexual images non-consensually taken in a public place, including but not limited to, so-called upskirting images. As currently drafted, and in response to concerns about images of streakers or naked ramblers, distribution of such images is excluded from the criminal offence. Although I recognise that the taking of such non-consensual images is prohibited under the Sexual Offences (Scotland) Act 2009, there is no provision to prevent their distribution. Of course, the images might be distributed by another individual.

The bill should cover the distribution of so-called upskirt or downblouse images and related images. Such images often end up on websites that are dedicated to the sharing of non-consensually taken private sexual photographs and/or pornographic websites. I understand that those sites are big business. In May 2015, one such site was exposed by the *Mail on Sunday,* and it was said to be receiving 70,000 views a day and was valued at £130 million.

The professors' recommendation is that the omission could be easily rectified by means of a defence of voluntary disclosure, which would prevent the criminalisation of images where the subject has voluntarily disclosed themselves, as in the case of a streaker. In addition, section 9(4B) of the Sexual Offences (Scotland) Act 2009 provides that an offence is committed where a person, A,

"records an image beneath B's clothing of B's genitals or buttocks (whether exposed or covered with underwear) ... in circumstances where the genitals, buttocks or underwear would not otherwise be visible".

However, the bill also includes breasts and, apparently, in addition to upskirting websites, there are also downblousing websites where pictures of women's breasts are exposed.

In order to cover the distribution of intimate photographs that are taken without consent in a

public place and to include the wider definition of an intimate situation, the bill should be amended. Amendment 4 is a small amendment that I believe would achieve that. If the wording, which has been suggested by the legislation team and modified by Professor Rackley, could be improved, I would be happy to work with the Government on amendments at stage 3. However, I hope that I can have the committee's agreement on the need for such an amendment—and I apologise for again having to discuss such unsavoury practices in public.

I move amendment 4.

Roderick Campbell: I understand where Elaine Murray is coming from, but my instinct is that, if we were going to deal with the issue, it would be by a further amendment to the voyeurism offence under the Sexual Offences (Scotland) Act 2009.

The Convener: There speaks an advocate for us. He refers us to other legislation, which is useful.

Michael Matheson: On amendment 4, which relates to one of the defences to the intimate images offence, the defence at section 2(5) currently operates so that, where the image or film that is shared has been taken in a public place with members of the public present, the accused will not be convicted. That is to avoid the situation where, for example, someone shares without consent a film or image of someone streaking at a sporting event and a criminal complaint is made to the police. In that situation, we do not think that a criminal offence should have been committed.

Amendment 4 seeks to restrict the defence to circumstances where the person in the film or image consented to being in that intimate situation. The effect of amendment 4 would be that the public place defence would be available only where the subject of the film or photograph consented to being in an intimate situation in a public place. That could be, for example, a person who deliberately chooses to streak at a sporting event or a person at a naturist resort. The defence will not be available where a person distributes an image showing, for example, a subject of a photograph or film who has been stripped against their will or sexually assaulted in a public place.

We understand and sympathise with the thinking that appears to lie behind amendment 4. We note that the defence would continue to apply where, for example, someone takes a photograph of a naked protestor in a public place. However, where someone had not consented to being in an intimate situation—for example, because they had been forcibly undressed in a public place—a person distributing the photograph or film could not avoid conviction simply because it was taken in a public place.

That said, we think that the exact wording of amendment 4 does not quite achieve what we consider to be the intended effect. In particular, we think that someone who is exposed in a public place cannot always be said to have consented to be in an intimate situation, as that implies that someone else is always involved in their being in an intimate situation. Instead, we think that it would be more accurate to say that, on that occasion, they chose to be in an intimate situation. Therefore, we do not think that the amendment is worded correctly.

The member has said that the amendment is intended to ensure that so-called upskirting or downblousing photographs taken in public places are covered by the offence. However, it is not clear to us that the amendment achieves that, as it is not clear that people who are photographed in such situations are in an intimate situation, as defined at section 3(1). In such cases, the person taking the photograph or film has operated equipment in such a way as to record an image of a person's genitals, buttocks or breasts in circumstances where they would not otherwise be visible. Therefore, it is not clear that there was any exposure on the part of the person being recorded, either consensual or otherwise.

It is for that reason that, in our response to the committee's stage 1 report, I said that, if the distribution of voyeuristic upskirting images were to be made an offence, that would be best achieved by building on the voyeurism offence contained in the Sexual Offences (Scotland) Act 2009. In addition, we would welcome time to fully consider the impact of restricting the defence, to ensure that there are no unintended consequences that would allow perpetrators to evade justice.

In light of that, I would be happy to work with Elaine Murray ahead of stage 3 to see whether a workable amendment can be developed to address the issues that she has highlighted. On that basis, I ask the member not to move amendment 4.

The Convener: Well, she has already moved it, so she has to decide whether to press or withdraw it. She can wind up first.

Elaine Murray: I will not take up more time in winding up. I am pleased that the cabinet secretary has indicated his willingness to try to find a solution to what is an important and serious issue. The idea that young women or, indeed, young men—or women and men of any age—can be intruded on in this way and money made out of putting materials on to a website is abhorrent. I seek leave to withdraw the amendment, and I look forward to working with the cabinet secretary.

Amendment 4, by agreement, withdrawn.

Section 2 agreed to.

Section 3—Interpretation of section 2

Amendment 81 moved—[Margaret McDougall].

The Convener: The question is, that amendment 81 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against

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

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

Amendment 81 disagreed to.

Amendment 82 moved—[Margaret McDougall].

The Convener: The question is, that amendment 82 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against

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

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

Amendment 82 disagreed to.

Section 3 agreed to.

Section 4 agreed to.

Schedule 1—Section 2: Special provision in relation to providers of information society services

The Convener: Amendment 5, in the name of the cabinet secretary, is grouped with amendments 6 and 7.

Michael Matheson: Amendments 5 to 7 are minor amendments to ensure that schedule 1 to the bill does what it is intended to do and to ensure that the wording is consistent. Schedule 1 makes provision in relation to the e-commerce directive, which requires the liability of information society service providers in respect of the section 2 intimate images offence to be limited in certain ways.

Amendments 5 and 6 adjust the wording of the provisions at paragraphs 2 and 3 of the schedule, which set out exceptions to the offence for internet service providers where they are caching or hosting information. To ensure consistency with paragraph 1 of the schedule, which sets out the exception for internet service providers that are acting as mere conduits, amendments 5 and 6 adjust the wording of those paragraphs to refer to the circumstances in which a service provider is

"not capable of being guilty of an offence".

Amendment 7 concerns the exception to the offence for internet service providers that are hosting information on their servers on the basis that they have no actual knowledge of illegal activity on their server. The amendment is to ensure that the exception applies in the right circumstances. The exception should apply if the service provider had no actual knowledge that an offence was committed under section 2. The amendment also has the effect of simplifying the drafting in paragraph 3(2).

I move amendment 5.

Amendment 5 agreed to.

Amendments 6 and 7 moved—[Michael Matheson]—and agreed to.

Schedule 1, as amended, agreed to.

After section 4

The Convener: Amendment 67, in the name of Alison McInnes, is grouped with amendment 68.

Alison McInnes: I hope that amendments 67 and 68 are uncontroversial. Amendment 67 would introduce a requirement on the Scottish ministers to carry out a public information and education campaign in connection with the new offence that is set out in section 2.

Members might know that, in England and Wales, where a similar offence has been introduced, the Ministry of Justice is already running the "Revenge Porn: be aware b4 you share" campaign, which includes a Facebook campaign page, a Twitter hashtag, a revenge porn helpline to support victims and other promotional material.

As modern technology is becoming a bigger part of our lives, we need to replicate that campaign to

ensure that as many people as possible are aware of the new offence. That includes not just potential victims but potential perpetrators, because the idea is to reduce the number of instances of the new offence. The written submission from Zero Tolerance outlined why a public awareness campaign is important.

Similarly, my amendment 68 seeks to amend the current guidance on relationships, sexual health and parenthood education in schools. It has the same aims that I have already discussed. Barnardo's and the National Organisation for the Treatment of Abusers have called for such a change, too.

I hope that the committee will support my amendments.

I move amendment 67.

Margaret Mitchell: I am very supportive of the amendments, especially given the inclusion of the recklessness provision in section 2.

Elaine Murray: I, too, am supportive of the amendments. An important part of what might be achieved by the bill is getting the message out that that sort of behaviour is unacceptable. It is also important that education in schools on sexual health and relationships gives out messages about consent and respect. Those are fundamental parts of what we used to call sex education, although it is taught in a broader sense now. It is important that the bill is accompanied by education of the general public and, particularly, education in schools.

The Convener: I have to say that I am sympathetic, but—I beg your pardon, I see that Rod Campbell wants to comment.

Roderick Campbell: I fully understand where Alison McInnes is coming from. There is a clear need to raise public awareness of the issue and to look at issues around education in sexual health. My query is whether we need to put that in legislation or whether we can rely on the Government's general commitment to raise awareness. I do not see—

The Convener: You took the words right out of my mouth—I am coming in now anyway, because I just want to.

I am sympathetic to what the amendments propose, but I do not think that it is appropriate to put it in legislation. Governments should publicise changes in the law, particularly when they are creating an offence that was not there before. My only objection to the proposals is that I do not think that they are appropriate in primary legislation.

Christian Allard: I want to share a small worry about telling youngsters that such a website exists. A revenge porn website should not get any advertisement from anybody.

12:00

Michael Matheson: Amendment 67 would place a duty on the Scottish ministers to carry out a public information and education campaign when the intimate images offence is commenced. I can confirm that the Scottish Government will take appropriate steps to promote public awareness of section 2 and its coming into force. As it is our intent to ensure that public awareness is raised prior to the implementation of the offence, amendment 67 is unnecessary to achieve what Alison McInnes seeks.

In addition, such a requirement is not normally included in legislation. The statute book would become a bit crowded if we had a provision about publicity in relation to every new offence or policy that was put into law.

We also consider that amendment 67 focuses entirely on the method of seeking to raise awareness, as it would require a publicity and education campaign rather than the raising of awareness, which we presume is Alison McInnes's intent. We therefore consider the amendment to be technically deficient in its wording. On the basis of the commitment that I have made to Alison McInnes, I ask her to withdraw amendment 67.

Amendment 68 would place a duty on the Scottish ministers to update guidance on relationships, sexual health and parenthood education in schools, to provide guidance on how issues relating to the intimate images offence are to be covered in such education.

It might be helpful if I explain that relationships, sexual health and parenthood education is a recognised subject in the health and wellbeing section of curriculum for excellence. In December 2014, the Scottish Government published guidance for schools on such education. The guidance notes that the education must take account of developments in online communications and ensure that children are informed of the law in Scotland on communications involving sexual content. Currently, that includes, for example, offences concerning indecent communications in the Sexual Offences (Scotland) Act 2009 and offences concerning the possession and distribution of indecent images of children.

When the intimate images offence comes into force, it will become part of the law of Scotland, and therefore the existing guidance already sets out that relationships, sexual health and parenthood education will cover the intimate images offence. I understand why the amendment has been lodged but, on the basis of the

explanation that I have given and my commitment that we will work to publicise the new offence, I invite Alison McInnes not to move amendment 68, as it is unnecessary to achieve the policy aim.

Alison McInnes: I am grateful for the cabinet secretary's reassurances, which I am happy to accept. I am particularly happy that he is talking about having a public campaign in advance of the legislation's coming into force. Heaven forbid that I should press an amendment that has been found to be deficient, so I would like to withdraw amendment 67.

Amendment 67, by agreement, withdrawn.

Amendment 68 not moved.

Section 5 agreed to.

Section 6—Jury directions relating to sexual offences

The Convener: Amendment 1, in the name of Margaret Mitchell, is grouped with amendment 2.

Margaret Mitchell: Amendment 1 would remove section 6, which sets a precedent by introducing statutory jury directions, and amendment 2 is consequential.

The section 6 statutory jury direction applies

"in a trial on indictment for a sexual offence"

when evidence has been given that the complainer

"did not tell, or delayed in telling, anyone ... about the offence, or ... did not report, or delayed in reporting, the offence to any investigating agency"

such as the police. It also applies when

"evidence is given which suggests that the sexual activity took place without physical resistance"

by the complainer, or when

"a question is asked, or a statement is made, with a view to eliciting, or drawing attention to, evidence of that nature."

The Scottish Government has insisted that the introduction of the statutory jury direction would be sufficiently flexible for judges to make appropriate decisions. In reality, it strikes down one of the central tenets of Scots law: namely, the independence of the judiciary and the separation of powers.

Others have described it as a worrying example of constitutional creep, and those concerns are shared by the legal profession. The Law Society has stated that the move

"represents a major departure from existing practice where the distinct roles of a judge and jury are clear".

Lord Carloway argued that the bill

"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."—[*Official Report, Justice Committee*, 8 December 2015; c 50.]

Both the Law Society and the Faculty of Advocates have argued that the Scottish Government has not made a sufficiently strong evidential case that, in the circumstances that the directions have been tailored for, juries acquit for the wrong reasons.

This dangerous precedent is being set despite the fact that, as I said in the stage 1 debate, the issues that the statutory jury directions seek to address can adequately be dealt with by the use of expert witnesses. The only reason that expert witnesses are not being used relates to the cost implications—a fact that was acknowledged by both Catherine Dyer, the chief executive of the Crown Office and Procurator Fiscal Service, and Lord Carloway, the then Lord Justice Clerk. Furthermore, given that the Scottish Government is in the process of undertaking jury research, there is a strong case for waiting for the results of that research, which would provide important evidence about how juries reach decisions and whether those misconceptions exist.

I therefore ask the Scottish Government to think again about interfering with judicial independence and urge it to remove the provisions from the bill.

I move amendment 1.

The Convener: I support amendment 1—which goes to show that we are very flexible on this committee. I have a serious concern. I fully support the argument that has been made by Margaret Mitchell—and by Lord Carloway and Sheriff Liddle—that it is a serious matter for legislators to tell a judge what directions he must, with some exceptions, give to a jury. To me, that crosses a line. We have a clear division between legislators and those who implement the law, which it is important to maintain.

Both Lord Carloway and Sheriff Liddle made the point that there is a constitutional issue at stake. When John Finnie asked what the position would be if the provisions came into practice, Lord Carloway said:

"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."

However, he went on to say:

"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."—[*Official Report, Justice Committee*, 8 December 2015; c 46.]

That is a heavyweight opinion from the Lord President. As Margaret Mitchell says, he argued that

"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."—[*Official Report, Justice Committee*, 8 December 2015; c 50.]

In my view, a line is being crossed that must not be crossed. The same point was made by Sheriff Liddle. There are other issues about the practicalities and how effective, or ineffective, the provisions will be if they are agreed to. I know that there is not a majority of committee members in favour of Margaret Mitchell's position or mine, but that does not matter a whit to me; what matters to me is that we are crossing a very important constitutional line by telling a judge, in statute, what must be said to a jury. That has not been done before and, to use the thin-end-of-the-wedge argument, if we do it once, we might do it again because somebody will use it as a precedent.

I fully support amendment 1. Amendment 2, which amends the long title, is simply consequential to amendment 1.

Elaine Murray: I do not agree with my friends Margaret Mitchell and Christine Grahame on this issue. We know that the public have misconceptions about the way in which rape victims behave. For example, they often have misconceptions about the degree of physical resistance or the speed at which somebody would report the fact that they had been raped. Juries are made up of members of the public and members of juries may also have misconceptions about the reactions of people who have been raped. We know that it is difficult for rape cases to come to court for a number of reasons that relate to corroboration, although I will not go into that debate again. We also know that around 15 per cent of not proven verdicts—the highest percentage—are given on rape cases.

It is necessary for the judge to be able to put right any misconceptions that a jury may have that could prevent a victim of rape from getting the justice that they deserve. There is an argument about such provisions being extended to other areas, but we are legislating for a specific instance in which judges must give jury directions. To extend directions to any other area of law, we would have to legislate. Therefore, I do not agree that directions will suddenly creep into all sorts of other areas of law. They would have to be introduced by specific primary legislation for that to happen.

I will oppose amendments 1 and 2.

Christian Allard: Not for the first time, I agree with Elaine Murray. The matter relates to sexual offences in which, unfortunately, the victim is more likely to be of a specific gender. Elaine Murray talked about misconceptions. The policy memorandum to the bill talks about

"certain ill-founded preconceptions held by members of the public".

It is important to say that those preconceptions are ill founded and, as long as we have those

"ill-founded preconceptions held by members of the public",

jury directions should be in legislation, because the preconceptions must be challenged in a non-adversarial manner. That would ensure that we had a way to rebalance what society thinks. If, in the future, society no longer has those "ill-founded preconceptions", I would be happy for the provisions on jury directions to be removed from the legislation. However, given where we are just now, jury directions are the answer.

Roderick Campbell: Unfortunately, I take a different view from Margaret Mitchell and the convener on the matter. I accept that section 6 does not find favour with what I might describe as the legal establishment. The key point to remember is that jury directions would be given only if there was an issue in the case in relation to delay or the absence of physical resistance. There is also a safeguard position that, if the judge feels that no reasonable jury could rely on the evidence, no direction needs to be given.

Yes, section 6 sets a precedent. Yes, we do not have jury research because of the difficulties with the Contempt of Court Act 1981, although we will address that through the jury research that Lord Bonomy is undertaking. However, it is well established from other sources that juries have preconceptions. The matter has been flagged up for a while, so we need to bite the bullet and pass the bill with section 6 in it.

John Finnie: The term "tradition" has been used a few times. The tradition that we have in Scots law is a fine one of an embarrassingly low level of convictions for heinous crimes. I set great store by the rights of the accused and do not doubt that the defence will tailor its comments to reflect any charge to the jury from the judge. Lord Carloway said that section 6 is not the best way of addressing the matter, but there have been plenty of opportunities for the judiciary to make suggestions of better ways of improving the situation. For those reasons, I will not support amendment 1.

12:15

Gil Paterson: My experience with women's groups, particularly Rape Crisis Scotland, suggests to me that some people on juries have preconceived ideas about how somebody would present or handle themselves. Would they be calm? Some people would expect them not to be calm, so there is a prejudice in the first place. I think that it would be good for the courts and for the system for simple explanations to be made. I do not think that judges should try in any way to influence people's minds on the case, but there is evidence that a substantial number of people on juries have expectations about when people report and believe that, if someone delays reporting, the alleged crime did not take place.

In fact, that is not the case, because there are complex reasons why people do not present. There could be a family reason. Quite often, people are raped by someone they know, and that could have a consequence because it could be a friend of the husband or wife. The consequences for the whole family, including the husband, the wife and the children, is a consideration.

The victim might stay quiet rather than do the right thing and be brave—it is a brave person who presents in a Scottish court with regard to rape, because it a horrendous experience for them and they need to relive what has happened to them. In such circumstances, someone who has been raped may reflect on the matter for a good number of years before reporting it. It might well be that a second rape takes place and the previous victim hears about the second rape, which gives them the courage to put themselves through the mill and report what happened to them.

It is a complex area for all those reasons, and it is good law that explanation and education are given if we know that people have preconceived ideas, which is prejudice.

Michael Matheson: Amendments 1 and 2 would remove the provisions in the bill relating to the introduction of statutory jury directions. The issue has been extensively debated during stage 1, and I am pleased that the majority of the committee supported the jury direction provisions in its stage 1 report.

Members do not need to be reminded that we have included those provisions in the bill to deal with the important underlying issue—which Elaine Murray highlighted—that some members of the public, and thus some members of a jury, will hold preconceived and ill-founded attitudes towards how sexual offences are committed and how someone who is subjected to a sexual offence is likely to act both when the offence takes place and afterwards.

Some people think that anyone who carries out a sexual offence will almost always require to use physical force. In addition, some people think that the victim will always offer physical resistance when an offence is being committed and that they will always make an immediate report to the police after an offence has been committed. When jurors hold those views and when any of those scenarios has taken place, those unenlightened views can, unfortunately, be allowed to affect how the jurors consider the evidence in the case.

Research clearly shows that people react in many different ways when a sexual offence takes place and in the aftermath of an offence having taken place. There is no one standard type of reaction that should be expected, and that body of research shows that it is a perfectly normal for a person not to offer physical resistance when a sexual offence is being committed or not to report the offence for a period of time.

It is clear to us that jurors must consider the evidence that they have heard in the case, so the intent behind jury directions is simple: we want the focus of the jury to be on the evidence that is laid before them. Any preconceived and ill-founded attitudes that may be held should not play a part in the jury's decision.

Members are aware that judicial discretion as to whether jury direction is necessary is built into the provisions. If no issues relating to a delay in reporting a sexual offence are raised at trial, the jury direction is not required. Even in cases in which an issue relating to a delay may have been raised in evidence, the judge does not have to give direction if they consider that no reasonable jury would think that the issue of delay was material to whether the offence was committed. The judge has similar discretion over jury directions in relation to a lack of physical force or physical resistance.

We consider that the jury direction provisions that are contained in the bill provide the right approach, with judicial discretion and flexibility built in. Therefore, the Scottish Government does not support amendments 1 and 2 in the name of Margaret Mitchell.

The Convener: Thank you. As you can imagine, I am itching to sum up. However, it is not for me to do so; I will save that for stage 3, if we return to the issue at stage 3. In my view, there is a lot of material to attack, and Margaret Mitchell has the opportunity to do that.

Margaret Mitchell: Thank you, convener.

This is not—as Roddy Campbell seems to suggest—about the legal establishment opposing progress. The concerns that have been expressed by the so-called legal establishment have been expressed because the provisions interfere with

two important principles of democracy in Scotland. The first is the separation of powers, which is a fundamental constitutional principle. The second is the independence of the judiciary, which is a central tenet of Scots law. If section 6 started to interfere with that principle, a precedent would be set in one area of the law and it would then be fair game to argue that the same precedent and the same jury direction should apply in other areas of the law. In effect, once the genie is out of the bottle, it will be impossible to put it back.

The cabinet secretary argued, somewhat disingenuously, that statutory direction is the only way to tackle the misconceptions that may be held by juries about the evidence that is laid in sexual offence cases. I do not think that anybody is arguing that those misconceptions do not—and have not—existed or that those misconceptions do not affect conviction rates. The important point is that there is another very effective way to address that, which was confirmed by the Crown Office and Procurator Fiscal Service and by Lord Caroloway, although they said that that effective remedy could not be employed without cost being incurred. Cost considerations should not take precedence and allow interference with the independence of the judiciary or with fundamental principles.

For those reasons, I press amendment 1.

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

Members: No.

The Convener: There will be a division.

For
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Paterson, Gil (Clydebank and Milngavie) (SNP)

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

Amendment 1 disagreed to.

Section 6 agreed to.

The Convener: It may be useful if I let the committee and the cabinet secretary know that we are going to go as far as amendment 18 and conclude at section 9 of the bill today. That will get us through a fair whack of it. We will not get through it all today.

After section 6

The Convener: Amendment 3, in the name of Margaret Mitchell, is in a group on its own.

Margaret Mitchell: Amendment 3 provides that, when an application is made to recover the psychiatric, psychological or medical records of the complainer in the types of sexual offence cases that are listed in section 288C of the Criminal Procedure (Scotland) Act 1995, the complainer must be notified of their right to seek legal advice and to appoint a legal representative. They must also be given the opportunity to seek such advice and appoint such a representative.

The amendment also provides that, when the complainer appoints a legal representative, that representative must be given the opportunity to submit written evidence and to represent the complainer at any hearing that relates to the application. The fees incurred by the legal representative will be borne by the Scottish legal aid fund, under regulations made by the Scottish ministers.

As members know, this is the third bill in which I have sought to address the release of medical records, including psychiatric records, in sexual offence cases when the complainer would object to their release if they had the opportunity to do so. What is notably different on this occasion is that amendment 3 follows the recent decision, from February this year, in the judicial review petition of WF v the Scottish ministers, for which Rape Crisis Scotland was the intervener, which found that denying a complainer—in this case, a domestic abuse victim—the right to oppose the release of her medical records was a breach of her right to privacy under article 8 of the European convention on human rights.

The Scottish ministers, defending their position, refused to make legal aid available, arguing that the victim had no right to be heard or represented in front of the sheriff on that application. However, on hearing the petition, Lord Glennie held that the Scottish ministers' decision to refuse legal aid was based on an error of law and was contrary to the duty imposed on them by the Victims and Witnesses (Scotland) Act 2014, section 1 of which provides that

"a victim or witness should be able to participate effectively in the investigation and proceedings."

Lord Glennie went on to say:

"the complainer is entitled to have her ECHR rights protected effectively."

In drafting amendment 3, I took account of comments that the cabinet secretary made at stage 3 of the Criminal Justice (Scotland) Bill. The amendment applies not only to applications in the sheriff court but to similar applications in the High

Court for orders granting commission and diligence for the recovery of documents and orders for the production of documents. Medical records are often used to discredit a victim's testimony. Therefore, it should be for the court to determine whether there is merit in having the documents released. The point is that, if the complainer is not there to object, only one side of the argument is heard.

There is no reason why amendment 3 should not be agreed to, as it seeks merely to ensure that the judicial review decision is put in statute.

I move amendment 3.

Elaine Murray: I congratulate Margaret Mitchell on her tenacity in bringing the issue to the fore. She said that she has raised the matter in the context of three bills, but I thought that it was in the context of more bills than that. I do not know whether she has just managed to wear me down.

The Convener: You were doing so well.

Elaine Murray: Some of the issues about which I was previously concerned appear to have been addressed. I also think that the bill is probably the appropriate place for the provisions.

In the past, I was concerned about having three lawyers in court to represent different people, and at one point it seemed that all complainers would get legal aid whereas now I note that the Scottish ministers will make provision for fees, so there could be some sort of scale relating to a complainer's ability to get legal aid, as is the case for the accused.

I have considerable sympathy with amendment 3, particularly in the light of the case to which Margaret Mitchell referred. Without such provisions, a person's human rights might not be respected. Therefore, I am inclined to support amendment 3.

Alison McInnes: As Elaine Murray said, Margaret Mitchell's tenacity on the issue is well known. I have supported her in the past, and I think that we have been vindicated by the recent judicial review. The Government has been wrong in law in its interpretation of the situation relating to petitions for the recovery of documents. It is clear that, in those circumstances, the Crown represents the public interest and not the victim's right. However, at that point, the Crown should represent the victim's right as one of a number of competing interests such as the right to a fair trial, the rights of any other victims and, indeed, public policy.

There is no doubt that there is an anomaly that needs to be addressed, although legislation is not needed to do that. The cabinet secretary could amend legal aid regulations to do it, and I urge him to tell us today that he is considering that, because there has been a misunderstanding in law. We need to move forward on this really important issue.

12:30

Roderick Campbell: Margaret Mitchell has referred to the decision of Lord Glennie in the Court of Session on the judicial review petition of WF v the Scottish ministers. That relates to an on-going case, so I must be careful in what I say.

There were two important points in that decision. First, Lord Glennie clearly found that, procedurally, under article 8 of the ECHR, the lady concerned should have been given notice of the application for the witness summons. Having established that, Lord Glennie considered the issue of legal aid. As Margaret Mitchell suggests, he said:

> "as a matter of Convention jurisprudence, the complainer is entitled to have her ECHR rights protected effectively."

The key question was how those rights could be protected effectively if she was unable to have appropriate representation.

The issues that have been raised might cause a substantial increase in the cost to the legal aid fund, but I hope that the cabinet secretary can help us on them.

John Finnie: I concur with a lot of what Elaine Murray has said. For the second time today, this is an issue on which I have changed my position. Lord Glennie has made a very interesting ruling, and I am grateful that members are highlighting it. It brings us into the same realm that we were in regarding fatal accident inquiries, in which the public interest and the individual's interest can sometimes conflict.

I do not share Rod Campbell's view that there will be substantial costs associated with the amendment. However, there is certainly the potential for substantial injury to individuals if the abuse that can be associated with the mere request for information is allowed to go unchallenged. Therefore, I will support Margaret Mitchell's amendment.

Michael Matheson: Members will recall, as Margaret Mitchell has alluded to, that similar amendments have been proposed in the past. I want to start now, as I started then, by sympathising very strongly with the intention behind the amendments.

The day after amendment 3 was lodged, the Court of Session issued its judgment in the judicial review by WF.

The Convener: Can I confirm, because slight alarm bells are ringing, whether the case is sub judice? Are we quite satisfied that it is not?

Michael Matheson: I will come on to that.

The case dealt with representation from a complainer seeking to restrict access to her medical records in connection with a criminal case. I must remind the committee that the criminal proceedings concerned have not concluded.

The Scottish Government will not appeal the decision. It is an important judgment and clarifies a number of issues that will lead to significant changes in procedure in cases where an application is made to recover sensitive information.

The principles confirmed by this judgment apply in all applications for sensitive information—not just in cases of sexual offences. Lord Glennie applies his decision to:

"any person whose Article 8 rights may be infringed by an order for recovery of medical records and other sensitive documents".

The article 8 right is to privacy. The rights that Lord Glennie found extend, therefore, not only to psychiatric, psychological or medical records, but to other sensitive information, and also to persons other than a complainer.

I have informed the agents acting for WF of my determination granting their application for legal aid. I recognise that it was important to deal with that matter first, to allow the associated criminal trial to proceed without further disruption.

Changes to the legal aid system require to be made for cases of this nature, and plans are being developed to deliver the necessary changes. Meantime, I have put in place interim arrangements that will allow the Scottish Legal Aid Board to provide legal aid in future similar cases. Importantly, a means test will not be applied in this interim arrangement. Legal aid, in the form of assistance by way of representation, will be available in appropriate circumstances for individuals whose sensitive records are being sought.

Lord Glennie has confirmed that a right to intimation and a right to be heard, together with—where appropriate—a right to representation, already exist. That means that there is no need for amendment 3, and as the amendment is set out in terms of sexual offences, it would introduce unnecessary confusion. What is relevant is the sensitivity of the records at issue, not the particular categorisation of the offences.

I note that amendment 3 does not provide for intimation of the application directly to the person whose records are being sought. The judgment confirmed that a complainer or witness ought to have intimation of the application regardless of whether they decide to appoint a legal representative. The judgment also confirmed that the courts now have the powers to protect the rights in question.

For the future, Lord Glennie recommended that rules of court be made to cover such applications. There is good reason for that. Rules are inherently more flexible. They are thus a more appropriate mechanism for dealing with the arrangements for asserting the rights. As Lord Glennie pointed out, that is the approach that is taken in civil cases in Scotland, and in England and Wales.

The challenge for those who are members of the Criminal Courts Rules Council in developing the rules includes that of preserving the fundamental principle that complainers have no right to appear in criminal trials. Lord Glennie outlined several ways in which the rules that he considered desirable could operate, and not all of those involve the complainer appearing in every relevant hearing. There is an additional challenge in that, at present, we do not have data that shows what the potential demand might be.

In those circumstances, we think that the inherent flexibility of rules of court in comparison with primary legislation is what is required. The Government has always made it clear that we wish to invest in support for victims. Members will be aware that I have previously outlined a monitoring exercise that we are undertaking of applications to lead character or history evidence. That is currently under way. The information that that exercise and any necessary follow-up provide, together with developing experience, will inform the development of the rules that Lord Glennie seeks.

In summary, the aims of Margaret Mitchell's amendment 3 have already been achieved and do not need to be legislated for. It is the case that the position today is that a court will require to ensure that the rights of complainers and others whose sensitive records are sought will be protected through a right to be intimated that sensitive records are being sought, and that a right to be heard will be given as consideration is given to whether the sensitive records will be disclosed. The Scottish ministers have directed the Scottish Legal Aid Board to provide legal aid—in the form of assistance by way of representation—to afford effective representation to those who seek to protect their sensitive information, and we will work to ensure that a permanent solution is put in place that will meet the requirements of Lord Glennie's judgment.

I therefore ask Margaret Mitchell to withdraw amendment 3.

Margaret Mitchell: I am greatly encouraged by the cabinet secretary's comments. He said quite a lot, which needs to be looked at in some detail to

ensure that the group of people we are talking about, for whom I have argued consistently over many years, will not be disadvantaged and that there will not be a time lag. It does not seem to me that amendment 3 would have that effect, but I am happy to seek to withdraw it at this stage and to work with the cabinet secretary to ensure that we have the kind of provision that Rape Crisis is in favour of on an issue that we know has been a barrier to getting a fair trial, and that we enable article 8 to be invoked for people whose medical, psychological and psychiatric records have been sought not for any justifiable reason but merely to discredit them in court. With that, I seek permission to withdraw amendment 3.

The Convener: I think that you have done very well, Margaret. [*Interruption*.] We are not allowed to clap, although I know how you feel. It is a pity, but that is one of the little—well, I do not know; I could have let you clap. Why not? It is very unusual, but then we are quite an unusual committee at times. We have been sitting a very long time today.

Amendment 3, by agreement, withdrawn.

Section 7—Incitement to commit certain sexual acts elsewhere in the United Kingdom

The Convener: Amendment 8, in the name of the cabinet secretary, is grouped with amendments 9, 10 and 18.

Michael Matheson: Amendments 8 to 10 and 18 address the point raised by Professor James Chalmers in his evidence to the committee during stage 1 about sections 7 and 8 of the bill concerning the extension of extra-territorial jurisdiction of Scottish courts to sexual offences against children committed in the other jurisdictions of the United Kingdom.

The concern was that the bill as introduced defined "habitual resident of Scotland" to include persons who had become habitually resident after committing the criminal acts that are the focus of these provisions. As a result, dual criminality requirements for non-habitual residents of Scotland would not apply in relation to persons who become habitual residents of Scotland at some point after the criminal act.

Professor Chalmers argued that the provisions as drafted had retrospective effect, because simply by moving to Scotland, a person could become criminally liable for an act that was not a crime in the place where they did it, at the time when they did it.

As I said in my evidence to the committee, that is a largely theoretical concern, as the law concerning sexual offences against children in the different jurisdictions of the United Kingdom is very similar and it is hard to envisage acts that are criminal in Scotland that would be lawful in England, Wales or Northern Ireland, or vice versa. However, we consider that it is appropriate to remedy the issue through our amendments.

Amendments 8 and 10 adjust the definitions of a "habitual resident of Scotland" that are to be inserted in sections 54 and 54A of the Sexual Offences (Scotland) Act 2009 so that they include only persons who were habitually resident in Scotland at the time that they committed or incited the act constituting a listed offence under Scots law. As such, a person can be held criminally liable for an act that was an offence under Scots law, but not under the law of the jurisdiction within the UK where the act took place, or where it was intended to take place, only if they were habitually resident in Scotland at the time they did so.

Professor Chalmers also noted that the existing provision concerning extra-territorial jurisdiction at sections 54 and 55 of the Sexual Offences (Scotland) Act 2009 has the same problem. Our amendments 9 and 18 address that.

It is worth noting that a slightly different approach has been taken with amendment 18, in that a person who was not a UK national or resident at the time that they committed the offence in a country outside the United Kingdom may be liable to be prosecuted for that offence if they subsequently take up UK residency or become a UK national, if the act in question also constituted an offence under the law in force in the country where the act took place at the time that it took place. We have provided for the amendment in this way to ensure that a person cannot take up UK residency or become a UK citizen and by doing so evade prosecution for a sexual offence against a child in another country.

I move amendment 8.

Roderick Campbell: I very much welcome the cabinet secretary's comments. Those points were made by an academic. For the record, the points in relation to sections 54 and 55 of the Sexual Offences (Scotland) Act 2009 were highlighted by Gerard Maher of the University of Edinburgh, rather than Professor Chalmers. We had two academics making points and that really helped us with our evidence session on 17 November. I am really pleased that the cabinet secretary has taken note of it.

Amendment 8 agreed to.

Amendment 9 moved—[Michael Matheson]—and agreed to.

Section 7, as amended, agreed to.

Section 8—Commission of certain sexual offences elsewhere in the United Kingdom

Amendment 10 moved—[Michael Matheson]—and agreed to.

12:45

The Convener: Amendment 11, in the name of the cabinet secretary, is grouped with amendments 12 to 17.

Michael Matheson: Amendments 11 and 17 are intended to enable a prosecution to be brought in Scotland for a listed sexual offence against a child in a case where it is known that the act took place in the UK but the jurisdiction in which it took place is not known.

Committee members will be aware of a case highlighted during a stage 1 evidence session in which it was alleged that a child was abused in a van travelling on the M74 between Carlisle and Dumfries and the abuser could not be prosecuted because it was not possible to establish whether the offence had been committed in England or in Scotland. Although such cases will be very rare, discussions with the Crown Office indicate that there has been at least one other case of this kind.

We consider that it is also possible that a historical child sexual abuse case could arise where the victim lived as a child in Scotland and in another part of the UK—possibly even several other parts of the UK—and might not be able to say with certainty whether the abuse occurred in Scotland or in another part of the UK.

Amendments 11 and 17 provide that an indictment or complaint in which a listed offence is charged does not need to contain information on which country in the United Kingdom the act took place. However, if the indictment does not identify the country where the act took place, certain extra limitations apply to the prosecution of the offence in Scotland.

Those are, first, that prosecution is not competent if the person charged with the offence has been or is being prosecuted for the act constituting the offence elsewhere in the UK and, secondly, that the director of public prosecutions in any jurisdiction in which the offence may have been committed must be consulted before the prosecution is initiated.

Provision is also made for the unlikely situation in which, as part of a course of conduct also involving offences alleged to have been committed by the accused person in Scotland, the prosecution wishes to libel a listed offence that may have been committed in England, Wales or Northern Ireland but which it is not alleged was committed in Scotland. In those circumstances, both heads of public prosecution must be consulted and the person must also be charged with a listed offence alleged to have been committed in Scotland.

Amendments 12 and 13 are minor amendments concerning the requirements that must be satisfied before a prosecution can be brought in respect of a listed offence. When taken together, the effect of amendments 12 and 13 is to remove the condition that an act must be a criminal offence in the UK jurisdiction where it took place to trigger the need to satisfy the requirements, including the Crown Office obligation to consult with the prosecution service in the other jurisdiction ahead of a Scottish prosecution.

There is a high degree of uniformity across the UK jurisdictions in relation to sexual offences against children and we think that it is appropriate simply to require prosecutors in Scotland to consult with their counterparts in other parts of the UK whenever they are contemplating prosecuting an act that has occurred in another UK jurisdiction.

Amendment 14 deals with circumstances where the prosecutor allows a complaint or indictment to fall and serves a new complaint in respect of the same conduct. It provides that the consultation with the local prosecutor must take place before the particular prosecution that is being taken forward.

Amendment 15 ensures that the existing provision in the bill that is intended to prevent people being prosecuted more than once in the UK in relation to the same act does not prevent a prosecution in Scotland where a prosecution in another jurisdiction is withdrawn specifically to allow the Scottish prosecution to go ahead.

Amendment 16 is intended to provide greater certainty as to when a prosecution can be said to have been initiated.

I move amendment 11.

Amendment 11 agreed to.

Amendments 12 to 17 moved—[Michael Matheson]—and agreed to.

Section 8, as amended, agreed to.

After section 8

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

Section 9 agreed to.

The Convener: That concludes stage 2 consideration of the bill for today. We have a little bit still to do next week. I thank the cabinet secretary and his officials for attending, and I praise the fortitude of the committee—although the meeting is not yet finished.

12:50

Meeting suspended.

12:51

On resuming—

Petition

Justice for Megrahi (PE1370)

The Convener: Item 3 is continuation of our consideration of petition PE1370, on the Megrahi conviction.

Last week we agreed to consider the matter following late receipt of the Lord Advocate's latest response on the petition. Members have now had a chance to consider his response, along with further material that has been provided by the petitioners. Additional background information relating to our previous consideration of the petition has also been provided in members' papers, as requested, together with extra papers—I know you like lots of papers—that came in late yesterday from the Lord Advocate's office—although I believe that much of what has been attached was previously within the committee's ken.

I invite members' views on what to do with the petition.

Christian Allard: I am happy to leave the petition open.

The Convener: Is there anything else members wish to say about the petition?

Do we want more information on operation Sandwood and the timescale for it? I think that it would be appropriate to ask for that.

John Finnie: I am at a loss to know why we are not in receipt of specific responses to the questions that have been asked. They were legitimately posed. We read, for instance, that the Crown Office

"asked a Senior Prosecutor who has had no prior involvement in the Lockerbie Investigation and associated Prosecution to act as a conduit with the Senior Investigating Officer to ensure that access to any material that the Crown has, and that The Police Service of Scotland consider is necessary for full and thorough consideration of the allegations, is facilitated."

Is that one and the same person that we are talking about in our papers? It would have been very helpful to know the identity of the individuals involved, or if not who they are specifically, who appointed them.

Basically, everything comes back to the questions that were legitimately asked. I cannot see why, rather than papers being delivered to the committee at the 11th hour—I appreciate the swift turnaround that was required from last week—we cannot get simple responses to the unambiguous questions that have been posed.

The Convener: What are your questions, therefore?

John Finnie: My questions are those in annex A on pages 4 and 5 of paper 3. I am referring to the bullet-pointed questions.

The Convener: Right. It is a public paper, so I do not need to go through the questions. Do members agree about the questions?

Roderick Campbell: We have known about the questions for a little while. On 5 January we did not raise the issue.

The Convener: Are you raising it now? I am trying to get consensus.

Margaret Mitchell: I would be in favour of taking no further action before dissolution, but without closing the petition. We should leave it for a future committee to decide what further action to take.

The Convener: I would quite like to know the name of the independent counsel who has been appointed. We have not even found that out.

Christian Allard: As we said at our previous meeting, this should be about process, not individuals. I am therefore quite happy to leave the matter open and take no further action.

John Finnie: I find it astonishing that an elected politician could say to a member of the public—one of their constituents—who has posed legitimate questions about process that we will pass this over until the end of May.

Christian Allard: Hold on—

The Convener: Through the chair, please, gentlemen.

Christian Allard: Before I am attacked further, convener, I will repeat exactly what I said: this should be about process. We are agreed on that.

The Convener: But this is process.

Christian Allard: This is not about individuals. We made that very clear at our last meeting. I repeat: this should be about process, not individuals. We should leave the matter open, and leave it at that.

The Convener: Do you want to know the timescale for the investigation and the progress of operation Sandwood?

Christian Allard: I am happy that you have rephrased your question, convener, but I will leave the matter at that.

The Convener: I am asking the committee whether it wishes to do that.

Christian Allard: I am happy to leave it at that.

The Convener: You are happy to find out the progress that has been made.

Christian Allard: No.

The Convener: So, you just want to leave things open and not do that.

Christian Allard: I am happy to leave the petition open.

The Convener: I do not actually agree with you. Could I hear some other voices? I think that there are one or two things that it would be fair for us to ask about, including the progress of operation Sandwood and who has been appointed independent Crown counsel. Why have we not found that out? It cannot be a secret. After that, we can continue the petition. That is fair enough—these are markers.

You do not agree, Christian.

Christian Allard: I have made my point clearly.

The Convener: Does anyone else wish to say anything?

Elaine Murray: Given that the committee will have only two more meetings after this, I am not really sure how much more we, rather than the successor justice committee, can achieve. If we ask the questions, what will we do with the responses?

The Convener: The answers would be there for the successor committee. That is all that I am saying.

Alison McInnes: Dissolution is neither here nor there. We should pursue the matter with the same vigour as we would pursue it had we a year to go. If, at the end of the day, we bump up against the buffers, that is what happens, but it is incumbent on us to continue to pursue issues that have exercised us for so long.

The Convener: Which are what? What do you want to pursue?

Alison McInnes: I want to pursue the points that you and John Finnie have already made.

The Convener: Those are the bullet points in the paper.

Alison McInnes: Yes.

The Convener: That is what you want to do—I will have to get some agreement from the committee on that.

Roderick Campbell: It is quite important that we reach consensus on this. If the question is whether we are going to ask about operation Sandwood and who the independent Crown counsel is, I would say yes, in the spirit of compromise, but I am not sure that we should go through all the bullet points.

John Finnie: I feel a bit exasperated. We have just spent two hours—quite rightly—on the minutiae of legislation, on very detailed ideas and concepts and on the relationship with other legislation. This is a simple process—I absolutely agree with my colleagues that this is about process and not about individuals. I have spent a lot of time trying to understand the process, but I do not understand it; I just thought that colleagues on the Justice Committee would want that understanding. Instead of seeking to reinvent the wheel, I am simply suggesting that a very simple way of approaching this would be to secure very simple answers to the very simple questions that have been posed about the whole process. I am really at a loss to know what the problem is with that.

The Convener: Rod Campbell has compromised a little about finding out who the independent counsel is, and I think that it is relevant to ask who appointed them. It is a huge problem for the Crown to investigate the Crown: I say to Christian Allard that that is a matter of process. We are talking about a very unusual circumstance. Do we want to ask who appointed the independent counsel and who the independent counsel is? Is that not fair enough? I do not think that there should be anything to hide.

John Finnie: I—

The Convener: I am trying to get somewhere here, John.

John Finnie: To be honest, I do not think that the identity of the individual is necessarily pertinent.

The Convener: So, we do not need to know the person's identity.

John Finnie: We need to understand the process.

The Convener: Can we settle for asking who appointed the independent counsel?

Christian Allard: I have been very clear, convener—

The Convener: I know that you have, but I am trying to get some consensus around the table; I want a position that the committee can agree to. I am not asking you to agree to absolutely everything, but if we all stick to black-and-white positions, we will not be able to move forward, and I do not know what we will do then.

Christian Allard: Each time we agree about the process, there is a question of identifying somebody—

The Convener: I have parked that.

Christian Allard: Never from me.

The Convener: Bear with me, Christian. I have parked that. I have said that all we want to know is what the process was for appointing the independent counsel. Shall we rephrase that?

13:00

Christian Allard: I do not know what other committee members think about our needing to know who the individual is. There is a place for the Justice Committee and there is a place for the Justice for Megrahi campaign. If I was involved with the Justice for Megrahi campaign, I would be interested in knowing that, but this is the Justice Committee.

The Convener: It is not to do with that. We went through this last week, Christian. Let us imagine that some other petition had come to us. We are in the very strange situation of somebody having been appointed to look at the actions of the Crown Office. I have never see that before, and I do not know how we should deal with that. Is the Crown Office never to be investigated by anybody? Who holds the Crown Office to account? Those are the kind of questions that we are asking. Is that what you are looking for, John?

John Finnie: That is entirely what I am looking for, but I sense my colleague's discomfort. If it helps him, we could rip the campaign name off the top of the petition and ask how we would proceed if it came from Joe Bloggs.

The Convener: Many times, when cases have not been pursued, we have asked why the Crown Office has not pursued them. We have raised the matter before. This time, we are asking about the Crown Office itself.

Margaret Mitchell: I have written an article on who watches the Crown Office—it is not a new issue. We have had the petition for many years—it goes way back—and I would probably have closed it earlier. I have not deviated from the opinion that I have stated today: I think that, without closing the petition, we should leave it for a successor committee to decide on.

The Convener: Because we are not going to get consensus on the petition, can we agree that we will find out about the progress of operation Sandwood and keep the petition open? It is up to individual members to pursue other issues themselves, if they wish to do that. I have to get some consensus in the committee. Do members agree to my suggestion?

Christian Allard: I am quite happy with that.

The Convener: Do you agree to that, Margaret?

Margaret Mitchell: In the interests of consensus, absolutely.

The Convener: You are always good at that, Margaret, and you got a round of applause today—never let that be forgotten. You have superseded Margaret McDougall's one liner that took the feet from under the chief constable.

It may not be all that you want, John, but do you agree to that suggestion?

John Finnie: Absolutely.

The Convener: Okay. We will seek that information and keep the petition open. Thank you very much.

Subordinate Legislation

Police Service of Scotland (Senior Officers) (Performance) Regulations 2016 (SSI 2016/51)

13:02

The Convener: Item 4 is consideration of three instruments that are subject to negative procedure. I will try to fly through them. The Police Service of Scotland (Senior Officers) (Performance) Regulations 2016 create a process for managing the performance of senior police officers when their performance is found to be unsatisfactory. The Delegated Powers and Law Reform Committee agreed to draw the instrument to the attention of Parliament, as it contains—surprise, surprise—some drafting errors. The Scottish Government has undertaken to lay an amending instrument to correct the errors

"as soon as is reasonably practicable".

Do members have any comments on the instrument?

Members: No.

The Convener: Are members content to make no recommendation on the instrument?

Members *indicated agreement.*

John Finnie: I strongly welcome the legislation, which could be very timely.

Civic Government (Scotland) Act 1982 (Metal Dealers and Itinerant Metal Dealers) (Verification of Name and Address) Regulations 2016 (SSI 2016/73)

The Convener: The Civic Government (Scotland) Act 1982 (Metal Dealers and Itinerant Metal Dealers) (Verification of Name and Address) Regulations 2016 stipulate particular means that can be used by a metal dealer or itinerant metal dealer for the purpose of verifying a person's name and address in relation to any metal that is acquired or disposed of by sale or exchange. Such little instruments are very important. The Delegated Powers and Law Reform Committee did not draw the instrument to Parliament's attention on any grounds within its remit. Do members have any comments on the instrument?

Members: No.

The Convener: There will be no more thieving of metal. Let us protect Network Rail.

Gil Paterson: The regulations will put the tin hat on it.

The Convener: Oh, dearie me. I hope that you did not think of that before you came here.

Are members content to make no recommendation in relation to the instrument?

Members *indicated agreement.*

Restriction of Liberty Order etc (Scotland) Amendment Regulations 2016 (SSI 2016/89)

The Convener: Before we descend into frivolity, we need to consider the third and final instrument that is before us. The Restriction of Liberty Order etc (Scotland) Amendment Regulations 2016 specify that certain devices may be used for the purposes of remotely monitoring a prisoner's compliance with a condition specified by virtue of section 40(2) of the Criminal Justice (Scotland) Act 2003. The Delegated Powers and Law Reform Committee did not draw the instrument to Parliament's attention on any grounds within its remit. If members have no comments, are they content to make no recommendation in relation to the instrument?

Members *indicated agreement.*

The Convener: I ask members not to move yet. Class is not dismissed—do not pack your satchels.

The next meeting of the committee will take place on 8 March, when we will continue to take evidence on the Family Law (Scotland) Act 2006, consider subordinate legislation, look at a draft of the committee's legacy report and conclude consideration of amendments on the Abusive Behaviour and Sexual Harm (Scotland) Bill.

Meeting closed at 13:05.

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