OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 30 May 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 30 May 2017

CONTENTS

JUSTICE COMMITTEE
20th Meeting 2017, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Mairi Evans (Angus North and Mearns) (SNP)
*Mary Fee (West Scotland) (Lab)
*John Finnie (Highlands and Islands) (Green)
Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Oliver Mundell (Dumfriesshire) (Con)
*Douglas Ross (Highlands and Islands) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

George Adam (Paisley) (SNP) (Committee Substitute)
Clare Connelly (Faculty of Advocates)
Michael Matheson (Cabinet Secretary for Justice)
Lindsey McPhie (Glasgow Bar Association)
Grazia Robertson (Law Society of Scotland)
Andrew Tickell (Glasgow Caledonian University)
Humza Yousaf (Minister for Transport and the Islands)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 30 May 2017

[The Convener opened the meeting at 10:00]

Interests

The Convener (Margaret Mitchell): Good morning and welcome to the 20th meeting in 2017 of the Justice Committee. We have apologies from Fulton MacGregor.

Agenda item 1 is a declaration of interests. I welcome to the committee George Adam, who is substituting for Fulton MacGregor. Do you have any relevant interests to declare?

George Adam (Paisley) (SNP): I have no relevant interests to declare.

Subordinate Legislation

Criminal Justice (Scotland) Act 2016 (Consequential and Transitional Provisions) Regulations 2017 [Draft]

10:00

The Convener: Agenda item 2 is consideration of an affirmative instrument: the draft Criminal Justice (Scotland) Act 2016 (Consequential and Transitional Provisions) Regulations 2017. I welcome the Cabinet Secretary for Justice and his officials: David Dickson is from the criminal justice delivery unit, and Kevin Gibson is a solicitor in the Scottish Government's directorate for legal services.

I refer members to paper 1, which is a note by the clerk, and I invite the cabinet secretary to make a brief opening statement.

The Cabinet Secretary for Justice (Michael Matheson): Thank you, convener. It is timely that we are looking at the regulations today, as Scotland's first trafficking and exploitation strategy was laid before Parliament this morning. The strategy is the result of extensive—[*Interruption*.]

Are you taking the trafficking regulations first?

The Convener: The other ones.

Michael Matheson: Okay. My folder is back to front. [*Laughter*.]

I hope that it will help if I briefly explain the purpose and effect of the criminal justice regulations. As members know, the Criminal Justice (Scotland) Act 2016 introduces a number of reforms to our criminal justice system, including in respect of the procedure for cases that are tried before a sheriff sitting with a jury. The provisions are being commenced and implemented in stages between the end of May and the end of August this year.

The regulations make some minor and technical amendments to the provisions of the Criminal Procedure (Scotland) Act 1995 that cover sheriff and jury cases. The amendments reflect the fact that, under the new system, the Crown will no longer indict accused persons to a first diet and a trial diet. Instead, the Crown will indict the accused to a first diet only, and the court will appoint a trial when it is satisfied that the case has been prepared by both sides and is ready to proceed to trial. The regulations will amend the 1995 act by removing references to the Crown fixing a trial diet, as that will no longer be the case.

In addition, the regulations contain some transitional provisions to ensure that the new procedure will function properly for cases that are

indicted under the old system, but which will still be live when the new system comes into force.

That is a very clear and brief overview of the regulations and their context. I am, of course, happy to answer any questions.

The Convener: The regulations seem to pick up on some of the points that were made in the committee's Crown Office and Procurator Fiscal Service inquiry report, and we are very encouraged by that.

As members do not have any questions for the cabinet secretary, we move to agenda item 3, which is formal consideration of motion S5M-05624. The motion will be moved and there will be an opportunity for formal debate, if necessary.

Motion moved,

That the Justice Committee recommends that the Criminal Justice (Scotland) Act 2016 (Consequential and Transitional Provisions) Regulations 2017 [draft] be approved.—[*Michael Matheson*]

Motion agreed to.

The Convener: That concludes our consideration of the affirmative instrument. The committee's report will note and confirm the outcome of our consideration. As it has been a non-contentious issue, are members content to delegate to me, as convener, the authority to clear the final draft of the report?

Members *indicated agreement.*

The Convener: I suspend the meeting briefly for a change of officials.

10:04

Meeting suspended.

10:05

On resuming—

Human Trafficking and Exploitation (Scotland) Act 2015 (Relevant Trafficking or Exploitation Offences and Relevant UK Orders) Regulations 2017 [Draft]

The Convener: Agenda item 4 is consideration of another affirmative instrument: the draft Human Trafficking and Exploitation (Scotland) Act 2015 (Relevant Trafficking or Exploitation Offences and Relevant UK Orders) Regulations 2017. I welcome the Cabinet Secretary for Justice and his officials: Anna Donald is head of the victims and witnesses unit; Susan Young is a policy officer on human trafficking; and Kevin Gibson is a solicitor in the Scottish Government's directorate for legal services.

I refer members to paper 2, which is a note by the clerk, and to paper 3, which is a briefing from Police Scotland. Cabinet secretary, do you wish to make an opening statement?

Michael Matheson: Yes, thank you, convener. As I mentioned earlier, it is timely that we are looking at the regulations today, as Scotland's first trafficking and exploitation strategy was laid before Parliament this morning. The strategy is the result of extensive partnership working and it sets out actions to identify and support victims, to identify and disrupt perpetrators, and to address broader conditions that foster trafficking and exploitation.

The regulations focus on disrupting the activities of perpetrators. Their purpose is to ensure that our legislative provision is as comprehensive as possible. The regulations relate to part 4 of the Human Trafficking and Exploitation (Scotland) Act 2015, which introduces two new court orders—namely, trafficking and exploitation prevention orders, or TEPOs, and trafficking and exploitation risk orders, or TEROs. Members will be aware that commencement regulations that bring part 4 into force have already been made, whereby all provisions relevant to TEPOs will be commenced by 30 June and all provisions that relate to TEROs will be commenced on 31 October. The regulations that are before the committee today make further provision in relation to part 4 in anticipation of that commencement.

Section 16(1) of the 2015 act sets out a list of relevant trafficking or exploitation offences, on which the operation of TEPOs and TEROs are based. Section 32 of the act deals with the enforcement of TEPOs and TEROs, and provides that it is an offence if a person who is subject to such an order does something that is prohibited by it, or fails to do anything that is required of them by it. Section 33 of the act provides that the Scottish ministers may specify that breaches of orders that are equivalent to TEPOs and TEROs but which have been made elsewhere in the United Kingdom are an offence in Scotland under section 32.

At the time of the introduction of the Human Trafficking and Exploitation (Scotland) Bill, the final form and in-force date of most of the additional offences and orders was not known. When it passed the Human Trafficking and Exploitation (Scotland) Bill, the Scottish Parliament ensured that there was a method for updating the relevant lists in order that the bill as enacted—in sections 16 and 32—had such provision. If approved, the regulations will do that, by adding offences that have been created by trafficking legislation elsewhere in the UK to the list of relevant trafficking and exploitation offences that are set out in section 16(1) and specifying court orders that have been created by that legislation, breach of which in Scotland will become an

offence. Those UK offences and orders are equivalent to the offences and orders that were created by the Human Trafficking and Exploitation (Scotland) Act 2015.

The only exception to that is section 62 of the Sexual Offences Act 2003, which makes it an offence to commit another offence with the intention of committing a trafficking offence. We seek to add that to the list of offences, because criminal conduct that is motivated by an intention to commit a trafficking offence demonstrates a clear risk that an individual might in the future engage in conduct that is related to trafficking.

The practical effect of adding those offences and orders to those that are already listed is that Scotland will be an increasingly hostile place for traffickers. People who have committed or are at risk of committing offences elsewhere in the UK that correspond to the offences that are listed in the Scottish act can be targeted. Furthermore, if traffickers who are subject to an order similar to our TEPO or TERO that has been imposed elsewhere in the UK breach that order in Scotland, it will now be possible to prosecute them here for that. I strongly believe that the addition of equivalent offences and orders elsewhere in the UK to the list in our act demonstrates our commitment to Scotland being and remaining a hostile environment to trafficking.

I am happy to answer any questions.

The Convener: Do members have any questions for the cabinet secretary?

John Finnie (Highlands and Islands) (Green): Good morning, cabinet secretary. I am fully supportive of the provisions that are laid out in the regulations.

I know that we have already discussed the matter, but my question relates to the TERO, which requires an application to be made by Police Scotland directly to the sheriff. One might expect that the Crown Office and Procurator Fiscal Service would make the approach to the sheriff—in other words, that the police would report the circumstances and then a warrant would be craved in that way. I am conscious that no conviction is required for the police to make such an approach, although there are clearly thresholds of evidence. Will the police think, "We haven't got enough evidence to go ahead with a prosecution, so we'll just go for a TERO"? What reassurance can you give around that? What would be the avenue of redress for anyone who was the subject of a TERO? Is there an appeals system, and who would any appeal be made to?

Michael Matheson: With a TERO, there is no requirement for a conviction, although the legislation contains a range of requirements that have to be met and the court must consider those when it receives an application.

The provision has been made for chief constables to apply for TEROs on the basis that the individuals concerned might not, at that point, have been referred to the Crown Office and Procurator Fiscal Service for a prosecution to be pursued. However, the police might have concerns about conduct or activity that might indicate that an individual is involved in the trafficking of people, and the provision gives them the opportunity to make an application to the court. The court must be satisfied that the adult against whom the order is sought has acted in such a way that there is a risk that they could commit a relevant offence under the Human Trafficking and Exploitation (Scotland) Act 2015.

Such individuals have the opportunity to challenge the order in court through the normal due process. If a TERO is granted, the accused has the opportunity to take the matter back to the court and have it reviewed. There is also the opportunity for the chief constable to do that if it is deemed necessary.

The timeframe for which a TERO applies is different from that of a TEPO on the basis that no conviction has been secured at that point. A TERO has a fixed period of at least two years, whereas the minimum period for a TEPO is five years. The timeframes are different, and certain criteria are set out for the court to consider in determining an application for a TERO.

John Finnie: Would you expect Police Scotland to liaise with the Crown Office regarding any application when there might be insufficient evidence for a prosecution but a TERO might be appropriate? I am thinking about the process of the police dealing directly with the courts and bypassing the Crown Office. It would be of concern if that were to become the process.

Michael Matheson: The likelihood is that the individuals concerned would be on the police's radar. Given the nature of the activity that they would probably have been involved in, I would expect the prosecution services to be aware of them as well. There might be insufficient evidence to justify a conviction at that point, but there could have been a range of activities that would raise concerns about an offence being committed. In those circumstances, a TERO would be appropriate. It provides the police with an additional measure in taking action against an individual who might be involved in activity that could lead to trafficking. From your own experience, you will know that it can be difficult and complex to identify such individuals and the way in which they are operating.

Liam McArthur (Orkney Islands) (LD): I want to follow up on John Finnie's line of questioning. What leapt out at me from the policy note was that oversight of the measures would need to be carefully managed. Is there a process by which the Government intends to look at the operation of TEROs, might further clarification be necessary on the criteria, and will the operation be kept under review?

10:15

Michael Matheson: We will look at how the TEROs and the TEPOs are operating. We will liaise with the Crown Office and Procurator Fiscal Service, Police Scotland and the Scottish Courts and Tribunals Service to evaluate how they are operating and whether they are fulfilling the purpose for which they were intended, and to consider whether there is any need for further alteration to the arrangements that we have in place. We will certainly keep them under review.

Liam McArthur: Would that review incorporate any evidence or input from other bodies outwith the courts or COPFS? I am thinking of bodies such as the Scottish Human Rights Commission, which I am sure will keep a weather eye on the situation over the coming years.

Michael Matheson: We are not planning any formal review process, given that the regulations for the TEPOs and TEROs have already been introduced; what we are doing now is just adding some relevant factors. However, when we introduce any new provisions—particularly orders such as these—we want to continue to evaluate how effective they are proving to be, so we will certainly be doing that. If any issues of concern were raised by the Scottish Human Rights Commission, they would of course be considered, but you will recall that quite a number of the issues were considered when the Human Trafficking and Exploitation (Scotland) Bill was going through Parliament, and at that time the measures were viewed as proportionate and reasonable.

We will also engage with organisations that work in the field, such as Migrant Help and the trafficking awareness-raising alliance, not only on how the orders are operating but on how the legislation as a whole is operating. Those organisations have been key to the strategy that has been published today, and in ensuring that we make the country as hostile as we can to those who want to peddle the misery of human trafficking.

The Convener: As there are no further questions from members, we move to agenda item 5, which is formal consideration of motion S5M-05625. The Delegated Powers and Law Reform Committee has considered and reported on the regulations and had no comment to make on them. The motion will be moved and there will be an opportunity for formal debate, if necessary.

Motion moved,

That the Justice Committee recommends that the Human Trafficking and Exploitation (Scotland) Act 2015 (Relevant Trafficking or Exploitation Offences and Relevant UK Orders) Regulations 2017 [draft] be approved.—[*Michael Matheson*]

Motion agreed to.

The Convener: That concludes our consideration of the affirmative instrument. The committee's report will note and confirm the outcome of our consideration. Are members content to delegate to me, as convener, the authority to clear the final draft of the report?

Members *indicated agreement.*

10:18

Meeting suspended.

10:21

On resuming—

Domestic Abuse (Scotland) Bill: Stage 1

The Convener: Item 5 is our second evidence session on the Domestic Abuse (Scotland) Bill. I refer members to paper 4, which is a note by the clerk, and papers 5 and 6, which are Scottish Parliament information centre briefing papers.

It is my pleasure to welcome Clare Connelly, who is from the Faculty of Advocates; Grazia Robertson, who is a member of the Law Society of Scotland's criminal law committee; Andrew Tickell, who is a lecturer in law at Glasgow Caledonian University; and Lindsey McPhie, who is a past president of the Glasgow Bar Association. You are all welcome. I thank you for your submissions, which are helpful for the committee's scrutiny of the bill.

I will start the questions. The Faculty of Advocates submission says:

> "the criminalisation of behaviours, such as those listed in section 2(3) of the Bill, requires to be contextualised if the legislation is to achieve its aim."

Will you tease out the distinction between common couple violence and coercive control, which you said needs to be looked at?

Clare Connelly (Faculty of Advocates): There is a substantial amount of international research on domestic abuse. Over the years and recently, an understanding has developed that distinguishes violence and conflict that arise within a couple from domestic abuse. Common couple violence is defined as violence and aggressive language that are used intermittently by individuals when a dispute arises in a couple but which are not underpinned by on-going coercive control. The distinction that has been drawn between such behaviour and domestic abuse has been very much welcomed.

Unfortunately, some people resolve interpersonal disputes by using violence, but such behaviour is different from the underpinning coercive control that is the main factor in domestic abuse. As members know, historically, people talked about domestic abuse as wife battering—that is how it was originally spoken about in the 1970s. Gradually, as time has gone on, domestic abuse—or domestic violence, as it used to be called in Scotland—has come to be understood as something much wider than physical violence that one partner uses against the other. The prevalent features are physical violence and sexual violence, but they may be episodic; what underpins domestic abuse in a relationship is a desire by one partner to control the other. Recognising coercive control becomes extremely important when we look at the victims of domestic abuse who are at the highest risk of homicide, which mainly occurs either when the victim leaves the relationship or after they have left.

In the 1970s, our understanding was that domestic violence was violence between partners to resolve disputes. We now understand that coercive control is the main feature of domestic abuse. That is why, for example, homicide risk heightens when the relationship is brought to an end—basically, it is because the controlling partner cannot handle that fact.

Our concern is that some of the behaviours that are listed could easily occur outwith a relationship that is underpinned by coercive control. Without accurate identification of the context of coercive control, it might become difficult to criminalise the behaviour that the bill seeks to criminalise and to maintain public confidence in what the Parliament is trying to achieve.

The Convener: Is that linked very much to the provisions on a course of behaviour?

Clare Connelly: Those provisions certainly go some way towards addressing our concern. The normal lens of the criminal law is a narrow lens—it is single-incident focused. The bill has gone some way towards contextualisation by talking about a course of behaviour.

We realise that the point that I just made is difficult to legislate on. We recommend in our latest submission to the committee that, for the bill to be successful, it must be accompanied by a public and professional education programme. That is the best way to achieve recognition of the distinction that I refer to. Personally, I do not think that it is possible to legislate for it. In an ideal world, it would be great if we could do so but, practically speaking, I am not sure that we can.

The Convener: Are there any other comments from panel members?

Grazia Robertson (Law Society of Scotland): On behalf of the Law Society of Scotland, I agree with those comments, which are mirrored to an extent in our submission. It mentions the lack of clarity, which relates in part to the fact that, as Clare Connelly said, there is no distinction between situations that ideally we would not wish to be criminalised and situations where the criminal law should intervene. That is the difficulty.

As practising lawyers, we see difficulties every day in addressing issues of domestic abuse under the existing legislation. I sit on a committee that is full of practising criminal lawyers, and we are in the courts day and daily. We see difficulties regarding legislation that seeks to protect innocent individuals in a domestic setting. Difficulties that

are being experienced even now include witnesses not attending; witnesses attending court and not speaking to their original statement, which seemed to support the allegation; and breaches of special bail conditions. All those situations result from difficulties in the current legislation.

Further investigation into that might shed some light on the dynamic of what is going on in those cases and the other cases that Clare Connelly referred to, which involve people who resort to violent outbursts because that is the only way in which they can respond to certain situations—that is how they are. I certainly do not disagree with anything that Clare Connelly said.

Lindsey McPhie (Glasgow Bar Association): One concern of the GBA is that, if the bill is passed, prosecutors will be faced with a new set of legislative provisions. The GBA's experience is that, when legislation is introduced, the Crown is understandably keen to use it. There are difficulties in the prosecution of such offences and there are issues of proportionality. Who will apply the reasonable person test? The Scottish Police Federation's submission expressed concerns about police officers being the reasonable person, which the committee might explore in a later evidence session.

I echo Grazia Robertson's comments that there are a lot of issues and complications even with the current domestic abuse provisions, which should be looked at closely before we tackle the very complicated area of domestic abuse that is being discussed.

The Convener: A lot of issues were raised in those opening responses. The course of behaviour, the time over which that takes place and what such behaviour includes are matters that other members will tease out. The issues point to this being a distinct offence.

10:30

Mary Fee (West Scotland) (Lab): Good morning. I will pick up on reasonable behaviour. Mr Tickle's submission, in particular, talks about the reasonable person test. It says that that is not a "helpful approach" and that a

"key function of this Bill must be to discriminate between degrees of wrongful behaviour, not ... to distinguish wrongful behaviour from innocuous behaviour".

Will you expand on those comments and give us a bit more detail on what should be in the bill to completely clarify that aspect?

Andrew Tickell (Glasgow Caledonian University): At the risk of introducing "The Thick of It" this early in the proceedings, I say that my surname is pronounced "Tick-ell". Everyone gets to call me "Tickle" once.

You have a difficult task in front of you in the sense that it involves discriminating between a wide range of behaviours. The abusive behaviour provision is broad and has to be so, because we are covering a range of behaviours that in one context would be innocuous and in another context would be profoundly problematic. The Crown Office and Procurator Fiscal Service and the Government have argued that there is a range of checks on that broad definition of abusive behaviour. The reasonableness test is one of those checks, and the accused person can offer that as a defence. I am not sure that defining criminal laws primarily in defence terms is particularly reassuring for the citizen because, to some extent, the burden of proving a defence falls on them.

The key aspect is ensuring that the thresholds for criminalisation are sufficiently high. In my submission, I directed you to the English legislation, which provides that the harm that is caused to the complainer has to be of sufficient severity and have a significant impact on their day-to-day life. There is nothing like that in the bill that would allow us to discriminate between more serious and less serious behaviour, but that would be the best way to ensure that the bill catches the right cases and criminalises those who are guilty, while ensuring that people who are behaving badly and not very pleasantly towards their partners are nonetheless outside the scope of the criminal law when their bad behaviour is not likely to cause significant harm to the complainer. That is the approach in England and it would be sensible to have that approach in Scotland, too.

Mary Fee: Would the definition of a significant impact have to be detailed? Where would you start with that definition and where would it end? I am sure that there are many different views on how to define a significant impact.

Andrew Tickell: One could say the same thing about reasonableness. Would a significant impact have to be defined exhaustively? Section 76 of the Serious Crime Act 2015 does not do so; it simply says that the impact has to cause significant or substantial harm or distress. To some extent, that is in the eye of the beholder, but it is a judgment about wrongfulness in context, because the pattern of behaviour is looked at. In most cases—summary cases—we would have to allow the judge to make that judgment; in jury cases, we would have to allow the jury to make it.

Such legislation cannot be exhaustively precise. It is powerfully difficult to define such things. All that we can do is ensure that the decision maker has an eye to certain principles. I suggest that one of the principles that should be taken into account is the seriousness of the harm, and not whether it might give rise to distress, which is the test in the

bill. Distress seems to be an incredibly low bar for criminalisation.

Mary Fee: Would the police be the first people who would have to judge whether something had a significant impact? If the police were called to a property where an incident had taken place, would they have to make the initial assessment of whether something that was of significant impact had occurred?

Andrew Tickell: Yes, although, equally, under the proposals, the police would have to decide whether the behaviour—or the course of behaviour—that was alleged to have taken place was likely to have one of the listed psychological effects on the complainer. In such a context, that does not seem to be a particularly straightforward task, either. I am not sure whether the task is qualitatively more difficult for police officers to do if they are made to focus on the seriousness of the harm, as opposed to considering simply whether harm has arisen.

Mary Fee: Does anyone else want to comment on that?

Grazia Robertson: I imagine that the suggestion that the police would have to assess such a scenario if they entered it is probably less likely in this situation, because the bill's purported aim is to deal with issues that are on-going over time. It is not supposed to deal with a single, dramatic incident, such as the breach of the peace or the assault scenario, which is more likely to be covered by police officers attending a scene and having to assess a situation.

In our submission, we made the point that gathering evidence about on-going behaviour is difficult. I imagine that it would be unusual for police who had suddenly appeared on the scene to be able to form a view at that time regarding the behaviour.

Lindsey McPhie: I presume that, as Grazia Robertson said, it is envisaged that there will have been a continuous course of abusive behaviour. There are issues with gathering evidence in such a situation, because the people who have experienced such abuse will perhaps be extremely reluctant to come forward.

When will the trigger occur? Will it be when another party reports the abuse to the police but, meanwhile, the two parties still live together? What is involved is not like the current situation in which there is a single episode, the police arrive and, if there is a sufficiency of evidence, they immediately detain or arrest the person concerned, who is inevitably kept in custody overnight or over the weekend. It is hard to envisage a situation in which the police will be aware immediately that coercive control is on-going.

There will be difficult and, as we called them, marginal decisions for prosecutors. They have specialist training, but the GBA indicated that it is quite concerned about what the guidelines will be and that it would welcome input from people who represent those who are accused, if that is feasible.

The Convener: The evidence that we took from people who had experienced such abuse was that the trigger time always seemed to be the point at which they left the relationship. When they reflected back, they saw that a substantial body of evidence had built up.

Lindsey McPhie: Yes.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Mr Tickell, paragraph 4 of your submission says:

"Entering into any relationship inevitably restricts the 'freedom of action' of both parties."

That goes to the heart of some of the decision making. Is that surrender of power voluntary or involuntary? Is that where you are trying to take us? Is the voluntary or involuntary character of the surrender a sensible way for the criminal justice system to think about the matter? Relationships are multifaceted; they change over time and are different in different instances. The degree of surrender or trading in of power and exchange for benefit will differ in every household in the country. Does that go to the heart of some of the difficulty?

Andrew Tickell: You could argue that it does. It is certainly worth reflecting on the fact that the definitions of abusive behaviours in the bill run through a spectrum. There are some at the high end of the spectrum—degrading behaviour, for example—that it is hard to see any healthy relationship participating in. Then there is behaviour at the possibly lower end of the spectrum—such as monitoring-type behaviours and making one person dependent on the other to some extent—that even the Scottish Government recognises might capture behaviour that is perfectly commonplace and sometimes benign, although it is sometimes not benign.

I see no way of capturing the broad gamut of behaviour that the bill aspires to capture without having a very broad definition of what abusive behaviour might look like. Unlike the Law Society, my core submission is that, to take that on to an appropriate level of criminalisation, we should have additional tests of sufficient severity. Given the range of behaviours that domestic abuse and coercive and controlling behaviours cover, from doing and saying things to not doing and not saying things, I do not see how we can have a straightforward, clear definition of abuse.

The committee should really think about whether the thresholds in the bill are sufficiently high. I suggest that they are not.

Stewart Stevenson: We come to the heart of it: do we need a definition in the bill or should we simply leave it to the courts? I am not sure whether anyone who is in the room was present when we debated curtilage in the Land Reform (Scotland) Bill in 2002. Ultimately, after many months of deliberation, we concluded that it was not possible to define curtilage; we had to let the courts consider the individual circumstances and specifics of each case. Are we back in that territory?

That question is directed not just at Mr Tickell but at other panel members.

Andrew Tickell: I do not think that you necessarily are back in that territory. I am not suggesting by any means that you try to define abusive behaviour exhaustively.

It is worth emphasising that it is the Scottish Parliament's function and your democratic legitimacy to make the laws. The procurator fiscal is not elected by anybody. It would be inappropriate to insist on a very broad definition of the crime that gives substantial discretion to prosecutors. I suggest that that would be an abrogation of your functions.

The issue of definition raises fundamental questions about European convention on human rights compliance, because the bill as a whole is a significant intervention in the private life of citizens of this country. Under the European convention on human rights, any intervention in people's private lives must be sufficiently clear, pursue a legitimate aim and be proportionate. In many cases that will not be a problem, but the named persons case in the UK Supreme Court should remind us of the importance of having laws that are sufficiently clear, such that the citizen can understand them.

Stewart Stevenson: You said that they should be "clear", but do you mean "certain"?

Andrew Tickell: I am a lawyer and so I am allowed to quibble. What distinction do you see between the two?

Stewart Stevenson: "Clear" means understandable and "certain" means delivering a certain legal outcome. They are rather different things. Clare Connelly is nodding at that distinction and might want to come in.

Clare Connelly: I would use the term "legal certainty", because to be convention compliant, a law has to be legally certain. I would use the term not only for that reason. Since its creation, the Scottish Parliament has made huge inroads in improving our legal and social response to domestic abuse: one of the first pieces of legislation to be passed by the Parliament was the Protection from Abuse (Scotland) Act 2001.

If we are trying to both protect individuals and empower them to seek legal protection that was not previously available to them because of the limited domestic abuse behaviours that have been covered by the existing criminal law, legal certainty is very important, in terms of making law that is enforceable and convention compliant and empowering individuals and giving them the knowledge that their lifestyle and the behaviours that they have endured and suffered are not condoned by law, but criminalised by it.

You have an extremely difficult task before you, as I said in my submission. I am by no means suggesting that it is easy. There has to be some guidance, and using a general term, without offering any definition or examples, is problematic. I come back to the point that for the bill to achieve its aim, context is everything.

Stewart Stevenson: You used the word "guidance", but do you mean that in a specific legal sense? Should there be extra-legal writings that inform the courts and the procurators fiscal when they make decisions, or should the guidance be incorporated in the primary legislation and supporting secondary legislation?

Clare Connelly: It cannot all be incorporated in the legislation. As the Faculty of Advocates has suggested in our submission, an education campaign for the public would be helpful, and front-line professionals involved in enforcing the legislation would have to receive some sort of training. That is something that is well understood by agencies such as Scottish Women's Aid and the Women's Support Project, and it is internationally evidenced in research on domestic abuse. For the legislation to be fully effective, it must be backed up by an improved general understanding of the importance of context of behaviours.

Lindsey McPhie: I echo Clare Connelly's comments. I appear daily in the domestic abuse court, and the response from the Scottish Parliament in improving awareness and understanding the dynamics of domestic abuse, the provisions for vulnerable witnesses, the ASSIST—advice, support, safety and information services together—project and specialised courts and training for sheriffs are all hugely welcome.

I wonder whether we are yet at the stage where we should be assessing the impact of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, which has just come in. It is only in the last two to four weeks that I have seen domestic aggravations appearing on the face of the complaints. The 2016 act says that section 1(1) applies where it is

"libelled in an indictment or specified in a complaint that an offence is aggravated by involving abuse of the partner or ex-partner".

The offence is so aggravated if

"(a) the person intends to cause the partner or ex-partner to suffer physical or psychological harm, or

(b) in the case only of an offence committed against the partner or ex-partner, the person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm."

We are talking about contextualisation of offences, and provision has just been enacted for sheriffs to give cognisance to whether the motivation behind the contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 or the assault is in fact to perpetrate physical or psychological harm. There are many provisions at the moment that are working well. Perhaps those could be refined further before we introduce yet another piece of legislation, which I think that everybody agrees can be problematic.

10:45

The Convener: We will cover the definition of psychological harm. We might assume that the coercive aspect is subsumed in that, but, given the discussion that we have had about coercion, perhaps that is where the gap is.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I want to ask about the impact of the bill in relation to children and, in particular, the concerns that the Glasgow Bar Association and the Law Society raised about clarification of the statutory aggravation in relation to a child. Will you expand on those concerns?

Grazia Robertson: The Law Society produced an example. The law needs to be clear in its terms so that everyone can understand it. It is a criminal law, and people should not be able inadvertently to contravene that. The bill must be quite clear about what kind of criminality it is seeking to address, to attack and, hopefully, to form a solution to.

One example that my committee came up with was the fact that the bill acknowledges that children can sometimes be used as a weapon by one party as a way of hurting the other party or controlling their behaviour. Above all, children, as eminently vulnerable people, must be protected. There are other protective and child welfare measures that can come into play in a scenario in which children are being adversely affected by the behaviour of one or both of the partners—both might be at fault. Those protective measures should always be properly in place and working well to protect the children. That is the front line. Those scenarios require not a criminal standard of proof, but a civil standard. People can become involved in helping children in such domestic scenarios without worrying about whether they reach the required high standard of proof for criminal matters.

In the bill, a child is defined as anyone who is

"under 18 years of age".

When my committee was chatting about that, we wondered what would happen if the couple were 17-year-olds, or their friends were. We could have a scenario in which there was an aggravation because a couple's young friends were in the house during an altercation between the couple. We assumed that that was not the aim of the bill and that it was to do with younger children, but that is not expressed in the bill. There could be a scenario in which a 17-year-old is on the periphery of a situation—perhaps they have not been given money to go out or something—and are then captured in that aggravation. What are the terms of the aggravation? Are such situations really what the Parliament is looking at? Will people be caught up by chance in a situation where there is an aggravation involving children?

As criminal lawyers, we know the shortcomings of the criminal justice system—it is quite a rigid system, as I was saying to colleagues. It can go for the extremes of behaviour, but it is not good with the subtleties. That subtle behaviour can have a bad impact on children. Civil remedies such as the involvement of social work and the children's referral system should be the front-line safeguard for children, given that they do not require such a high standard of proof. My hope would be that social work and the children's referral system would always be rigorous and well resourced and that that side of the situation would be dealt with by well-trained professionals who can enter into an environment and protect children, even in a scenario in which no criminal conviction would succeed against anyone.

Rona Mackay: Thank you. Would anyone else like to comment?

Lindsey McPhie: The GBA also addressed the point that Grazia Robertson mentioned, on which I am sure that the committee will have had submissions from the Scottish Children's Reporter Administration.

My understanding is that currently there are fairly rigorous provisions. As I mentioned, under section 67(2)(f) of the Children's Hearings (Scotland) Act 2011, there can be a ground of referral without there being a criminal conviction; it only has to be established, on the balance of probabilities, that the child has been in a house in which domestic abuse has occurred. For example, I understand that in the situation where a partner leaves a relationship in which there have been recorded incidents of—though not necessarily

convictions for—domestic abuse and forms a relationship with a new family, the fact that there have been previous recorded incidents will form an automatic ground of referral.

There are fairly strong provisions at the moment. However, the children's reporter might feel that there is a gap, and in its evidence to the committee it might say that the current provisions are not stringent enough.

Rona Mackay: In their submissions, some of the children's organisations said that the provision about the child being in the house was not strong enough. They asked whether that meant that the child had to be in the room or whether, for example, it was enough that they were listening in the bedroom and could hear the abuse happening. Would you like to see specific clarification on such points?

Lindsey McPhie: Clarification is always welcome. I know that this will probably not answer Rona Mackay's question, but we observed that, even without specific legislation, a prosecutor will always draw such things to the court's attention. Where children were in the house, sheriffs will certainly take a very strict view of an incident occurring in their presence, whether or not they heard the abuse or were even in the same room, and that would always influence a sheriff's disposal.

Rona Mackay: Thank you. To go back to your point about 17-year-olds, would you advocate putting a limit or threshold on the age?

Grazia Robertson: I am here on behalf of the Law Society of Scotland. In our discussions, we did not go into suggestions as to how the bill could be altered. We looked at it from the point of view of perceived difficulties, problems and anomalies.

On the point about children being present in the house, there would presumably have to be some way of establishing that the perpetrator of the crime knew that they were there. It would be invidious to have an aggravation that could conceivably mean an increased punishment for someone without their being aware of that scenario. Regard must be given to how a case would be presented in the course of a trial in a criminal court setting, and what evidence would have to be led to establish the aggravation. We took the pragmatic view that the protection of children in such scenarios is paramount. We asked ourselves how we would best protect them, and our view was that front-line measures such as social work involvement and referral to the children's panel would be best suited to dealing with such scenarios, rather than there being an aggravation in the form that is in the bill.

Rona Mackay: Okay. Thank you.

Clare Connelly: I want to add one thing. There is substantial research that has shown that children who hear domestic abuse are often more adversely affected by it than are those who see it. What is evidenced is that children who hear but do not see abuse become much more distressed, because they cannot see how badly their parent is being injured. If we are trying to control children's distress at exposure to abuse, the value of making a distinction between their being in the same room or not is not supported by the evidence.

Mairi Evans (Angus North and Mearns) (SNP): Rona Mackay touched on a couple of the questions that I was going to raise, and she has made important points on them. In other legislation that we have looked at, we have discussed the definition of a child, and the panel has just answered my question on that, too.

I found the submissions of Children 1st and the National Society for the Prevention of Cruelty to Children interesting. They said that the aggravation should go further, to recognise that, where children live in a domestic abuse situation, they are inevitably victims of that abuse. Regardless of whether they see or hear it, it will have an impact on them. The submissions also list all the studies that have been done on that. Would the wider impact that they mention be recognised under the bill?

Clare Connelly: The aggravation provision in the bill allows that to be taken into account. The information required as to whether it is appropriate to have the aggravation—such as knowledge that children were present—will be before the person who marks the papers and the person who will prosecute the case. The bill can make only so much detailed provision for that aggravation and, as drafted, it allows flexibility. I agree with my colleagues about the civil provisions, but I would expect agencies that represent children to be keen to have an aggravation attached to the criminal offence where children were present. The research results on the impact on children certainly support that because, although children are not direct victims, they are consistently secondary victims of domestic abuse in a household.

Mairi Evans: I would also like your views on the requirement to consider non-harassment orders. A lot of the written submissions that we have received agree with that requirement. The evidence that we have had so far indicates that non-harassment orders are not issued frequently. What are your views on that? At the moment, a lot of people have to resort to the civil process to get action.

Clare Connelly: I was an academic before I went back into practice and went to the bar, and at that time Kate Cavanagh, Jane Scoular and I

evaluated the Protection from Abuse (Scotland) Act 2001. As part of that, we looked at access to, and breach of, civil protection orders, and it became clear that the provisions that existed at that time meant that, before a prosecutor could move to get a non-harassment order, they had to be able to show a course of conduct and behaviour. Because the narrow lens of the criminal law meant that, generally, one incident of domestic abuse was prosecuted, it was not possible to show a course of conduct and therefore the prosecutor could not move for a non-harassment order. When I later worked with Rhoda Grant on the Domestic Abuse (Scotland) Bill, we suggested that the requirement for showing a course of conduct be removed from the bill, and that was done.

I believe that a non-harassment order should be available. In fact, it should be compulsory for sentencers to consider granting a non-harassment order, because women routinely cannot secure civil protection orders because of the contribution levels that are required under civil legal aid. A person who perpetuates domestic abuse, who is charged and who goes to court might access legal aid more easily than someone who is seeking protection. Given what we know about the trigger for increased violence and the increased risk of homicide where a person has left or is trying to leave a relationship and is taking formal steps to seek protection, it becomes extremely important that we join up our legal response to that in criminalising behaviours and, at the same time, offering the necessary protection.

Lindsey McPhie: Clare Connelly and I have discussed the issue of non-harassment orders previously. Clearly, they can be a very effective measure, but one of the issues that the Glasgow Bar Association raised in its written submission is how the measure will operate in practice. At the moment, there can be many situations where people appear from custody and plead guilty immediately. I think that it is envisaged that, as part of the inquiry and investigation that the Crown Office and Procurator Fiscal Service and ASSIST—the advice, support, safety and information services together project—will have carried out, the complainer will be asked whether they wish to have a non-harassment order. However, there could be a situation where that view has been sought on the Friday night and the accused appears from custody on the Monday and pleads guilty in court. If the view at that point is that a non-harassment order is welcome, the question is whether it should be put in place immediately without any further inquiry.

Often, the complainer's views are the most persuasive issue, and that is very problematic when a non-harassment order is made. We said in our written submission that, as far as we can see, there is no provision at the moment for the recipient of a non-harassment order to ask for a variation of it. On numerous occasions, we have received letters from solicitors acting on behalf of a partner who has been the victim of domestic abuse to say that they wish the non-harassment order to be removed. However, there is no provision in the Criminal Procedure (Scotland) Act 1995 for them to make an application; it has to be done by either the prosecutor or the solicitor acting on behalf of the accused person.

11:00

Sheriffs will obviously be very considered in their approach, but issues could arise when there has not been sufficient time for the views of the complainer to be sought after a period of time. Clearly, in cases where there is a record of domestic abuse, it might be immediately apparent that an order is appropriate or that the complainer is seeking one. Quite often, an application is made after a criminal justice social work report has been prepared, and the prosecutor and sheriff have time—as does the accused—to reflect on whether an order is appropriate. I worry that, if sheriffs are to be faced on every occasion with the decision on whether to make a non-harassment order, they might work on information that is new without even the complainer having had the chance to consider whether he or she wants it. Once an order is in place, it is strictly enforced. That is more a point about the practical application.

Clare Connelly is right that a domestic abuse interdict can be achieved under the Domestic Abuse (Scotland) Act 2011, and for that there does not have to be a course of conduct; one incident is sufficient. However, there are issues of funding for that.

Mairi Evans: The written evidence that we had from the charity Children 1st said that it would

"welcome an amendment to the Bill to include a mandatory duty on the court to consider whether to impose a non-harassment that includes the children in all cases where the statutory aggravation in relation to a child is applied."

Evidence that we received from the NSPCC says that it heard from the bill team that

"there has been at least one domestic abuse case in Scotland where a court ... made a non-harassment order covering children",

but the order

"was subsequently overturned in a civil child contact case."

The NSPCC was of the view that

"it must be in the authority of the court within this legislative instrument to consider making a non-harassment order in respect of children"

and that, when that order is made, it should be recognised by the civil courts as well.

Grazia Robertson: My personal impression is that there is an issue with non-harassment orders to do with when they are and are not granted and how they are implemented and enforced. I have spoken with the agencies who are keen to have the provision in the bill, and their main complaint appears to be that not enough orders are being made and, when they are made, they are not effective enough.

My initial view, as a criminal lawyer, is that we should look at what is happening and whether there is an issue regarding the orders, rather than seek to incorporate them into another act when more offences may come to light. I wonder if there is an underlying problem in how the orders are being implemented. People think that there are not enough orders, yet when they are there, people do not find them effective. If there is an issue with the orders, the bill will not necessarily assist matters.

Clare Connelly: The question of the effectiveness of civil protection orders is complex. What do we mean by "effective"? Do we mean that the orders are effective in stopping an abuser being abusive, or that they are effective in empowering the recipient of the order? Quite substantial international research shows that the main benefit from civil protection orders is that they empower the recipient, because a formal external process has said that the behaviour is wrong and should not happen again. Women—it is predominantly women—report that that is one of the big benefits for them.

In the worst or most extreme situation of an estranged partner who, as a result of having lost control, is going to carry out an act of homicide, a non-harassment order will not change that. Let us be honest: an order will not change that extreme violence.

When we interviewed women, they told us that the difficulty was that they went to court and tried to get a protection order, but they could not afford to pay their contribution to civil legal aid because they were bringing up the kids on their own with no financial support from the estranged partner. In such situations, it is difficult to justify to someone why they cannot get protection under the law.

Undoubtedly there will be mixed views on how effective non-harassment orders are. Certainly, some time ago, we were told that, when orders were breached, police officers who attended would say that there was no corroboration for the event that breached the order. There has been a bit of misunderstanding there. As I said, if protection orders are not being granted when they should be granted and breaches are not being appropriately responded to, that is a training issue rather than something that requires legislation.

To respond to Mairi Evans's question, if the aggravation in relation to the child is there and children are to be regarded as victims, they should be afforded the protection of a non-harassment order, for the same reasons as those that I gave for protecting other victims of domestic abuse.

Mairi Evans: Thank you.

The Convener: Victims of coercive behaviour more or less told us that non-harassment orders were pretty useless, because if children were involved there would be contact orders, which would inevitably bring them into contact with the abuser. Perhaps Ms Robertson is right. The issue is complex and there needs to be further investigation—probably outside the scope of the bill—of how non-harassment orders are operating in practice.

Liam McArthur: My colleagues have probably covered the principal issues in relation to the bill.

Concern has been expressed that the Government has not taken the opportunity in the bill to acknowledge the wider context of violence in a domestic setting. Violence can be perpetrated by children against their parents or grandparents, for which we use the generic term "elder abuse". Is there justification for excluding that type of abuse in a domestic setting, because it is different from the abuse that we have been talking about this morning? Would its inclusion complicate the implementation of the legislation?

Clare Connelly: I understand that there is a distinction between domestic abuse among partners who have or have had an intimate relationship and violence that is perpetrated by children against parents or elder abuse.

Liam McArthur: Elder abuse would not necessarily mean violence; I presume that the term covers controlling behaviour and all the rest of it—that is, all the serious abuse that happens and the distress that is caused between partners who have an intimate relationship. I wonder whether we are missing a trick by not including elder abuse in the bill. Would doing so make implementation more difficult, because such abuse is regarded as very different from abuse of a partner with whom there is an intimate relationship?

Clare Connelly: I understand that one reason for the bill is that the national definition of domestic abuse in Scotland includes a lot of behaviours that are not yet criminalised. My mind is turning on elder abuse, and I think that things such as misusing money are covered by the existing criminal law. They are not the same issue. Perhaps you can assist me by identifying specific behaviours that would arise in respect of elder abuse and which are not already covered by the

criminal law, as there are in respect of domestic abuse in intimate relationships.

Liam McArthur: The concern came through in the evidence that we received. I think that the overwhelming majority of respondents to the broad consultation on the provisions supported a narrower focus. That might be precisely for the reasons that you suggested. However, we are opening up the scope of the law to deal with controlling behaviour, and I am not sure whether such behaviour is currently covered in the context of elder abuse, when it is not covered in the context of abuse between partners in an intimate relationship.

Andrew Tickell: Let me suggest an example. Let us imagine that two maiden aunts live together—I used to have a couple who lived together and who had a happy relationship. If one such person was systematically coercing, controlling and otherwise abusing the other in a way that was outside the scope of the criminal law, that would not be covered by the bill.

Perhaps you also have in mind the English definition, which is broader and covers family members—not just children, but cousins who may be living in the same house. The fundamental question is: if coercive and controlling abusive behaviour is worth criminalising in relationships of an intimate character, why is it not worth criminalising in other contexts, too?

Scottish Government civil servants told the committee that they felt that it was appropriate that domestic abuse should be a distinct category of wrong. From a purely personal perspective, I am not really sure why. If abuse is very serious but it occurs between people who happen to live together and do not have a sexual or romantic relationship, I am not sure why that should be categorically different, and not criminalised by the criminal law, from abuse in a domestic partnership, which would be criminalised.

Liam McArthur: Are there current examples in which the nature of a relationship has impacted on the way that the courts have dealt with a case?

Grazia Robertson: I do not know if this will assist you at all, but the Law Society has considered the issue of a specific focus on intimate partner relationships, and we came to the view that, in the spirit of equality, the English approach of narrowing the focus is really to be preferred to the Scottish approach. As Andrew Tickell said, if coercive and controlling behaviour is wrong and is to be criminalised, it should be criminalised equally in other domestic settings in which it appears.

I presume that the difficulties in gathering evidence are the same in a close domestic relationship as they are in an intimate partnership. The issue is the distinction that is made, with special pleading for special cases of people. I know that some organisations feel that that is an appropriate way forward, and that domestic abuse is a special case that requires its own tailored response. I understand their view, and they are representing a particular group of people—that is their function. However, should not a provision of the law apply equally to others who may suffer from the same type of behaviour under other circumstances and who also find themselves in a situation in which evidence is difficult to gather?

Liam McArthur: In the way in which the English law is currently being implemented, are courts approaching different instances in different ways? Are there issues with the thresholds, as we discussed earlier, or have those been resolved in relation to the law as it applies in England and Wales?

Grazia Robertson: I guess that it is too early to be able to comment. One issue that we raise in our submission is the difficulty, when a number of legislative provisions come in one after the other—for example, the provisions in the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 came in last year—of assessing the efficacy of one individual provision rather than all of them together. Simply by getting cases through the courts, it would be a bit premature to form any view as to how the English provision is working out.

Andrew Tickell: My understanding is that the English legislation came into force in December 2015. Thus far, as far as I am aware, very granular data has not been reported. Overall, looking across England, one comment that has been echoed in the media is that the provision is not being used very much. It has been used in cases that are not predicated only on the complainer's evidence but in which, for example, the police find a tracking device in the complainer's car and there is strong corroborative evidence or communications data that reflects regular contact between the alleged abuser and the complainer.

In Scotland, of course, corroboration issues are even more important—as a matter of law, we have to produce corroboration for a prosecution to proceed. Those are the kinds of cases that are being taken under the legislation in England, but it is difficult at this stage, for the reasons that were just set out, to undertake a systematic review of its use.

The Convener: We should not forget that section 76 of the Serious Crime Act 2015 extends to those who

"live together and ... are members of the same family".

Liam McArthur: My final point is on definitions. Lindsey McPhie spoke about the references to

intent and recklessness in the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. You have all, in your submissions, expressed concerns about the definition of reckless behaviour. Do those concerns remain, despite the fact that it appears that existing legislation refers to those things, or is it again too early to tell how the provisions in the 2016 act will be viewed by the courts and implemented in practice? Are there particular concerns arising from use of that definition in the bill?

11:15

Lindsey McPhie: I think that you said that most of the submissions are concerned about the definition of recklessness. Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 mentions behaviour that

"would be likely to cause a reasonable person to suffer fear or alarm"

and a person who

"is reckless as to whether the behaviour would cause fear or alarm."

Sections 38 and 39 of that act deal with threatening or abusive behaviour and stalking. Glasgow Bar Association's particular concern is about the bill criminalising even omissions, and people potentially being convicted of recklessly failing to do something. That encapsulates our concerns about the very broad nature of the types of behaviour that could be captured, including even "reckless" omissions. I know that we perhaps focus on the most extreme minor examples, but the difficulty is that the umbrella of the legislation would cover all those situations.

Liam McArthur: Could the bill avoid opening up situations that could be viewed far too broadly?

Lindsey McPhie: The straight answer to that is that the bill could be made to say that the offence would have to be committed intentionally rather than recklessly.

Liam McArthur: Is that view shared across the panel?

Clare Connelly: Yes.

Andrew Tickell: I go back to the offence in section 76 of the Serious Crime Act 2015. The mens rea component of that is that the accused

"knows or ought to know".

It is maybe worth stressing that, in Scots criminal law in general, mens rea is assessed objectively: we do not try to make windows into men's and women's souls. Rather, we try to draw inferences about what they must have known, based on their patterns of behaviour.

It might also be worth stressing that "recklessness" is used in a range of criminal offences and is not a new term in the law. It means something more than negligence; it is often described as complete disregard for the circumstances and implications of what was done. Perhaps that suggests a higher threshold than the word "recklessly" might imply in common language. I do not see a particular problem with making the crime one of both intention and potential recklessness.

John Finnie: Good morning, panel. I have a question for Mr Tickell about his concerns about the term "reasonable person". I know that that has been touched on previously. If two officers are sent to a dwelling house and make a judgment, is that the judgment of reasonable people, which will be followed by the reasonable judgment of the officer at the place of custody? Is not that, in any case, an intrinsic part of the existing arrangements?

Andrew Tickell: That is true. My particular complaint or concern is to do with the use of "reasonableness" as a defence, in that a person could defend their behaviour if they could argue that it was reasonable. The point that I tried to make was that some behaviour might be unreasonable but not worth criminalising, whereas "reasonableness" is also used in the earlier part of the bill to determine whether a reasonable person would think that the abusive behaviour was likely to cause the complainer harm. I think that you are asking about the second of those two issues, whereas I was principally talking about the first in relation to defence.

John Finnie: This question is particularly for the court practitioners. We understand that, under the existing arrangements, police officers might be called to premises and detain a party, and a decision might be taken at some point in the process that further inquiry is merited, so the person might be released. That has given rise to a number of fairly high-profile historical abuse incidents in which patterns of behaviour—particularly violent behaviour—by offenders over a number of years have resulted in salutary sentences. If the bill progresses amended or unamended, would that approach be taken in relation to coercive behaviour—which we all, I hope, appreciate needs to be addressed?

Clare Connelly: The domestic abuse taskforce has a joint protocol with the Crown Office and Procurator Fiscal Service. That protocol determines that, when officers attend a domestic abuse incident, the investigative response will be more akin to a murder inquiry than the old response was, which was to walk the man around the block and then put him back in the house.

Now the assumption is made that there might not be anyone who can speak to the evidence, and there is a much more proactive gathering of evidence from neighbours and so on. Moreover, the focus is very much on ensuring safety in the situation instead of allowing it to perpetuate.

The difficulty is that we have always had in Scotland the requirement for corroboration, which can be very difficult in relation to domestic abuse because it is a classic case of an offence that is committed in private. As John Finnie will know—indeed, he alluded to it—the police tactic has been to investigate proactively whether former partners have been subjected to the same types of behaviours. That allows a prosecution to be brought that includes charges in respect of a number of complainers, which in turn brings into play something called the Moorov doctrine, which allows corroboration to be found in the separate individual complainers. That has been very successful as a policing tactic, but it would not be wholly accurate to say that it is popular among individuals doing defence work—if I can say that.

John Finnie: I should make it clear that I was not putting myself forward as a spokesperson in that respect.

Clare Connelly: In any case, one would expect that style of policing and evidence gathering to be replicated.

John Finnie: Of course, no one is going to phone up the police and say, "I want to report a course of coercive behaviour." The call would be driven by an individual act.

Clearly, if the level of investigation is to be enhanced to deal with a range of domestic situations, that will have significant implications for the resources that are needed to underpin investigation.

Grazia Robertson: There are already significant implications for resources with the operation of the current system and range of offences. Budgets are being curtailed, and difficult decisions are being taken. I point out that great steps have been made in specialist domestic abuse courts, and domestic abuse cases are given priority in trial fixing to ensure that they come to court more speedily and witnesses are not left hanging around and waiting for ages. However, making them a priority inevitably means that other cases fall down the list; indeed, some totally fall off the edge and are not prosecuted at all, because of the view that some offences need not be brought into the criminal courts and can be dealt with elsewhere.

However, pressure is building in the existing system. That is not say that the bill should not go ahead, but it will inevitably put additional pressure on a system that is already suffering. Of course, that is no reason not to do it, but it is something that everyone should recognise.

John Finnie: Indeed. Also, the pressure to carry out detailed inquiries does not necessarily result in what a complainer would see as a speedy response to their concerns.

Grazia Robertson: You must also remember that the bill envisages cases in which the complainer, as we would call them, or the victim—the person whom we believe is being subjected to the crime—might not give evidence at all, and may not support the charge. The bill gives the opportunity to bring to court cases in which other parties or sources are relied on for the evidence, which becomes difficult.

John Finnie: What are your concerns about that?

Grazia Robertson: One can envisage a situation in which a person might be convicted of a crime in order to protect another individual from that crime, but that individual has not given evidence to support what has been said about the behaviour and does not accept that she is the victim of the crime. She has not come to court and given evidence. The bill says that the case does not have to rely on the evidence of the victim herself or himself. Such cases might well not happen—I cannot think of scenarios in which one could gather that much qualitative evidence without the individual herself giving evidence of what she has experienced. However, the bill envisages a scenario in which it would not be essential to have evidence from that person.

John Finnie: I presume, though, that that sort of provision would be pivotal if the complainer was incapable of giving evidence for whatever reason—mental incapacity, illness or whatever. It would be important for criminal law to intervene in such circumstances, if there was a known problem.

Grazia Robertson: I presume that that is why the provision is in the bill—to deal with situations in which someone is so psychologically damaged that they are not aware of how they are suffering or, indeed, refuses to accept that they are suffering, because they consider the behaviour to be acceptable when, by anyone else's reckoning, it is not. However, how such an offence might be evidenced becomes even more problematic.

Andrew Tickell: It is probably worth stressing that it is much more likely that far more cases will arise in which there is not much more than the evidence of the complainer, and the case does not proceed, however ghastly and tyrannical the partner has been. In that sense, it is always important to remember that in criminal law interventions we have to take into account corroboration and the wider evidential rules, which

impose significant restrictions on the capacity of any criminal law to prosecute crimes that take place in private. We see that with rape conviction rates and are already seeing it with crimes of domestic violence being covered by laws on assault and on threatening or abusive behaviour.

John Finnie: This has already been touched on. Is there an opportunity for the civil law to provide protection if there is insufficient evidence for a criminal prosecution? We have heard that there would be resource implications from that and implications for access to criminal legal aid.

Andrew Tickell: You would have to use a number of the civil orders—with the inherent problems—that have been referenced by a number of members of the panel.

Lindsey McPhie: The police are likely to face much more complicated investigative procedures. The defence will then have to respond in kind, which makes defence of such charges difficult and time consuming. The definition of the offence is "a course of" coercive "behaviour" and the bill mentions "relevant effects" of making people "dependent ... or subordinate". We can envisage a situation in which the accused person would not be readily advised that there will be limits to the admissibility of the evidence that they might wish the defence to lead, because under the definition in the bill, that accused person could rightly want to introduce a lot of evidence about the day-to-day activities in their relationship. There would, therefore, be additional effects for every aspect of the criminal justice system, including the defence.

Grazia Robertson: I appreciate what Andrew Tickell said about corroboration, and I know that it is some people's bête noire, but remember that one of the main tenets of the criminal justice system is that the accused is convicted only when the court is satisfied beyond all reasonable doubt, which is a high standard. It is an inevitably high standard in any good system of criminal justice whether there is corroboration or a range of other safeguards or protections. A higher level of proof has to be surmounted—although it is different in a civil case.

John Finnie: Thank you.

The Convener: The COPFS submission goes to the heart of the sufficiency of evidence and the corroboration aspect. It says:

> "Potential evidence may be available from a range of sources including friends and family who may not have directly witnessed the behaviour of the accused but may be well placed to give evidence on the 'relevant effects' this has had on the victim."

When we were trying to get our heads around the bill we heard good evidence from victims about isolation and being cut off from family. Will you comment on how that would play out? Would such evidence alleviate some of your concerns?

Grazia Robertson: I imagine that that could alleviate some of the concerns about evidence from third parties, but it could also open the door for third parties to bring their own prejudices, complaints and perceptions about the relationship that might not be accurate. That is why it would have to be put to the test in a criminal court setting. There could be problems and benefits in relying on third-party evidence in such cases.

Clare Connelly: There are also issues around admission of hearsay evidence. Primary hearsay is allowed in courts as evidence of something being said by A to B, but that, in itself, does not speak to the truth of what is being said. We allow hearsay evidence to a certain extent, but not to speak to the truth of the matter.

If we are going to ask family members, for example, to give evidence about a family member becoming more and more isolated, rather than about what they saw as direct eyewitnesses, we are in danger of asking non-expert witnesses to express opinion in court, by asking them to describe their perception and then to express an opinion of what that amounts to. We have very strict rules and we do not let witnesses do that: only expert witnesses are allowed to express opinions. It would be very difficult.

11:30

The Convener: I suppose that I was thinking that if someone said explicitly that so and so did not welcome them and did not want them to visit, that would not be an opinion—it would be a statement of fact that the person was isolated. Would that count as evidence or is it still hearsay?

Clare Connelly: You are absolutely correct that someone can say, "She didn't want us to visit," but if the witness then goes further and says, "That happened because he told her we weren't allowed to visit," the second part is opinion. It might be quite difficult to manage that in a court setting, but it is the role of the judge to manage such things and to ensure that the evidence rules are followed. However, reliance on such evidence—you can understand why it could become very important—might make it difficult for civilian witnesses, who are not trained lawyers, to understand where the limits of their evidence should lie.

The Convener: Ben Macpherson is next.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): Thank you, convener, but I was going to ask about recklessness and that point has already been covered.

Mary Fee: I want to come back briefly to the issue of the aggravation in relation to children in

section 4. Barnardo's and Children 1st have both raised concerns around the way that the issue is described, discussed and drafted in the bill. I want to focus specifically not on the issue of a child witnessing or hearing abuse but on cases in which a child is used in the commission of the offence, particularly if a very young child is used by an ex-partner to perpetrate and continue psychological behaviour towards the child's parent. If a young child does not fully understand why they are being used but they are perpetrating abuse, they are a victim but they are also being used to continue the abuse. Should there be something else in the bill on that? Are you content that there is enough in the bill to reflect the issue, or is it captured somewhere else?

Andrew Tickell: Sorry—maybe you can clarify one point so that I am clear. Do you mean scenarios in which, for example, one partner poisons the outlook of the child in respect of the other partner—where they turn them against the other partner?

Mary Fee: No.

Andrew Tickell: Because that is criminal in some jurisdictions, interestingly.

Mary Fee: No. I mean where a child is used quite specifically to continue psychological abuse by behaviours and different ways that the child is used.

Andrew Tickell: The bill focuses on the abusive behaviour of the accused person and behaviour can be acts, omissions, things said or things not said. Given that extremely broad definition of behaviour, which includes doing things and not doing things, I suppose that it is hard to see why that would not already be covered under the provisions.

Stewart Stevenson: I want to go back to the situation in which the victim is not the complainer and test what that really means. Surely we have lots of examples already in which the victim lacks legal or practical capacity, as a child does in other parts of the legal system. There is nothing novel about the victim not being able to be a complainer that particularly informs this debate, is there?

Grazia Robertson: That is correct. The difficulty here is that depending on the incident, you can have actions or activities that you are seeking to show are criminal that, of themselves, would not necessarily be criminal but that would become criminal in a particular context, and I would have thought that the person's evidence would be very useful in seeking to prove that. I am not saying that it is impossible to prove it by other means, but it is an inherently difficult charge to prove—the responses from legal contributors have indicated that. Therefore, it will be difficult to get evidence to support the charge. It will not be impossible but it will be difficult and it may be resource intensive and lengthy, with no guarantee of a conviction at the end because the standards that have to be met are high. It will be difficult but not impossible.

There is an added difficulty if the one witness who is vital in cases of breach of the peace or assault in domestic settings is not there. Generally, such cases in a domestic setting are heavily reliant on the evidence of the individual who has been subjected to the crime. Therefore, it is an extra difficulty, as it were. That is not to say that it will be impossible to bring such a charge, but it will be more difficult because the offence is wide-ranging and incorporates both behaviour that is not necessarily criminalised at the moment and behaviour that is already criminalised, such as threatening and intimidating or violent behaviour, and is covered by existing legislation.

Stewart Stevenson: There is also a risk that, if the victim is not prepared to be a complainer, they could end up as a witness for the defence. The prosecutor would have to consider that—

Grazia Robertson: It could, inadvertently, make matters worse for the individual.

Stewart Stevenson: That is correct.

The Convener: The low bar issue has been raised in relation to various definitions. The first of those is the definition of

"a course of behaviour which is abusive".

The Faculty of Advocates says that the definition

"avoids criminalisation of single isolated incidents"

as it talks about such action taking place on at least two occasions. However, the Law Society points out that there is no indication of

"what gap in time might be reasonable".

Two incidents could conceivably happen on the same day.

Grazia Robertson: Or, conversely, years apart.

The Convener: Yes. Will you comment on that? Is that insurmountable? How can we address that low bar?

Grazia Robertson: I think that the Law Society raised the issue simply because, when we discussed the matter in committee, we noticed that the policy memorandum talks about a pernicious, sustained, on-going course of conduct that can be as damaging as any violent assault because of its pernicious and continuing nature, perhaps over a long period of time. In trying to express that, however, the bill says that the conduct must take place on a minimum of two occasions.

There seems to be a bit of a contradiction between the bill's initial aim and the inclusion of the minimum of two occasions, which does not

seem to marry up with the idea of conduct that is continually pernicious over a period of time and systematic in wearing down an individual, as it were, which is perhaps what people would normally understand by the terminology "coercive" and "controlling", because it is on-going—not high level or dramatic on any one occasion, but continuous. I think that the policy memorandum uses the word "pernicious".

The Convener: Is there any other way to address that? For the people from whom we took evidence, the behaviour continued over a number of years. Interestingly, in every case, it happened once they were married—they might have been in a relationship before, but it started many years later.

It would be interesting to get Mr Tickell's thoughts on distress, as you have particular concerns about the low threshold.

Andrew Tickell: If you look at the language that is used in the bill, you will see that "abusive behaviour" has to cause "physical or psychological harm". Read simply, that sounds like a pretty substantial test. However, if you go into the definition of psychological harm, you find that it includes the traditional criminal definitions of "fear, alarm and distress". It strikes me that distress is not used in other comparable public order statutes that we have seen. Also, distress is a fairly low bar for criminalisation. It is quite easy to cause somebody distress; causing someone fear and alarm seems to be categorically different.

The word "distress" is included in the English legislation, but it is qualified by the word "serious"—"serious fear or distress"—so we are talking about a threshold of seriousness. If you told me that I look fat, the chances are that I might be moderately distressed about that. I do not mean to trivialise the matter, but that would be a distressing thing. Distress seems a low bar, and if the bill is about the kind of serious cases in which people's human integrity is undermined by their partnerships, it seems unnecessary to incorporate such a minimal threshold in the bill. If it is about catching cases that are not criminalised at present but deserve to be, the term "distress" merely drags in a whole set of behaviours, given the broad definition of abuse, which may well impact on the credibility of the legislation by casting its net far too broadly. I would argue that that is very problematic in a statute that has a maximum penalty of 14 years in prison.

The Convener: So, for example, if I were to refer to you as "Mr Tickle"—

Andrew Tickell: That would cause profound distress. [*Laughter*.]

The Convener: A final aspect concerns psychological abuse and the "reasonable person" test. There was some concern over whether a reasonable person would be able to identify or recognise what is psychological. Would that need expert witnesses?

Lindsey McPhie: We were of the view that there could be situations in which the only way to establish the psychological impact would be to call an expert witness to speak to that, particularly if the complainer was not supportive of the prosecution. It is hard to envisage a situation in which the complainer does not give evidence but the court is able to establish psychological distress.

Andrew Tickell: It might go back to the wider definition. You do not need to be an expert to recognise fear, alarm and distress in that context, which might weigh against the requirement to have expert witnesses. In many breach of the peace cases you do not have expert witnesses explaining to sheriffs or juries what fear and alarm looks like. In a sense, you are using a lay definition of the distress that is likely to be caused to the complainer.

The Convener: There is a final point on procedure in the bill, which is that the accused should not be allowed to carry out his own cross-examination.

Clare Connelly: The Faculty of Advocates strongly supported that mirroring of the provisions that we have in sexual offence trials, where the perpetrator is not allowed to conduct their own defence. That is so that there is not an opportunity for further distress to and abuse of the complainer.

The Convener: Did everyone concur with that point?

Lindsey McPhie: Yes.

Liam McArthur: There was a concern that in a case of a reasonably high worth, in which an individual was unable to carry out their own cross-examination but was unwilling to instruct a solicitor, there might be pressure on legal aid budgets. Is that right?

Grazia Robertson: I think that we made that point. It is something that one would have to be alert to. As criminal lawyers, our initial response was that it is not a situation that we come across very often—people in summary cases saying that they want to represent themselves. If it were to happen, we can see that it would cause distress, but given that the bill will eliminate that option, we felt that it was appropriate to raise the point that if someone was manipulative enough to wish to carry out their own cross-examination in court, in order to make life a misery for the person over whom they wished to exert power, then another way of subverting the system—for people who are quite calculating by nature—would be to refuse to

engage a solicitor. Then, a provision would have to be invoked to allow the court to appoint a solicitor for that person. Realistically, there is the possibility that by doing so, the person would have legal representation free of charge.

We just wanted to raise that point as a practical consideration—somebody might subvert the system in a different way, by getting a free lawyer to do their trial for them.

Liam McArthur: Did you work through that to see whether there is a possible workaround, or would any workaround cause more serious problems in other areas?

Grazia Robertson: It would need to be looked into. I am not sure that there is a real risk of it happening, but it might happen. There is already a provision to allow court-appointed lawyers in sexual offence cases, if someone refuses to engage a solicitor or, more commonly, has sacked their solicitor as a way of creating more mayhem in the system.

I am not sure how often that provision is used and I do not know how successful it is in its current setting. The criminal law committee could not really say what impact it might have in the new setting.

The Convener: That concludes our line of questioning. I thank all of you for your evidence, which has been immensely helpful to the committee.

I will suspend the meeting briefly to allow for a change of witnesses.

11:45

Meeting suspended.

11:49

On resuming—

Railway Policing (Scotland) Bill: Stage 2

The Convener: Item 7 is consideration of the Railway Policing (Scotland) Bill at stage 2. I ask members to refer to their copies of the bill, the marshalled list of amendments and the groupings.

I welcome the Minister for Transport and the Islands and his officials.

Section 1—Provision for policing of railways and railway property

The Convener: Amendment 1, in the name of the minister, is in a group on its own.

The Minister for Transport and the Islands (Humza Yousaf): The committee's stage 1 report recommended that

"the new section 85C(1) of the Police and Fire Reform (Scotland) Act 2012 (inserted by section 1 of the Bill) be amended at Stage 2 so that it is subject to the affirmative procedure."

That recommendation picks up on the conclusion of the Delegated Powers and Law Reform Committee's stage 1 report on the bill that that procedure should be amended. The procedure relates to the future regulations that are to specify which rail operators, or classes of rail operator, are covered by the requirement to enter into a railway policing agreement. The DPLRC's rationale for recommending a change to the procedure is that it provides for a greater level of parliamentary scrutiny of those regulations.

In correspondence with the DPLRC, we set out our view that the power to make those regulations is narrowly drawn and could be used only for the specified purpose. We also explained our view that applying the negative procedure to those regulations provided an appropriate balance between the need for parliamentary scrutiny and the effective use of parliamentary time and resource. However, as our written response to the committee's stage 1 report indicated, in light of the views of both committees and the fact that such matters are always a balancing exercise, I am content to accept the recommendation. Therefore, I propose amendment 1 to change the procedure to the affirmative one.

I move amendment 1.

Amendment 1 agreed to.

Section 1, as amended, agreed to.

Section 2—Chief constable's functions in relation to policing of railways and railway property

The Convener: Amendment 3, in the name of Liam McArthur, is grouped with amendments 8, 9 and 14.

Liam McArthur: As colleagues will recall from the stage 1 debate, I have concerns about the content of the bill as well as the approach that the Government has taken.

On the latter, it was a mistake for ministers not to consult on more than a single option—merging the British Transport Police with Police Scotland. I recognise that that was their preferred option and understand that they might have found it difficult to persuade BTP officers and staff and the wider public that they were genuinely willing to consider others. However, not to bother asking for views comes across as blinkered, dogmatic and even a little arrogant. As a consequence, Parliament has been presented with a bill that has not been properly road tested and has attracted concerns, controversy and criticism from the majority of respondents to the Government's consultation and to the committee's call for evidence.

The amendments in the group, along with others that would inevitably have to be lodged for stage 3, seek to explore an alternative option. Clearly, this approach and the timing are less than ideal, but that is scarcely my fault or that of the amendments. It is certainly not the fault of the British Transport Police Authority, which made alternative proposals well before the bill was introduced to Parliament. We have the opportunity to give the Parliament and the Government greater oversight of the British Transport Police functions in Scotland. That opportunity respects the commitments and recommendations of the Smith commission and avoids many of the risks that the committee has heard arise directly as a result of the Government's hasty decision to press ahead with full-blown merger.

I move amendment 3.

Stewart Stevenson: I hear the policy position that Liam McArthur expresses. I am glad to see that the Conservatives are now on the same side as the Scottish Government, as their manifesto proposes to abolish the British Transport Police south of the border without providing for any other options. However, that is neither here nor there.

Douglas Ross (Highlands and Islands) (Con): Will the member take an intervention?

Stewart Stevenson: No, he will not. You would not take one from me last week.

Liam McArthur's choice of amendments is rather odd because, when we look at what he is doing, we see that the effect is to remove the oversight of the British Transport Police Authority from the British Transport Police in Scotland—that is fair enough; we can choose to do that—without putting any alternative oversight into the bill as it would be amended by his amendments. That seems a rather odd way to progress the policy position that he adopts. The construction of his amendments, by leaving section 1 in place, also creates a set of duties for the Scottish Police Authority in relation to railway policing in Scotland without correspondingly creating any oversight from the SPA for railway policing.

It seems a rather curious set of amendments that are not practically constructed to deliver the policy position that Liam McArthur seeks to take. I have the more principled point that I disagree with his policy position but, if the position were to be accepted, the amendments would not serve it properly.

Mary Fee: I am happy to support the amendments that Liam McArthur has lodged. The concerns that he raised are the ones that I have had throughout the bill process—that only one option was consulted on and that no other options were considered despite the fact that the British Transport Police Federation indicated in its written evidence that there were two other options that should have been consulted on and discussed. Not to include them is short-sighted and a fundamental flaw in the bill.

Douglas Ross: I am delighted that Stewart Stevenson recognises a Conservative victory in the general election. I will make sure that I repeat that as I go around my area. He will also know that what the Conservative Party proposes is quite different from what the Scottish nationalists propose in Scotland.

I support these amendments and reiterate the points that Liam McArthur made, which I made during the stage 1 debate in the chamber. The Government had only one view on the matter and did not consult the public. It is perfectly understandable why it did not consult on more options because, when people responded to it and to the committee, the majority were against the proposed merger of the British Transport Police with Police Scotland. That was a clear message. The Government should listen to that, and I hope that it will take cognisance of it if the amendments are agreed to.

Rona Mackay: I will not support Liam McArthur's amendments for some of the reasons that Stewart Stevenson outlined. With regard to options, it is clear that the model that was chosen is the only one that makes the British Transport Police accountable to Scotland.

Douglas Ross: Will the member take an intervention on that point?

Rona Mackay: No.

Liam McArthur's amendments also delay implementation until 2027, which is not acceptable. In effect, they ride a coach and horses through the bill, so I will not support them.

John Finnie: The key point is oversight, regardless of the model. I accept that people wanted different models but I do not know anyone who thought that it was appropriate to have less oversight, particularly at this juncture. We have seen in recent times the absolute need for scrutiny. I will not support amendment 3.

George Adam: I am here as a substitute, but I have managed to watch a lot of what has happened approaching this stage. Although Liam McArthur makes his points as eloquently as always, I will not support him, because I agree with everything that Stewart Stevenson said.

I find it bizarre that Douglas Ross is trying to defend the Tory party's conversion to the Scottish Government's policy. The wording of its manifesto is:

"We will create a national infrastructure police force, bringing together the Civil Nuclear Constabulary, the Ministry of Defence Police and the British Transport Police to improve the protection of critical infrastructure".

Is that not a very similar position to the Scottish Government's? That clearly tells us what the Westminster Government's position is but, obviously, if a Tory comes over the border in a train, plane or bus, they change their mind just because the Scottish Government comes up with the idea. The Tories need to look at themselves and the practicalities of what we are trying to achieve, which is to have a police service that is fit for purpose.

The Convener: Only one option was consulted on and that was a great mistake. Therefore, I support amendment 3. In relation to the point that Stewart Stevenson made, the amendment merely reverts to the status quo and we have concurrent jurisdiction at present.

12:00

Humza Yousaf: I thank Liam McArthur in particular for his explanation of the reasons why he has lodged his amendments. They reflect much of what he said at the stage 1 debate.

Liam McArthur and other committee members will be fully aware of the Scottish Government's intention in introducing the Railway Policing (Scotland) Bill, which is to make use of the powers over railway policing that are now devolved to this Parliament by integrating the British Transport Police in Scotland into Police Scotland. We have made that intention abundantly clear from the outset, and it has been a long-standing policy position of the Government for many years, both before and after our proposals to the Smith commission that railway policing powers should be devolved to the Scottish Parliament and that the BTP should be integrated into Police Scotland.

That may not take away from Liam McArthur's concerns. Where they are constructive, the Government will of course always reflect on them. However, amendments 3 and 8 would leave the Scottish Police Authority with a power to enter into railway policing agreements with railway operators, under which Police Scotland would police the railways and railway property in Scotland without having all the powers needed to carry out that policing on a routine basis. There would be no duty on the chief constable of Police Scotland to ensure that policing of the railways was carried out in accordance with those agreements.

Amendment 9 would retain the policing functions of the BTP in Scotland but, as Stewart Stevenson eloquently said, the governance duties of the BTP Authority would no longer exist. If the intention underlying that amendment is that the BTP should continue to police the railways and railway property in Scotland, it is not clear to me how that is to be reconciled with the lack of any governance and accountability relationship between the Scottish Police Authority and the BTP. It is equally unclear how funding for the BTP's policing of the railways in Scotland would be secured, as section 2 continues to permit the SPA to enter into railway policing agreements in respect of Police Scotland only.

If the objective is that the BTP should police the railways in Scotland and be accountable for that to the Scottish Police Authority and to this Parliament while also policing the railways in England and Wales with accountability for that being to the BTPA and the UK Parliament, then my clear and previously expressed view is that that would prove complex and confusing for all concerned. It is hard to see how Scotland's interests and geography would receive the attention that they deserve within a framework that will inevitably remain dominated by the complex needs of railway policing in London and the south-east of England.

How that accountability might work is also far from clear. The legislative basis for it would need to be established, and the amendments do not set that out. However, even if they did, for the reasons that I have just given, we do not think that that would be a satisfactory solution.

Putting all that aside, and as other members have mentioned, Liam McArthur will be aware of the manifesto commitment that the Conservative Party has made—both the UK party and the Scottish Conservatives—to

"create a national infrastructure police force, bringing together the Civil Nuclear Constabulary, the Ministry of Defence Police and the British Transport Police to improve the protection of critical infrastructure such as nuclear sites, railways and the strategic road network."

If the Conservatives win the election and have their way, there will no longer be a British Transport Police. We would have to wait to see exactly what form the new national infrastructure force would take. I do not expect that this Parliament is likely to have any influence over that, but we would of course keenly await news if we were depending on it to police Scotland's railways. I am not aware whether that commitment has gone out to public consultation or indeed whether other options were considered.

From what we know, I hope that I can persuade Liam McArthur that rejecting the opportunity to have a railway policing function within Police Scotland that is fully accountable to the people of Scotland and the Scottish Parliament would not be a good use of the powers over railway policing that have been devolved.

The alternative before us, if a UK Conservative Government is returned, would appear to be to have railway policing in Scotland integrated with the policing of the strategic road network of England and Wales, but not with that of Scotland, and integrated not with the policing of the whole of Scotland's transport infrastructure—ports, roads and airports—but instead with the policing of nuclear sites.

It also appears from various press reports that the national infrastructure police force would be predominantly an armed force—that is what a recent article in the *Police Oracle* suggested. I invite Liam McArthur to reflect on whether that is the path that he wishes to go down.

I ask Liam McArthur not to press the amendments but, if they are pressed, I urge the committee to reject them for the reasons that I have set forth.

Liam McArthur: I thank everybody for their contributions. In particular, I thank Douglas Ross, the convener and Mary Fee for their support for the amendments. I recognise that my concerns are shared by some colleagues on the committee.

I also thank those who do not feel able to support the amendments—either because of the principle or because of the way in which they were lodged—for the way in which they conveyed their concerns. The comments from Stewart Stevenson set the tone for those of others. The timing and the approach are not necessarily of my choosing, but the amendments are an attempt, even at this late stage, to fashion a way to road test the alternative approach that the BTPA set out, which it did in good time and which could have been consulted on. The BTPA made it clear that statutory oversight of BTP functions in Scotland was perfectly possible short of a full merger with Police Scotland. As I said before, it is regrettable that that was not explored explicitly.

I thank George Adam for referring to my comments as eloquent. I do not recall that he ever said anything as nice about me in the however many years it was that we were on the Education and Culture Committee. Once the whips find out what he said, his stay on the Justice Committee may be time limited.

I also thank the minister for engaging with me over my concerns about the bill, from the outset and throughout, and I acknowledge his willingness to engage with the stakeholders who raised concerns about the proposals. Nevertheless, we are where we are as a result of the Government approaching the matter on the basis that there is only one option. I do not accept that. A great deal more work will need to be done ahead of stage 3 to address the concerns that have been raised about the need for proper oversight of BTP functions in Scotland.

I will press amendment 3.

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

Members: No.

The Convener: There will be a division.

For

Fee, Mary (West Scotland) (Lab)
McArthur, Liam (Orkney Islands) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Mundell, Oliver (Dumfriesshire) (Con)
Ross, Douglas (Highlands and Islands) (Con)

Against

Adam, George (Paisley) (SNP)
Evans, Mairi (Angus North and Mearns) (SNP)
Finnie, John (Highlands and Islands) (Green)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 3 disagreed to.

Section 2 agreed to.

After section 2

The Convener: Amendment 4, in the name of Douglas Ross, is grouped with amendments 5 to 7.

Douglas Ross: Members and, indeed, the minister will be aware that during our discussions as a committee and with numerous witnesses, concern was raised about the training of officers if the integration of the BTP and Police Scotland

goes ahead. At this stage, it is important to remind ourselves of our deliberations with some quotations.

I asked the rail operators how they would react if Police Scotland said that it was not going to put all officers through the training for personal track safety certificates. Neil Curtis of Direct Rail Services Ltd said, "We would be concerned," and Darren Horley of Virgin Trains said:

"We would be very concerned."—[*Official Report, Justice Committee*, 21 March 2017; c 27.]

I move on to the panel of witnesses that included Nigel Goodband of the BTP. I asked:

"What implications will there be if officers in Scotland are not trained to the same level as BTP officers and they do not have a personal track safety certificate?"

Nigel Goodband replied:

"Every officer in Police Scotland who intends to police the railway—or go anywhere near the railway—will have to have the personal track safety certificate."

Chief Superintendent McBride, also of the BTP, said:

"We go through ... personal safety training because, from a health and safety point of view, it is necessary to protect our officers ...That is why we do ... PTS. The benefits that flow from that are all geared to the public and to recovering operations more quickly when they have been brought to a stop by a criminal act or mental health episode."

When Michael Hogg of the National Union of Rail, Maritime and Transport Workers spoke about BTP officers, he said:

"They are properly trained, and having staff with a personal track safety certificate is crucial. Anything else is pure nonsense, as far as we are concerned."—[*Official Report, Justice Committee*, 14 March 2017; c 40, 41.]

Should the merger go ahead, it would be "pure nonsense" for us as a committee not to include our clear expectation that all officers in Police Scotland who have an opportunity to move into railway policing either as dedicated railway policing officers or at the request of the chief constable and others should—they must—have a personal track safety certificate.

I have lodged a further amendment that stipulates and requests that the Scottish Government brings information on the costs of training to the Parliament for scrutiny. That issue was raised by Dr Murray in her paper, too.

My amendments add to the committee's deliberations and discussions. Should the bill be passed, the amendments will be vital in ensuring that both officers and the public whom they serve in policing our railways are adequately protected.

I move amendment 4.

The Convener: I will speak to amendment 6, which is in my name, and the other amendments in the group. Amendments 6 and 7 complement Douglas Ross's amendments 4 and 5. Amendments 4 and 5 provide that Police Scotland officers must be trained and the cost of that training must be reported. My amendments 6 and 7 seek to ensure that no officer can enter a railway property without a PTS certificate having been obtained.

At stage 1, the committee heard evidence from the British Transport Police Federation that

"Every officer in Police Scotland who intends to police the railway—or go anywhere near the railway—will have to have the personal track safety certificate."

The RMT agreed, saying:

"Police Scotland would not have access to our railways if there was a derailment or a collision or any trespass on a railway. If Police Scotland officers do not have a PTS certificate, they cannot go on or near the running line."—[*Official Report, Justice Committee*, 14 March 2017; c 40, 59.]

The rail operators all concurred with those statements.

The stage 1 report notes that

"The Committee wrote to Police Scotland for clarification on the nature and type of training that it intends to provide to all police officers post-integration, and on whether all officers are to undertake Personal Track Safety Certificate training."

In his response, Assistant Chief Constable Higgins explained that Police Scotland's

"training curriculum for new recruits at SPC"—

the Scottish Police College—

"is currently under review".

Amendment 6 clearly sets out the requirement for personal track safety certificate training for police constables, and amendment 7 would ensure that the training would be to the same standards as that attained by BTP officers, by requiring the making of regulations specifying the level of training. That would be done in consultation with the Office of Rail and Road and Network Rail, which specify the current level of training for the BTP. The amendments would ensure that police officers operating on the railways undertake personal track safety certificate training to the level that BTP officers are required to attain.

Do members have any comments on or questions about the amendments?

Stewart Stevenson: I want to engage on the construction of the amendments, and I will address amendment 6 in your name, convener. Before I do that, I agree with the quote—we could hardly disagree with it—used by Douglas Ross: every officer who intends to police the railway needs to have a personal track safety certificate.

However, we need to be cautious about what that means.

Amendment 6 says:

"A constable must not enter a railway property ... unless that constable has completed personal track safety training."

What is a "railway property"?

Douglas Ross: Will the member give way to allow me to clarify the quote that he alluded to?

Stewart Stevenson: I only cited part of the quote—I accept that.

Douglas Ross: It is important to give the full quote.

Stewart Stevenson: I invite you to complete the bit that you think I missed that matters.

Douglas Ross: I am grateful to the member for giving way. I gave the full quotation, which is:

"Every officer in Police Scotland who intends to police the railway—or go anywhere near the railway—will have to have the personal track safety certificate."—[*Official Report, Justice Committee*, 14 March 2017; c 40.]

12:15

Stewart Stevenson: I accept that, but you will find that that will merely reinforce the point that I am about to make, which is this: what is the definition of "railway property"?

The definition of railway property in the bill, at proposed new section 85M(1) of the Police and Fire Reform (Scotland) Act 2012, provides a list, which specifically includes

"a station"

and

"a train used on a network".

Without a track safety certificate, a police constable would not be able to enter a station that I am perfectly entitled to walk into any time I choose to do so although I do not have a track safety certificate. Furthermore, I can enter and use a train without having a track safety certificate but amendment 6 would prohibit a constable from being able to exercise that same right.

Proposed new section 85M(3) of the 2012 act makes further reference to the definition of "railway property" in the Railways Act 1993. Section 83 of the 1993 act states that a station

"means any land or other property which consists of premises used as, or for the purposes of, or otherwise in connection with, a railway passenger station or railway passenger terminal (including any approaches, forecourt, cycle store or car park), whether or not the land or other property is, or the premises are, also used for other purposes".

Therefore a police constable—who is a constable, whether on duty or not—would be prohibited from cycling to a station and putting his bicycle in the car park, and from purchasing a ticket in the station booking office, because he is not permitted to be there without a track safety certificate. He would also not be permitted to use a train to travel to another destination.

It actually goes further than that. There are already circumstances where police constables, as part of their job with Police Scotland, enter the tracks without track safety certificates—that would be prohibited by amendment 6. For example, there is a level crossing on the eastern outskirts of Inverness. Police in hot pursuit of a criminal fleeing an act of criminality would, without a track safety certificate, be unable to progress across that level crossing on to the railway to pursue a criminal if amendment 6 were agreed to. In terms of a construct that is trying to give effect to the policy position that is being espoused, it does not work at a practical level.

I turn to amendment 4, in the name of Douglas Ross, which is the lead amendment in the group. My specific question is: who needs to have track safety training? In the past week, we have seen Police Scotland officers supplementing BTP officers, going on patrol on the concourse of Waverley station without track safety certificates. We can see the quite proper collaboration that currently takes place.

Who should determine what training particular constables require for particular tasks? I do not think that it is the duty of MSPs—or, for that matter, the duty of the minister—to determine that. It is an operational matter for the chief constable to determine.

It is entirely proper that the initial training of constables should refer to the duties that Police Scotland will exercise in relation to railway policing if the bill is passed, and constables should be familiar with the constraints on a constable's proper actions.

The same applies to armed police. To be blunt, if a policeman who is not qualified to be an armed policeman is standing adjacent to an armed policeman who falls over and drops his gun, I am dubious as to whether that policeman should pick up the gun because they do not know about handling guns.

Only people who are properly trained should engage with the dangers that are specific to the environment of railway policing. However, amendment 4 comes to a very different conclusion.

Essentially, amendment 5 follows on from amendment 4. I have no particular objection to the provision of annual reports to ministers and

Parliament about what is going on in the police force. If we are talking about information on a necessary part of training, that is all well and good.

However, with regard to the issue of limiting access to stations, it is clear that the amendments in the convener's name simply do not serve the intended policy purpose. There appears to be an almost deliberate attempt to make it impossible for Police Scotland officers to continue to discharge the duties that they currently perform without any reported difficulties in relation to certain aspects of what is currently, and would be in future, defined as "railway property".

John Finnie: I align myself with much of what Stewart Stevenson says about the implications for forensics if the amendments in this group are agreed to.

I highlight my specific police experience. As a police dog handler, I performed mountain search-and-rescue duties, during which I was conveyed in—indeed, winched into and out of—Royal Air Force, Royal Navy and civilian helicopters. In the course of those duties, I had to carry pyrotechnics, which brought their own issues. I conveyed my dog on a fixed-wing passenger service, occasionally in a motor launch, and in one instance on a skidoo. I had to deal with firearms, albeit that they were deactivated, as part of my training. I had a second dog for detecting explosives, and I had to handle a variety of explosives. Colleagues with drugs dogs had to deal with a variety of drugs. When I became a Scottish Police Federation official, I became aware of the role of vehicle examiners and the evolving nature of the issues that, when examining vehicles, we had to be aware of, such as the corrosive effect of brake fluid.

The point is that health and safety legislation applies to all those areas. The bill before us today is not about micromanaging the police, and the provisions in the amendments contain things that, to my mind, should not be in the bill. I therefore do not support the amendments.

Liam McArthur: Douglas Ross set out clearly a number of the explicit concerns that we heard in evidence at stage 1 about training for those accessing the railways and railway property. Those concerns were reflected in the committee's report.

From Police Scotland, we heard assurances that a training assessment would be undertaken. We have no reason to doubt that, but to an extent it rather reinforces the point about the rushed nature of the bill. It even underpins some of my arguments for lodging certain amendments that appear in a later group.

Nevertheless, whether or not the specific amendments in this group deal with the precise concerns that the committee acknowledged and reflected in its stage 1 report—and I am interested to hear the minister's response—I certainly support the idea of toughening up the language in the bill around training, which was a central concern throughout the evidence that we heard at stage 1.

Rona Mackay: I cannot add anything much to what Stewart Stevenson said, as he covered all the points. I agree with John Finnie that the provisions in the amendments are far too restrictive and specific; to be frank, they are unworkable. The provision of training is an operational policing matter. It is not the responsibility of the Government; it is the responsibility of the chief constable. For those reasons and others, I will not support the amendments.

Mary Fee: Liam McArthur has more than adequately expressed many of the sentiments that I was going to express. I am minded to support Douglas Ross's amendments on training. It is worth remembering that in the stage 1 evidence we heard concerns regarding the loss and dilution of specialist skills among well-skilled professional railway staff. In addition, every rail union in the country is opposed to the bill.

When the RMT gave evidence, it warned that it might take industrial action if the bill were to go ahead, citing concerns about the safety of the workforce and the travelling public. It is worth reminding ourselves of that when we consider these amendments. If the bill goes ahead, it needs to be far more prescriptive and detailed about the minimum level of training required by officers policing the railway and the refresher training that they would need.

I share some of Stewart Stevenson's concerns in relation to amendment 6 because of the use of the phrase "railway property". If agreeing to that amendment would mean that an officer could not enter a railway station, for example, I would be unable to support it. However, I am happy to support the amendments on training.

Humza Yousaf: As members have said, all the amendments in this group seek to dictate to the chief constable of Police Scotland the nature and level of training that officers working in a specific area of operational policing should have. We are not aware of any precedent for Parliament prescribing requirements for the chief constable in that way, and the Scottish Government cannot support it. The chief constable is responsible for operational policing. His responsibilities include ensuring that officers across Police Scotland have the specialist training that they need to carry out their duties. That is kept under continual review to meet operational requirements.

Neither the Scottish Parliament nor the Scottish Government should seek to intervene in the business of operational policing by dictating a fixed set of training requirements for railway police officers. We do not prescribe what firearms or driving qualifications, or the many other qualifications listed by John Finnie, officers should have—such things are rightly operational policing matters—and we should not constrain specialist railway police in that way.

Furthermore, the Government's view is that in lodging the two sets of amendments in the group, members have misunderstood the information that Police Scotland has provided to the committee on the different levels of railway policing training that it proposes to provide to officers in different parts of Police Scotland, which reflect different operational needs. Committee members can see for themselves, from the letter that Police Scotland sent last week in response to the committee's stage 1 report, that it is not Police Scotland's intention to provide all its 17,000-plus officers with a personal track safety certificate. The certificate will be for officers who work within the railway policing specialism, and the number will be similar to the number of certificates currently provided to BTP officers in Scotland. If members choose to press the amendments, they will be seeking to override the professional view of Police Scotland.

Police Scotland's recent letter also makes it clear that it has clear operating procedures—they are currently under review, which is being done in conjunction with the BTP—which state that its police officers should not go on to the tracks when they attend an incident that is related to the railway. Should there be a requirement to go on to the tracks, a nationally agreed process demands that a competent and trained member of the rail industry is present at the scene to advise. As has been mentioned, Police Scotland is currently working with the BTP on a training needs analysis and we should allow that work to continue.

If amendment 4, from Douglas Ross, were to be agreed to, we would be faced with the substantial cost of providing personal track safety certificates to around 17,000 officers who would not have an operational requirement for one. If amendments 6 and 7, from Margaret Mitchell, were to be agreed to, a police officer who did not have that certificate would be unable to exercise the power of entry to railway property, as Stewart Stevenson mentioned, even if that was to access an area nowhere near the track—for example, a locked station building, a railway station or a train. We would be in the ludicrous situation in which committee members and I could go into a station or get on to a train, but a police constable who did not have the certificate could not. I am sure that no one would want us to be in that position.

Although amendment 5 is dependent on amendment 4, I cannot support it on its own terms. Amendment 5 would require separate training plans and costs to be published. The bill already places a statutory requirement on the Scottish Police Authority to engage with the railway industry and others on service, performance and costs. The SPA will, of course, be accountable to this Parliament for that engagement, as it is for other matters. The committee already has the power to scrutinise and question the annual reports and accounts that are laid by the SPA, and it has the option to seek further details from Police Scotland on training and the costs of railway policing at any time.

The Scottish Government strongly opposes these amendments, which would impinge on the role of the chief constable in determining the training that is required to support operational policing. I therefore ask Douglas Ross and Margaret Mitchell not to press their amendments. If the amendments are pressed, I ask the committee to reject them.

12:30

Douglas Ross: I thank all members for their contributions from different sides of the debate on these amendments. Stewart Stevenson went to great lengths to describe the potential effects of my amendments and, indeed, the convener's amendments. I now feel that I should belatedly declare an interest because, based on what Stewart Stevenson said, my wife, as a police sergeant, may not be able to cycle into Elgin train station or get on to a train at Elgin to go anywhere else.

I accept that there has been some criticism of the reference to "entering a railway property" but I do not believe that that should take away from the general emphasis that we are trying to include with the amendments, which is that the bill must contain more detail and require more scrutiny on training.

If I decide to press my amendments and they are agreed to, I give a full assurance that, at stage 3, I would like to redefine the element of "railway property" to ensure that we do not end up with what would be the rather ludicrous situation in which my wife and 17,233 other officers could not board a train anywhere in Scotland.

I also noted Mr Stevenson's question about who should determine the training requirements. He does not want that to be done by politicians, but I think that it is important that, as politicians and as members of the committee, we voice opinions and views that were shared by British Transport Police officers, the British Transport Police Authority, rail users, unions and rail operators, all of whom had

significant concerns about a lack of detail on training in the bill and the response from the Scottish Government. We can give voice to those concerns.

Stewart Stevenson: What Douglas Ross is saying is reasonably constructive in the context of the debate that we have had. I will not step back from being interested in training; like all members, I will continue to be interested in training. I think that the sole area of difference relates to who should be responsible for setting the training—that is the top, bottom and middle of it. However, we can make common cause by continuing to take an interest in training and by holding the chief constable and the minister to account for the adequacy of any training.

Douglas Ross: I appreciate Stewart Stevenson's remarks.

I will briefly comment on some of the other contributions. Liam McArthur was right to mention that, when we scrutinised the bill at stage 1, training was a central concern for the committee and for our witnesses. Mary Fee was correct to highlight the unions' concerns—indeed, Michael Hogg said that some of them would be prepared to take industrial action. We need much more detail, not just for the safety of our officers, which is paramount, but for the safety of all rail users.

I was pleased to get the support of Mr Stevenson for amendment 5 and disappointed that, for some reason, the minister was not quite so supportive.

I began by quoting the RMT, the BTP and rail operators. I think that it would be correct to finish with a quotation from the Scottish Police Federation. Calum Steele told the committee:

"I do not consider it feasible—I find it incomprehensible—that the service, be it the BTP in its current state, a hybrid or a transport service within the Police Service of Scotland, would put a police officer out to work on a railway line without their having the appropriate track safety requirements. The old adage 'If you think health and safety is expensive, try an accident' would come bearing down on them at a hell of a rate of knots—and I would be at the front of the queue knocking lumps out of them for even suggesting it should be done that way."—[*Official Report, Justice Committe*e, 14 March 2017; c 42.]

Stewart Stevenson: Will the member take a further intervention?

Douglas Ross: No—I want to finish.

Stewart Stevenson: It is just a tiny point.

Douglas Ross: I would hope that, in considering all the responses that the committee has received, and indeed that final quotation from the SPF, we would treat training as an imperative part of the bill, as Stewart Stevenson said.

I press amendment 4.

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

Members: No.

The Convener: There will be a division.

For

Fee, Mary (West Scotland) (Lab)
McArthur, Liam (Orkney Islands) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Mundell, Oliver (Dumfriesshire) (Con)
Ross, Douglas (Highlands and Islands) (Con)

Against

Adam, George (Paisley) (SNP)
Evans, Mairi (Angus North and Mearns) (SNP)
Finnie, John (Highlands and Islands) (Green)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 4 disagreed to.

Amendment 5 moved—[Douglas Ross].

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

Members: No.

The Convener: There will be a division.

For

Fee, Mary (West Scotland) (Lab)
McArthur, Liam (Orkney Islands) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Mundell, Oliver (Dumfriesshire) (Con)
Ross, Douglas (Highlands and Islands) (Con)

Against

Adam, George (Paisley) (SNP)
Evans, Mairi (Angus North and Mearns) (SNP)
Finnie, John (Highlands and Islands) (Green)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 5 disagreed to.

Section 3—Power of entry in respect of railway property

Amendment 6 moved—[Margaret Mitchell].

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

Members: No.

The Convener: There will be a division.

For

Fee, Mary (West Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mundell, Oliver (Dumfriesshire) (Con)
Ross, Douglas (Highlands and Islands) (Con)

Against

Adam, George (Paisley) (SNP)
Evans, Mairi (Angus North and Mearns) (SNP)
Finnie, John (Highlands and Islands) (Green)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
McArthur, Liam (Orkney Islands) (LD)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

The Convener: The result of the division is: For 4, Against 7, Abstentions 0.

Amendment 6 disagreed to.

Amendments 7 and 8 not moved.

Section 3 agreed to.

Section 4 agreed to.

Section 5—British Transport Police Force functions

Amendment 9 not moved.

Section 5 agreed to.

After section 5

The Convener: Amendment 2, in the name of John Finnie, is in a group on its own.

John Finnie: The purpose of the amendment is to put on a statutory footing the assurances that were offered verbally by Assistant Chief Constable Higgins that any BTP officer who transferred into Police Scotland would continue to work on railway policing duties unless they agreed to move. It does that by providing a protection to officers that is modelled on the Police and Fire Reform (Scotland) Act 2012 protection for officers who transferred from the territorial forces into Police Scotland and, indeed, legislation that applied long before that with all previous amalgamations.

The previous arrangements set out that an officer must not be assigned to duties that would require them to move away from the geographical area of their former force unless they consent to do that. The restriction in the amendment relates to railway policing rather than geographic location. That would facilitate officers who serve within the BTP at the moment moving from one area to another but remaining within railway policing. That would provide a greater level of assurance to officers who wish to continue their careers in railway policing and place Police Scotland's statement of intent on a statutory footing.

I move amendment 2.

Liam McArthur: I thank John Finnie for lodging amendment 2. Given the debate that we had on an earlier grouping, I am minded to recall the minister's statement that the Parliament and the Government should not seek to intervene in the chief constable's discretion or decision making. John Finnie has set out a fairly reasonable argument for how that discretion and decision making should, to some extent, be circumscribed. For the reasons that he sets out, the amendment reflects the concerns that we heard during stage 1. It is a pragmatic and proportionate way of addressing them and, therefore, I support it.

Stewart Stevenson: I want to raise a wee technical point about the drafting of John Finnie's proposed new subsection (3); I suspect that it will be for the minister to comment on it.

I want to be absolutely clear that a constable of the British Transport Police who is engaged in duties outwith that police service would be treated as being a constable of the Police Service of Scotland operating on service outside the BTP at the point of transfer. It would be useful to get that on the record to ensure that there is no ambiguity. I agonised over that point and concluded that it was okay, but I seek clarification. John Finnie may want to respond first.

John Finnie: The intention is not to disadvantage anyone. Officers are afforded protection—section 19 of the Police and Fire Reform (Scotland) Act 2012 is well known to afford that protection—albeit that they may temporarily be seconded elsewhere.

Stewart Stevenson: I absolutely support what is proposed. I am simply making a tiny, narrow, technical point to ensure that the intention is on the record. As I said, it is probably for the minister to answer my question.

Mary Fee: I am happy to support the amendment. As John Finnie and Liam McArthur said, it will provide assurance in response to the concerns that we heard in evidence from those BTP staff who will transfer over. The amendment would clearly set out in legislation a firm indication of intent that officers will be allowed to stay in the BTP if they so wish. That is a sensible way forward.

Humza Yousaf: The amendment is a very constructive contribution, and I thank John Finnie for lodging it.

ACC Higgins of Police Scotland gave the committee assurances that Police Scotland will respect the right of any member of the BTP who transfers to police the railway environment for the remainder of their career and that they will not be moved elsewhere unless they volunteer to do so. In response to concerns that railway police officers could be diverted to other duties following integration, ACC Higgins gave a clear assurance that they would not be diverted, with the obvious exception of a crisis situation.

I am conscious that those assurances have not yet persuaded all those who have concerns on either front. In the stage 1 debate, some members

queried whether BTP officers would be deployed to non-railway duties. John Finnie's amendment clearly sets out the position beyond any doubt and provides a statutory guarantee that any constable who transfers from the BTP to Police Scotland will be able to continue their career in railway policing if they wish to do so.

Liam McArthur: Will the minister take an intervention on that point?

Humza Yousaf: Yes.

Liam McArthur: As I said earlier, I fully support what the minister has described as a constructive approach to an issue that was raised with the committee. The minister has—fairly, I think—quoted ACC Higgins, who offered similar assurances in response to the concerns that BTP officers expressed. Nonetheless, those assurances could be seen as enabling the Parliament and the Government to establish criteria for the operational freedom and decisions that are taken by the chief constable and senior officers in Police Scotland. How is that different from the concerns that Douglas Ross raised in relation to his amendments on training provision?

Humza Yousaf: It is different in a couple of ways. If Liam McArthur does not mind, I will quote directly from the remarks that he made a moment ago. He said that the amendment strikes the right balance in being both "pragmatic and proportionate", and I agree with him on that.

The most important part of John Finnie's amendment is the proposed new subsection (2)(b), which states:

"A constable to whom this subsection applies ...

(b) must not be assigned duties that do not so relate unless it is necessary to meet a special demand on resources for policing."

That brings me back to my point about a crisis situation. The provision allows the chief constable flexibility while, as Liam McArthur said, striking the right balance in being both "pragmatic and proportionate". The amendment gives statutory force to the guarantee that officers who transfer will not be diverted to other duties while ensuring that flexibility exists for the chief constable.

On Stewart Stevenson's point, I concur with John Finnie's response that the intention is to ensure appropriate protection for anyone who is on secondment at the time of transfer. It is helpful to put that on the record.

I strongly welcome the amendment. I am grateful to John Finnie for seeking to provide a greater level of reassurance to BTP officers who transfer to Police Scotland that they will have every opportunity to continue their career within railway policing. In turn, I believe that the amendment will help to secure the objective of ensuring that the expertise of BTP officers is retained within railway policing on integration with Police Scotland.

The Scottish Government supports the amendment and I ask the committee to support it, too.

12:45

John Finnie: I am grateful to those members who have spoken in the debate. The important thing is that the bill is entirely consistent with previous legislation relating to the amalgamations that took place in 1975. I also mentioned the Police and Fire Reform (Scotland) Act 2012. The position is consistent across the various decades.

I press amendment 2.

Amendment 2 agreed to.

Section 6 agreed to.

Section 7—Commencement

The Convener: Amendment 10, in the name of Liam McArthur, is grouped with amendments 11 to 13.

Liam McArthur: As with the earlier grouping, the amendments to section 7 reflect concerns that I set out during the stage 1 debate. Throughout the evidence that we heard earlier in the year, we heard concerns about the impact that the bill is likely to have on BTP officers and staff, on the availability of specialist expertise around the policing of our railways and even on the ability of the railway operators to provide a safe and efficient service to the travelling public.

However, we also heard concerns about the ability of Police Scotland to accommodate yet more structural change at this time. It is an organisation that has not had its problems to seek over recent years. Audit Scotland has highlighted serious shortcomings in financial management in Police Scotland, and many of the savings and efficiencies that were promised by ministers at the time of centralisation have not materialised. Even if the policing 2026 strategy finally enables Police Scotland to emerge from a period that has taken its toll on the morale of officers and staff, I ask why we are adding to the challenges that they are being asked to contend with by layering on further structural upheaval.

If the Government is intent on pressing ahead and it secures the backing of Parliament to do so, I believe that there is a strong case for delaying the implementation of the bill's provisions. My amendment 10 proposes a delay of 10 years, which would safeguard the interests of BTP employees and allow more time for changes to be

made that would enable the transfer in due course to be managed smoothly and with less disruption.

I accept that 10 years is an arbitrary figure and I am open to suggestions about what might constitute a more appropriate timeframe for implementation, but I firmly believe that it is in the interests of policing in Scotland, both on our railways and more widely, for ministers to row back from the headlong rush to dismantle the BTP. More time would at least allow the ground to be better prepared, even if the direction of travel remains the same.

I move amendment 10.

The Convener: I call Douglas Ross to speak to amendment 12 and to other amendments in the group.

Douglas Ross: I have mentioned some of these points already. I go back to the quote that Stewart Stevenson mentioned earlier: training is important to the committee. It is also important for the bill process that we get up front information on the costs of training, that that is laid before the Parliament, and that it shows that all constables and police cadets have received the necessary training to police the railways and railway property. That may be different now that my earlier amendment failed, but it is still important that we get information on the training of police officers and cadets and on where the funding for that will come from.

Stewart Stevenson: Liam McArthur talked about a headlong rush. I am not sure that I recognise that in the context of the date of 1 April 2027. In broad terms, if one is going to set a date that far in the future it might be more appropriate to say something like "no sooner than", but that is a minor and picky point.

The real point comes in amendment 11, which gets it fundamentally and absolutely wrong. The future of the bill lies on only two hands. The responsibility for what we are doing must lie, first, with the chief constable, who has to be sure and give us confidence that he is prepared to pick up the responsibilities that the bill, if it is passed by the Parliament, will give him. Secondly, it is for us to take responsibility for how we vote at stage 3, at the end of the bill's parliamentary process. Amendment 11 contains a long list of bodies and people who would have no responsibility for the consequences of any decisions that they might choose to make. It would be entirely inappropriate to hand a veto over the policing of railways to people who have no responsibility for carrying it forward. On that basis, I cannot support amendment 11.

My real problem with Douglas Ross's amendment 12 is simply the use of the word "all" in proposed new section 7(2B)(a), which uses the wording

"all constables and police cadets".

This comes back to a point that I have made before. The training of constables and indeed police cadets is a matter for the chief constable, who must ensure that the training that all constables and police cadets receive is consistent with the duties to which they will be assigned. The reason why I cannot support amendment 12 is as simple as that.

John Finnie: I shall not support the amendments in this group either. I point out that an important category is missing from proposed new section 7(2B)(a), namely, that of police support staff who play the valuable role of scene of crime examiner, so there is a deficiency in amendment 12 anyway.

The Convener: I call on the minister to respond.

Humza Yousaf: The committee has been asked to consider a complex set of competing amendments. I am grateful to Liam McArthur for his explanation of what he is looking to achieve with his amendments. However, the Scottish Government is unable to support the amendments in the group. In my remarks, I will concentrate on Liam McArthur's amendment 11 and Douglas Ross's amendment 12 as they raise the most important points, although I will also say something about timescales in response to Liam McArthur's amendment 10.

I have welcomed the Justice Committee's stage 1 report on the bill. It makes a number of constructive suggestions and we have responded positively to those. The committee has also heard from many members of the joint programme board—the BTP, the BTP Authority, Police Scotland, the SPA and the UK Government's Department for Transport—about the detailed programme of implementation that is already under way and is being delivered through effective partnership working. The passage of the bill will enable that work to move on to vital areas such as secondary legislation in order to deliver on our commitment to BTP officers and staff on their jobs, pay and pensions. It will also encompass detailed work on operational integration, led jointly by Police Scotland and the BTP, including the arrangements for training, which Douglas Ross focuses on in his amendment.

The committee has, rightly, shown great interest in the work of the joint programme board and a desire to scrutinise the wide range of preparations over the coming period, ahead of the integration of the BTP in Scotland into Police Scotland by the target date of 1 April 2019. The committee has asked for six-monthly progress reports on the joint programme board's work. As I have said, I am

happy to accept that recommendation and will ensure that the Scottish Government provides those reports on behalf of the board. They will enable the committee to assess progress across the full range of the board's work and to consider evidence of how the recommendations are being followed through, including the recommendation that the board should broaden its engagement to include the railway industry and other key interests during the work that is ahead of it.

Liam McArthur's amendment 11 and Douglas Ross's amendment 12 go further than what is envisaged in the committee's stage 1 report and seek to include a statutory requirement for other reports in addition to that. In the case of Douglas Ross's amendment 12, that would focus primarily on training. Progress reports from the joint programme board will, of course, provide the committee with much more than that.

The board's progress reports will also provide regular updates on readiness for integration. Liam McArthur's amendment 11 would create an additional hurdle whereby, as Stewart Stevenson said, a large number of different bodies would all have, in effect, a right of veto before integration could proceed. Liam McArthur will not be surprised to hear that I cannot support that proposal. Although the Scottish Government will engage closely with a range of interests in considering the timing of commencement, we believe that the Government must retain the responsibility for that decision. In taking that responsibility, the Government will, of course, be accountable to Parliament for the decisions that we make.

Liam McArthur will also be unsurprised to hear that I am unable to support his amendment to delay commencement of the provisions of the bill until 2027, because it would mean that we would have very limited say about how railway policing in Scotland would be delivered in the meantime.

Of course, we know that if the Conservatives are returned to power in Westminster, railway policing would no longer be delivered by the BTP as it currently exists. The amendment would mean that we would lose out on the benefits of integrated policing across Scotland's transport infrastructure for the lifetime of two parliamentary sessions.

I ask Liam McArthur and Douglas Ross not to press their amendments; if they press them, I ask the committee to reject them.

Liam McArthur: I will start with an apology to Douglas Ross for not acknowledging his amendment 12 in my earlier remarks. As with his earlier amendments, I support its emphasis on the importance of training.

In relation to Stewart Stevenson's comments—I thank him again for those—when I referred to a "headlong rush", I was not of course levelling a criticism at myself. As he rightly says, in putting the date back to 1 April 2027, I could not be accused of anything like a headlong rush.

I think that it is fair to say that the Smith commission recommendations came somewhat out of left field for the BTP, and the distance that we have travelled between that report and this bill being introduced is no great distance at all. Therefore, I think that as far as many in the BTP are concerned, there has been a headlong rush, particularly given the absence of other options being consulted upon. However, I take Stewart Stevenson's point that "no sooner than" would perhaps have been more felicitous language. I will certainly bear that in mind.

I thank John Finnie for his comments, although I think that they were directed more at Douglas Ross's amendment than at mine. I acknowledge that he does not support my amendments. I also acknowledge, belatedly, Rona Mackay, who let the cat out of the bag about her views on my amendments in this group in responding to the earlier group, but I thank her for her comments.

The minister is right to point to the partnership working. We had a good evidence session with a representative of the JPB and I think that he very much reinforced what the minister has said.

The proposal to merge the BTP with Police Scotland was not at the request of Police Scotland. Had we offered Police Scotland more time, I am not entirely sure that it would have cast that back up in our faces, given the challenges that it has to take on board. To give credit to Police Scotland, it tried to offer the committee reassurances where it could. Nevertheless, I think that the structural upheaval that this will involve, over and above the challenges that Police Scotland already has on its plate, should not be underestimated.

A lot of the evidence that we heard around the concerns that BTP officers and staff have about the maintenance of their terms and conditions will make it very difficult to provide reassurance on that side while at the same time going through a difficult process with Police Scotland officers and staff in the context of the policing 2026 strategy, in that the more that is given in one area, the more difficult it will be to provide reassurance in the other.

John Finnie: I am grateful to the member for giving way. Does the member accept that ACC Higgins described the BTP timeframe as a "luxury" compared with the amalgamation into a single force?

Liam McArthur: I am grateful for John Finnie's comment, although I think that ACC Higgins's reference to the timeframe being a "luxury" only

serves to underscore the other difficulties that ACC Higgins and his colleagues are trying to grapple with. I would not necessarily suggest that, by any stretch of the imagination, it reflected enthusiasm on his part that the workload that they are trying to deal with in relation to this structural change is particularly welcome.

On that basis, I press amendment 10.

The Convener: The question is, that amendment 10 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Fee, Mary (West Scotland) (Lab)
McArthur, Liam (Orkney Islands) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Mundell, Oliver (Dumfriesshire) (Con)
Ross, Douglas (Highlands and Islands) (Con)

Against

Adam, George (Paisley) (SNP)
Evans, Mairi (Angus North and Mearns) (SNP)
Finnie, John (Highlands and Islands) (Green)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 10 disagreed to.

Amendments 11 to 13 not moved.

Section 7 agreed to.

Section 8 agreed to.

Long Title

Amendment 14 not moved.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the minister and his officials for attending. We were trying to get through all the amendments today, rather than having to call him back to the committee.

Justice Sub-Committee on Policing (Report Back)

13:00

The Convener: The next agenda item concerns feedback from the Justice Sub-Committee on Policing on its meeting of 25 May. Following the verbal report, there will be an opportunity for brief comments or questions. I refer members to paper 7, which is a note by the clerk, and invite Mary Fee to provide that feedback.

Mary Fee: The Justice Sub-Committee on Policing met on 25 May, when it agreed and published its report on the governance of the Scottish Police Authority. The sub-committee shares the very serious concerns about the governance of the Scottish Police Authority that were raised by the Public Audit and Post-legislative Scrutiny Committee. It wrote to the Cabinet Secretary for Justice with its views, and that letter was also copied to Her Majesty's inspector of constabulary to assist Derek Penman in his urgent review of the openness and transparency of the Scottish Police Authority. The sub-committee will consider that report next month.

The next meeting of the sub-committee is scheduled for Thursday 1 June, when it will take evidence from Police Scotland and the Scottish Police Authority on the Auditor General's 2015-16 audit of the Scottish Police Authority, and the review of Police Scotland's i6 programme.

The Convener: As members have no questions, that concludes the meeting. Our next meeting will be on Tuesday 6 June, when we will continue our evidence taking on the Domestic Abuse (Scotland) Bill.

Meeting closed at 13:02.

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