OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 21 November 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 21 November 2017

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JUSTICE COMMITTEE
34th Meeting 2017, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Maurice Corry (West Scotland) (Con)
*Mary Fee (West Scotland) (Lab)
*John Finnie (Highlands and Islands) (Green)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Claire Baker (Mid Scotland and Fife) (Lab)
Annabelle Ewing (Minister for Community Safety and Legal Affairs)
Linda Fabiani (East Kilbride) (SNP)
Michael Matheson (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 21 November 2017

[The Convener opened the meeting at 10:00]

Subordinate Legislation

First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (SSI 2017/328)

The Convener (Margaret Mitchell): Good morning and welcome to the 34th meeting in 2017 of the Justice Committee.

Agenda item 1 is consideration of four negative instruments. I refer members to paper 1, which is a note by the clerk. Do members have any comments on the first instrument? I call Liam Kerr. I am sorry—I meant Liam McArthur. I was looking at Liam McArthur, but I said Liam Kerr.

Liam McArthur (Orkney Islands) (LD): That threw me, convener.

I know that, like other committees, we have had issues with drafting errors that have subsequently required things to be tightened up and dealt with. However, looking at the response from the Delegated Powers and Law Reform Committee in relation to the instrument, I cannot recall having seen a comment from that committee or its predecessors that has gone quite so far. It says:

"it is highly unsatisfactory for the instrument to have been laid before the Parliament in its present form. The Committee's role is not to provide a substitute for internal checking by the relevant Scottish Government department. The Committee urges the Government to examine its quality control procedures to avoid laying instruments containing so many errors in the future."

I recognise that those issues have subsequently been addressed, but we should lend our support to the representations made by the DPLR Committee, because the situation is wholly unsatisfactory.

The Convener: Can we agree to do that? This is not a new issue, and as Liam McArthur has said, it results in the Government having to lay another instrument. The issue must be looked at—I know that we keep saying that—but at least the DPLR Committee seems to be very robust in its scrutiny.

If there are no more comments, does the committee agree that it does not wish to make any recommendation in relation to the instrument?

Members *indicated agreement.*

First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 (SSI 2017/369)

The Convener: If members have no comments on the instrument, does the committee agree that it does not wish to make any recommendation in relation to it?

Members *indicated agreement.*

First-tier Tribunal for Scotland General Regulatory Chamber Charity Appeals (Procedure) Regulations 2017 (SSI 2017/364)

The Convener: If members have no comments on the instrument, does the committee agree that it does not wish to make any recommendations in relation to it?

Members *indicated agreement.*

First-tier Tribunal for Scotland Health and Education Chamber (Procedure) Regulations 2017 (SSI 2017/366)

The Convener: If members have no comments on the instrument, does the committee agree that it does not wish to make any recommendation in relation to it?

Members *indicated agreement.*

The Convener: I suspend the meeting briefly to allow the cabinet secretary to come in.

10:03

Meeting suspended.

10:04

On resuming—

Criminal Justice (Scotland) Act 2016 (Consequential and Supplementary Modifications) Regulations 2017 [Draft]

Criminal Justice (Scotland) Act 2016 (Modification of Part 1 and Ancillary Provision) Regulations 2017 [Draft]

The Convener: Agenda item 2 is consideration of two affirmative instruments. I welcome to the meeting Michael Matheson, Cabinet Secretary for Justice, and the following Scottish Government officials: Steven Tidy, police powers team; and Louise Miller, directorate for legal services. I refer members to paper 2, which is a note by the clerk.

Do you wish to make a short opening statement, cabinet secretary?

The Cabinet Secretary for Justice (Michael Matheson): Thank you. I hope that it will help if I briefly explain the purpose and effect of the instruments.

On the draft Criminal Justice (Scotland) Act 2016 (Modification of Part 1 and Ancillary Provision) Regulations 2017, part 1 of the Criminal Justice (Scotland) Act 2016 represents a significant change to the system of arresting people and holding them in custody. The new arrest and custody processes contained in part 1 provide a clear balance between the proper investigation of offences and the protection of suspects' rights while in police custody.

Although the majority of arrests are of people suspected of criminal offences, the police have powers of arrest for other reasons not related to a criminal offence—for example, an arrest for breaching a protective court order or an arrest under warrant of a witness for failing to attend court. For those types of arrest, not all the provisions set out in the 2016 act are appropriate. For example, it would not be appropriate to take a witness arrested for failing to appear at court to a police station rather than directly to court. Similarly, the requirement to tell someone the offence for which they have been arrested clearly makes no sense for arrests that do not relate to an offence.

For that reason, as I set out during the passage of the bill, some limited modifications to the arrest provisions are needed for non-offence-based arrests. The modifications made by the regulations will ensure that individuals in those situations are dealt with appropriately—for example, by requiring individuals to be told the reason for their arrest rather than the offence of which they are suspected, and by disapplying the provisions that allow people to be held in investigative custody when the person is not being held on suspicion of committing an offence.

The regulations ensure that people arrested for breaches of protective orders will continue to be brought before the courts under specialist provisions, rather than under section 21 of the 2016 act. They also ensure that, where rights given to everyone in police custody under part 1 of the 2016 act apply, old provisions that partly duplicate those rights in relation to particular types of non-offence arrests will be removed.

For the committee's information, I point out that a full public consultation was carried out on the regulations and that a draft was included in that consultation. Although the consultation received only a small number of responses, various interest groups including the Law Society of Scotland and Scottish Women's Aid commented positively.

On the draft Criminal Justice (Scotland) Act 2016 (Consequential and Supplementary Modifications) Regulations 2017, these mainly technical amendments are consequential to the 2016 act. For example, they formally repeal old powers of arrest abolished by section 54 of the act, and they also remove statutory reference to detention under section 14 of the Criminal Procedure (Scotland) Act 1995, which, again, was abolished by the 2016 act.

Paragraph 12(3) of the schedule adds the Sheriff Appeal Court to the list of criminal courts to which the Lord Justice General may make directions enabling an accused to appear by live television link in certain circumstances. All the other criminal courts—the High Court, the sheriff court and justice of the peace courts—are already included on the list. The omission of the Sheriff Appeal Court is purely down to timing, as the bill that became the 2016 act was introduced before the bill that established the Sheriff Appeal Court. This amendment therefore plugs a gap in the provisions relating to live links.

That is a very brief overview of the regulations and their contexts. I am, of course, happy to answer the committee's questions.

The Convener: If members have no questions or comments on the instruments, we will move to agenda item 3, which is formal consideration of the motions on the affirmative instruments. I note that the Delegated Powers and Law Reform Committee has considered and reported on the instruments and has made no comment on them.

Motions moved,

That the Justice Committee recommends that the Criminal Justice (Scotland) Act 2016 (Consequential and Supplementary Modifications) Regulations 2017 [draft] be approved.

That the Justice Committee recommends that the Criminal Justice (Scotland) Act 2016 (Modification of Part 1 and Ancillary Provision) Regulations 2017 [draft] be approved.—[*Michael Matheson*]

Motions agreed to.

The Convener: Is the committee content to delegate authority to me as convener to clear the final draft report?

Members *indicated agreement.*

The Convener: I thank the cabinet secretary and his officials for attending, and I suspend the meeting briefly to allow for a change of officials.

10:11

Meeting suspended.

10:12

On resuming—

Domestic Abuse (Scotland) Bill: Stage 2

The Convener: Agenda item 4 is consideration of the Domestic Abuse (Scotland) Bill at stage 2. For this item, I ask members to refer to their copies of the bill and the marshalled list of amendments. I welcome back the cabinet secretary and his officials, and I also welcome Linda Fabiani to the meeting.

Section 1—Abusive behaviour towards partner or ex-partner

The Convener: Group 1 is on the relationship context of the offence. Amendment 1, in my name, is grouped with amendment 2.

Amendments 1 and 2 were prompted by evidence that the committee received at stage 1 from Scottish Women's Aid. Heather Williams gave the following example of psychological abuse:

"if I meet you in a shop and you say, 'I notice that your son's got a new bike. I hope he doesn't have an accident,' that might appear to be a reasonable conversation. However, it could set off a lot of distress if, in the context of the relationship, you are threatening me and saying that if I leave or do anything that you are not happy with, you will hurt my son ... when taken in the full context, we can understand why it would cause harm and distress".—[*Official Report, Justice Committee*, 13 June 2017; c 18.]

I consider that evidence to be absolutely crucial, because it seems to me essential that, in order to understand whether behaviour can be deemed abusive or likely to cause someone to suffer psychological harm in a domestic relationship, we look at the behaviour in the context of that relationship. Behaviour that in some circumstances might not appear to be threatening or intimidating might be seen in an entirely different light once the context of the relationship between A and B is taken into account. As a result, amendments 1 and 2, which have the support of Scottish Women's Aid, seek to insert

"in the context of the relationship between A and B"

into section 1.

I move amendment 1.

10:15

Michael Matheson: Amendments 1 and 2, which relate to the new offence of domestic abuse, are, as I understand it, intended to address a concern raised during stage 1 scrutiny that the operation of the offence does not acknowledge that relationships between partners are, by their nature, different and that, as a result, behaviour occurring within the context of one relationship might be construed quite differently than the same or similar behaviour occurring within another, different relationship. Although the amendments are obviously well intentioned, I will explain why I do not think that they are required and, indeed, why they might confuse how the courts should approach consideration of the new offence.

First, I will briefly confirm how the new offence operates to explain the context for why the amendments are not necessary. The wording of section 1 already makes it clear that the offence relates to a course of abusive behaviour in the context of a relationship between a person and their partner or ex-partner. It is important to consider the definition of "abusive behaviour" in section 2, which provides that behaviour that is abusive includes behaviour

"that is violent, threatening or intimidating";

and it is hard to imagine any circumstances in which such behaviour would not be abusive. Amendments 1 and 2 are therefore unnecessary in relation to those aspects of abusive behaviour.

However, as members know, the definition of "abusive behaviour" also includes behaviour that is likely to have one of the effects on the complainer listed in section 2(3). It is important to keep in mind that the question here is whether the accused's behaviour is likely to have one of those effects on the actual complainer in the case, as opposed to a hypothetical person. That means that the court is required, case by case, to have regard to the context of the relationship between the accused and the complainer in reaching its decision on the evidence. For example, the court must consider whether the accused's behaviour was likely to have the effect of

"frightening, humiliating, degrading or punishing"

the complainer in question.

It is also important to bear in mind that the court is required to consider whether a reasonable person would consider the accused's behaviour likely to cause the complainer to suffer physical or psychological harm, not whether it would be likely to cause such harm to a hypothetical victim. For example, if the court accepts evidence that the relationship between the accused and the complainer was characterised as being, for instance, very argumentative and marked by the use of strong language by both partners that others might consider abusive in a general sense, the court might reach the conclusion that, given the context of the relationship between the accused and the complainer, the accused's behaviour was not likely to cause psychological harm to the complainer. Again, that turns on the likely effect on the complainer in question, rather than a hypothetical victim. Nevertheless, it

depends on what the court believes that a reasonable person would conclude as likely to affect the complainer in question. That, too, ensures the right measure of objectivity, as the evidence is assessed case by case.

I hope that that provides reassurance that the bill as introduced requires the court to have regard to the whole context of the relationship between the accused and the complainer in deciding whether it is proven that the offence has been committed.

John Finnie (Highlands and Islands) (Green): Your examples have all related to interpretation by the court, but there is a step prior to that, which is the involvement of the police. With regard to the particular phrase that the convener quoted, if you or I were to use it in addressing someone, it would be seen as very innocent. The difficulty is that a woman who is the victim of such an approach might find it difficult to convince the police that the behaviour is unreasonable. Is the challenge here not about how the court interprets the matter but about how we get the issue to court?

Michael Matheson: Not necessarily, as it will be for the courts to decide how to interpret the legislation. The balance in the offence has been set out this way in the bill to ensure that the whole context of the relationship can be taken into account in consideration of the matter.

Amendments 1 and 2, which reiterate that the offence takes place within the context of a relationship between partners or ex-partners, are simply not needed. To add the words

"in the context of the relationship between A and B"

to two places in section 1 would have no true legal effect on what is already addressed by the provisions when they are read as a whole.

Furthermore, I am concerned that the additional words are also liable to cause confusion. Indeed, I am not precisely sure what truly is qualified by the proposed additional wording in each case. The amendments also perhaps raise a question about when abusive behaviour between partners and ex-partners would not happen in the context of their relationship. Would it ever be possible to separate relationship abuse from non-relationship abuse when abuse occurs between people who are in or have once had a relationship?

Finally, if the convener's intention is to provide for an objective overview of what is reasonable in a typical relationship context between two hypothetical people, I have to say that the amendments do not achieve that, because they refer to the particular relationship between person A and person B. In any event, the nature of what amounts to abusive behaviour in the context of a particular relationship is, as I have explained, already covered in the bill. In addition, it is worth reminding members that the defence in section 5 of the bill is part of the checks and balances designed to ensure that no one is unfairly criminalised by the new offence.

On that basis, I invite the member to withdraw amendment 1 and not to move amendment 2.

The Convener: The cabinet secretary said that the wording is likely to cause confusion, but the type of relationship that we are looking at here is an abusive one. There is also the issue of psychological harm, which can be quite hard for people to get their heads around. There are two types of relationship: non-abusive relationships and relationships that the legislation seeks to address. That is why context is all important and greatly adds to the bill's understanding.

In all of your explanations, cabinet secretary, you have constantly mentioned context, but it is not on the face of the bill. Amendment 1 merely serves to make the legislation the best that it can be and to aid understanding of psychological abuse. If the bill referred to context, it would make it totally evident what psychological behaviour is.

I ask the cabinet secretary to reflect on that. As an example that he might take into account, we constantly asked for amendments to the Human Trafficking and Exploitation (Scotland) Bill to strengthen the bill and make it better. Eventually, at stage 3, those amendments appeared.

I will not press amendment 1, but I would very much welcome further discussion with the cabinet secretary to see if we can come to a meeting of minds. For me, context is all important to ensuring that the bill achieves what we all desperately want it to achieve. I have had a lengthy discussion with Scottish Women's Aid, which provided evidence on the issue, and it is very much of the same opinion. As I have said, if the cabinet secretary is happy to discuss the issue further with me, I will not press the amendment at this stage.

Michael Matheson: I am always happy to discuss matters with committee members with a view to improving legislation, but I think that our discussions with Scottish Women's Aid have been slightly different from those described by the member. That said, I am more than happy to have a discussion with the convener before stage 3.

The Convener: I had a discussion with the group as recently as half an hour before we came into committee, so there has obviously been some miscommunication.

Amendment 1, by agreement, withdrawn.

Amendment 2 not moved.

Section 1 agreed to.

Section 2 agreed to.

After section 2

The Convener: The next group is on extraterritorial jurisdiction. Amendment 3, in the name of Michael Matheson, is the only amendment in the group.

Michael Matheson: Amendment 3 inserts a new section that provides the Scottish courts with extraterritorial jurisdiction in respect of offences of domestic abuse. Members will recall that the issue was raised by Scottish Women's Aid in evidence at stage 1. Scottish Women's Aid emphasised that it was necessary to provide Scottish courts with extraterritorial jurisdiction over the domestic abuse offence to comply with the Istanbul convention on violence against women.

The effect of amendment 3 is to provide that, where a United Kingdom national or a habitual resident of Scotland commits the offence wholly or partly outside the United Kingdom, the Scottish courts have jurisdiction to deal with that offence. That is particularly important given that such an offence is constituted by a course of behaviour that can occur over time in various places. Amendment 3 also states which sheriff court is to have jurisdiction if the offence is committed wholly outside the United Kingdom. Existing jurisdictional rules will apply when the offence is committed partly abroad and partly in Scotland. Simply put, the offence can be tried in the sheriff court district where the Scottish part of the course of conduct took place.

Amendment 3 does not make such provision when the offence is committed in another UK jurisdiction. That is because, when an offence occurs partly in another UK jurisdiction, common-law rules concerning offences that are committed across the different jurisdictions of the UK will enable the elements of a course of conduct that happen in another part of the UK to be included in the charge. For the avoidance of doubt, when the behaviour occurs wholly in another UK jurisdiction, we think it appropriate that it should be prosecuted in a court in that jurisdiction.

I move amendment 3.

The Convener: Will you give an example of the kind of behaviour that might be covered under the amendment?

Michael Matheson: For example, a couple is on holiday in Spain and a course of abusive behaviour takes place there and, on return to Scotland, when a complaint is made to the police and is investigated, reference is made to the behaviour that took place outwith Scotland. That could be taken into account when the complaint is being considered and it could be presented in court.

The Convener: Would the jurisdiction be worldwide?

Michael Matheson: In what sense?

The Convener: Where are we looking at for extraterritorial jurisdiction?

Michael Matheson: The course of behaviour could take place anywhere in the world; it does not matter where it happens outwith Scotland or the UK. The provision is not specific to any particular country.

The Convener: You mentioned a country that is in the European Union—that is all that I was asking.

Michael Matheson: It is not dependent on whether we remain in the EU.

The Convener: That is good to know.

Michael Matheson: Of course, Istanbul is not in the EU.

Liam Kerr (North East Scotland) (Con): I have a slight concern about the status of the perpetrator, who is identified as "A" in the bill and in the amendment. We have set out two categories: we have "habitually resident in Scotland" or "a UK national". I completely accept that there needs to be a very real connection to Scotland so I am perfectly comfortable with the category of "habitually resident in Scotland". However, it is my understanding that, if modern statutes have a nationality category at all, it tends to be limited to British citizens. That is not the slightly wider definition of UK national that is in the amendment, which includes

"a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen".

My view is that the best option would be to narrow it down to those who are habitually resident in Scotland at the time the offence is committed, with the caveat that, if it is going to be wider, it is extended only to British citizens. I would be interested in your thoughts on that.

10:30

Michael Matheson: My understanding is that, in order to comply with the convention, the provision has to apply to those habitually resident in the UK or UK nationals. That is why the amendment has been drafted in that way: it is to comply with the requirements of the Istanbul convention.

Liam Kerr: I see, so it is about those habitually resident and British nationals.

Michael Matheson: UK nationals.

Liam Kerr: UK nationals—okay. To comply with the convention, overseas territories need to be included.

Michael Matheson: Yes.

Liam Kerr: I understand. Thank you.

Liam McArthur: I will follow that up for the purposes of clarity. In terms of extraterritorial jurisdiction, a UK national as defined in the amendment might not be habitually resident in Scotland. New subsection (3)(a), which amendment 3 would insert, refers to someone who is

"habitually resident in Scotland, or ... is a UK national."

We are not dealing with somebody who is a UK national but who resides habitually somewhere else in the UK and commits the offence overseas in whole or in part and then is subject to the jurisdiction of sheriff courts in Scotland. How is that delineated through the amendment's provision?

Michael Matheson: Sorry, but I am not entirely with you. What sort of person are you referring to?

Liam McArthur: A UK national or somebody who is habitually resident somewhere else in the UK, who commits the offence overseas, either entirely or in part, and returns to the UK and finds themselves the subject of a complaint.

Michael Matheson: If it is a UK national who commits the offence entirely outwith the UK, the offence can still be prosecuted in Scottish courts. However, if it is a UK national—I am just trying to clarify this for the member—who commits the majority of that offence in another part of the UK and outwith Scottish jurisdiction, they would be prosecuted through the domestic courts where the majority of that—

Liam McArthur: Sorry, but I am probably not explaining this clearly. I am asking about that first example of a UK national who commits the offence overseas and the entire sequence of actions takes place overseas. That UK national is not habitually resident in Scotland. Presumably the provision is not about prosecuting in Scottish sheriff courts an individual from Manchester, London or wherever.

Michael Matheson: No. If it was, for example, an expatriate staying overseas who committed the offence against someone who resided in Scotland and that was their habitual residence, they could be prosecuted here in Scotland for that offence. I hope that that clarifies the type of person that we are thinking about.

Liam McArthur: Okay. That is helpful.

The Convener: This has been more of a question-and-answer session, because of the technical point. Normally, we would take all the comments in a oner and then ask for the cabinet secretary's view. Do you want to say anything further to wind up, cabinet secretary?

Michael Matheson: No.

Amendment 3 agreed to.

Section 3 agreed to.

Section 4—Aggravation in relation to a child

The Convener: Amendment 4, in the name of the cabinet secretary, is grouped with amendments 5 to 9.

Michael Matheson: Members will be aware that the bill contains a statutory aggravation in section 4. The aggravation provides that if the accused involved a child in committing the offence, the aggravation applies. A child can be involved in three ways: if the accused directed behaviour at the child; if the accused made use of a child in directing behaviour at their partner or ex-partner; and if a child saw, heard or was present during incidents of behaviour forming part of the course of abusive behaviour that constitutes the offence. The aggravation is intended to ensure that the harm caused to children when they witness or are involved by the perpetrator in the abuse can be reflected by the court when sentencing the perpetrator.

Members have heard stakeholders who represent children affected by domestic abuse express some concern that the aggravation in the bill does not reflect the harm that is caused to children by growing up in an environment in which their parent or carer is being abused. That criticism has focused on cases in which a child is in the environment in which the abusive behaviour is being carried out but is not directly involved as such, in which case the current aggravation in section 4 would not apply.

Examples of the harmful effects of domestic abuse on children that are not covered by the aggravation include: coercive and controlling behaviour that has the effect of isolating a child, as well as the primary victim, from friends, family or other sources of support; abusive behaviour that undermines the ability of the non-abusing parent or carer to look after the child by, for example, restricting their access to transport, thereby limiting their ability to get a child to doctor's appointments, or restricting their access to money, thereby limiting their ability to provide essentials for a child; or the harm that is caused when a child is aware that the abuse is taking place, even though they never see or hear it and are never present when the abusive behaviour takes place.

The stage 1 report noted those concerns and asked the Scottish Government to respond to evidence that the reference in the current approach to the aggravation being established where a child

"sees or hears, or is present during"

an incident of abusive behaviour was too narrow. It was argued in that evidence that children in the care of victims of abuse were likely to suffer trauma as a result of that abuse, whether or not they directly witnessed abusive behaviour or incidents, and therefore that there was an aggravation. Amendments 4 to 9 respond to those concerns by widening the scope of the aggravation.

Amendment 5 provides that, in addition to the existing ways in which the offence can be aggravated, it is also aggravated

"if a reasonable person would consider the course of behaviour, or an incident ... that forms part of the course of behaviour, to be likely to adversely affect a child usually residing with"

the victim or the perpetrator.

Amendment 9 adds to that by providing that references to a child being adversely affected include

"causing the child to suffer fear, alarm or distress."

That is a non-exhaustive definition, so other ways in which a child was adversely affected could be taken into account if the court was satisfied by the evidence in a particular case. For example, if a perpetrator controls a victim's movements to such an extent that they are unable to leave the house to ensure that their children get to school or a doctor's appointment, the court could determine that that amounts to behaviour that is likely to adversely affect a child.

As with other aggravations, evidence from a single source is sufficient for the aggravation to be proven. That is provided for in section 4 already. The aggravation uses a reasonable person test, so there is no requirement for the prosecution to prove that the child was actually adversely affected provided that the court is satisfied that a reasonable person would consider it likely that the child would be adversely affected by the perpetrator's actions.

The aggravation is limited to children who usually reside with the victim or the perpetrator. That reflects the feedback that living in an environment in which domestic abuse is perpetrated is what can most adversely affect a child.

Amendment 4 paves the way for amendment 5. The two current limbs of the aggravation will accordingly be split between the present subsection (2) and a new subsection (2A), which sits alongside new subsection (2B) in amendment 5.

Amendments 6 to 8 are technical and just for the avoidance of doubt in relation to the operation of the aggravation as a whole.

Amendment 6 provides that it is not necessary to prove that a child had awareness of, understood the nature of, or was adversely affected by the accused's behaviour for the aggravation to be proven.

Amendment 7 ensures that the three limbs of the aggravation are capable of being applied separately but can also be used in combination with one another when more than one applies in a particular case.

Amendment 8 ensures that nothing in the formulation of the aggravation prevents evidence from being led on certain impacts on a child, even though such impacts are not essential to prove the aggravation.

I move amendment 4.

Liam McArthur: I warmly welcome these amendments. As the cabinet secretary has rightly said, they address concerns that we heard from a number of witnesses at stage 1 about the aggravation being limited to children who have heard or seen abuse taking place and not covering the full range of the effects of abusive behaviour on a household and the children in it.

My question is about amendment 6, and it is on an issue that the cabinet secretary touched on in his comments. The amendment allows for an aggravation in circumstances where there is no evidence of a child being adversely affected by a perpetrator's behaviour. I understand the reason for the provision—you have mentioned the reasonableness test—but I wonder whether there needs to be a reference to recklessness on the part of the perpetrator. We need to be clear that, even with the best of intentions, we are not setting the parameters of any offence too broadly, but I might well be missing some aspect of how amendment 6 should be read or how it interrelates with other provisions in the bill. I would therefore welcome any comments that the cabinet secretary might wish to make, particularly with regard to the recklessness of a perpetrator's behaviour.

Liam Kerr: I echo everything that Liam McArthur has said. I am going to argue against myself here, cabinet secretary, so bear with me, but when I looked at the issue, I was slightly concerned about the reference in amendment 6 to a child not necessarily ever having

"any ... awareness of A's behaviour"

and our putting in place an aggravation that involves some hypothetical child who can know nothing and yet aggravate the offence.

I said that I was going to argue against myself, because I also noted the reference in amendment 5 to a child's

"usually residing with A or B"

and wondered whether that was unnecessarily restrictive with regard to the offence. I presume that you will counterargue that the residence criterion in amendment 5 makes the awareness reference in amendment 6 acceptable.

Michael Matheson: That is correct.

Liam Kerr: I was simply throwing that into the discussion.

Michael Matheson: So—

The Convener: Cabinet secretary, I just want to ensure that all the comments have been heard before we finish this debate.

I have to say that I had concerns similar to those expressed by Liam McArthur about amendment 6, but the one thing that I seek reassurance on is compliance with the European convention on human rights. I understand that the amendment's purpose is to catch those children who, although they have no awareness or understanding of the abuse or are not affected by it, might still be at risk.

Michael Matheson: I am grateful for members' comments. On the points that Liam McArthur made, we have set amendment 6 out in that way because it deals with the aggravation rather than the offence. The offence covers issues such as recklessness, but the aggravation relates to the impact on a child who might be affected by the behaviour.

Liam Kerr actually answered his own question. The two references that he highlighted are interrelated, because the child would normally be resident with the perpetrator or the complainer in such cases. With regard to the reasonable person test, one could imagine a baby or a one or two-year-old child having no understanding of the impact of the abusive relationship on their parent, who for some good reason might be unable to take them to the doctor for an appointment and so on. That is where the reasonable person test kicks in, because the court is then able to say, "Well, a reasonable person would assume that that would have an adverse impact on the child." That is why in amendment 6 we have ensured that the reasonable person test is applied when the court considers such matters.

Amendment 4 agreed to.

10:45

Amendments 5 to 9 moved—[Michael Matheson]—and agreed to.

Section 4, as amended, agreed to.

Sections 5 to 10 agreed to.

Section 11—The 1995 Act etc

The Convener: The next group is on restriction on bail in solemn cases. Amendment 10, in the name of the cabinet secretary, is grouped with amendment 11.

Michael Matheson: Amendments 10 and 11 are important additions to the protections that the bill offers victims of domestic abuse. They are consistent with the approach that is taken elsewhere in the bill, where we have extended to victims of domestic abuse and related offences protections that our legal system already offers victims of sexual offences.

Under section 23D of the Criminal Procedure (Scotland) Act 1995, bail is to be granted only in "exceptional circumstances" in solemn proceedings in which an individual is accused of violent or sexual offences and when that individual has been convicted on indictment of sexual or violent offences. We want the availability of bail for repeat offenders who are accused of domestic abuse to be limited in a similar fashion and the link between domestic abuse offences and sexual or violent offences, which we have made elsewhere in the bill, to be made here, too.

Amendment 11, which is the main amendment in the group, constructs a group of offences including violent, sexual and domestic abuse offences. Its effect is that, when an individual is accused in solemn proceedings of any violent, sexual or domestic abuse offences and has past convictions for any such offences, bail will be granted only in exceptional circumstances. In this case, domestic abuse offences include both the new offence of domestic abuse in the bill and any offence charged to which the domestic abuse aggravation in the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 has been attached. When an individual is accused in solemn proceedings of an offence of any of those kinds and has been convicted on indictment of an offence of any of those kinds, which includes previous convictions for equivalent offences in other parts of the UK and the rest of the EU, bail is to be granted by the court only if there are exceptional circumstances to justify it.

Amendment 10 adds a reference to those changes to the list of procedural changes that we are making in the bill.

I move amendment 10.

Liam Kerr: I throw up the possibility that we are tying the hands of the court in circumstances in which there is little evidence of guilt. I am simply wondering aloud whether there is a human rights angle to this or whether it would fall foul of human rights legislation.

Michael Matheson: That is why we have given the court the scope to determine, on the basis of what has been presented, whether there are any exceptional circumstances.

As for whether there are any human rights aspects to this, the member might be aware that the jurisprudence of the European Court of Human Rights makes very clear the need for the courts to have the final say in bail matters and that they must have discretion in making such decisions. Amendment 11 ensures that that will continue to be the case, and we are therefore confident that, with the exceptional circumstances provision, it complies with the jurisprudence of the European Court of Human Rights.

Amendment 10 agreed to.

Section 11, as amended, agreed to.

Schedule—Modification of enactments

Amendment 11 moved—[Michael Matheson]—and agreed to.

The Convener: Amendment 14, in the name of Mairi Gougeon, is grouped with amendments 15 to 25. I point out that amendments 18 to 20 are pre-empted by amendment 31 in the group, which is on mandatory non-harassment orders, and that, if amendment 24 is agreed to, I cannot call amendment 23 in the group.

Mairi Gougeon (Angus North and Mearns) (SNP): Amendments 14 to 16, 19, 21 and 24 are key amendments that will improve and strengthen the bill by increasing the protections that are afforded to children who are affected by domestic abuse. I am pleased to have lodged those amendments, which relate to issues that I and other members of the committee raised during our stage 1 scrutiny. I thank Assist, Children 1st, Barnado's, the NSPCC and other stakeholders for raising those issues with the committee and the Scottish Government and for their briefings and the support that they have given to the amendments.

Amendment 16 is the main amendment in the group. It provides that certain children can benefit from the protections of a non-harassment order in a way that they cannot under the current legislation. At the moment, an NHO is available as a disposal to a criminal court following a conviction. The court can impose such an order for offences involving misconduct towards another person—namely, the victim. An NHO can therefore be made only in respect of the victim of an offence.

Although, as we have heard throughout our scrutiny of the bill, children are the victims of domestic abuse, the bill as it is currently drafted does not recognise that in relation to the granting of NHOs. Under criminal law, and as NHOs currently operate, children are generally not classed as victims of domestic abuse offending for the purposes of considering the imposition of an NHO.

Amendment 16 and the associated amendments would change that. The benefit of those amendments will be that children who reside with the perpetrator of the domestic abuse and children who reside with the partner or ex-partner who has been abused will be able to receive the protection of an NHO. Any child who is the subject of the child aggravation in section 4 of the bill will also be eligible for the protection of an NHO—that does not depend on where the child lives—in addition to the court having to consider whether to make an NHO in respect of the partner or ex-partner. It will, of course, be for the court to consider and decide in any given case whether to impose an NHO, but amendment 16 will, for the first time, empower our criminal courts to impose an NHO for a child who has been harmed by domestic abuse offending.

Amendment 19 is consequential on amendment 16 and provides for a requirement that the court explain why it has or has not imposed an NHO in respect of a child in any given case.

Amendment 15 is a restating of some material that is already provided for in the bill, but with the addition of the necessary definition of a child. That makes the provisions as a whole unfold better in the light of amendment 19.

Amendments 14 and 24 are consequential on amendment 15, and amendment 21 is a technical amendment that removes a word that is no longer useful.

I know that Liam McArthur's amendments are similar to mine, but I think that my amendments really strengthen the bill and are more powerful in the sense that they provide for the protections of NHOs to be available to a wider range of children. In particular, NHOs will be available to children who usually reside with the perpetrator of the abuse or the victim of the abuse, which I do not think is the case with Liam McArthur's amendments.

I encourage the committee to support my amendments in order to achieve our common policy goal of better protection for children who are affected by domestic abuse.

I move amendment 14.

Liam McArthur: I thank Mairi Gougeon for her comments on her amendments. She and I were left commiserating together last week after we lost out in the community MSP category of the politician of the year awards. I am delighted, however, that we have shown great fortitude,

picked ourselves up, dusted ourselves off and joined forces to improve the protection that the bill affords to children who are affected by domestic abuse. I also pay tribute to the organisations to which Mairi Gougeon referred.

Amendments 17, 18, 20, 22 and 23 seek to ensure that, where an offence of domestic abuse is found to have been aggravated by the presence of a child or children, that must be specifically taken into account by the court in its consideration of imposing an NHO. That is in keeping with the evidence that we heard throughout stage 1, and it seems the only reasonable response for the committee to make in such circumstances.

Amendment 25, like the amendments that have been lodged by Mairi Gougeon, provides an alternative means of achieving the same outcome, through giving ministers an order-making power. Ultimately, I am entirely relaxed about how the committee chooses to address the gap in the bill, but I look forward to our doing that as well as to the comments from the cabinet secretary and from colleagues about the amendments in the group.

Michael Matheson: Amendments 14 to 16, 19, 21 and 24, in the name of Mairi Gougeon, are important amendments that will improve the protections that the bill affords to children who are affected by domestic abuse. As has been indicated, the amendments will provide that children can benefit from the protections of a non-harassment order in a way that they cannot under the present legislation. We know that children are too often the victims of domestic abuse. Although the bill is largely focused on domestic abuse between partners and ex-partners, stakeholders have indicated that the fact that the non-harassment order provisions in the bill do not extend to children is unfortunate.

The benefit of the amendments will be that children who reside with the perpetrator of the domestic abuse or with the partner or ex-partner who has been abused will be able to receive the protection of a non-harassment order. It will also be possible to give any child who is the subject of the child aggravation in section 4 the protection of a non-harassment order. That particular aspect will not depend on where the child lives and will be in addition to the court having to consider whether to make a non-harassment order in respect of the partner or ex-partner.

Without the amendments, it would be necessary for applications to be made through the civil court if non-harassment orders were to be considered for the children who are covered by the amendments. The amendments will, therefore, reduce the trauma and inconvenience for families who are affected by domestic abuse and will allow a criminal court to consider whether protections are needed for children who are affected by domestic abuse.

The Scottish Government is pleased that the amendments have been lodged and asks the committee to vote them into the bill.

I have considerable sympathy for what Liam McArthur is seeking to achieve with many of his amendments, but I will explain why I think that the amendments in the name of Mairi Gougeon are preferable.

As I have indicated, Mairi Gougeon's amendments will mean that non-harassment orders will be available more widely to children who reside with the perpetrator of the domestic abuse, children who reside with the partner or ex-partner who has been abused and children who were involved in the committal of the abuse by being subject to the child aggravation in section 4. However, Liam McArthur's amendments cover only those children who are subject to the aggravation in section 4 and, in our view, do not go far enough.

Amendment 25 seeks to provide an order-making power for the Scottish ministers to make further provision relating to non-harassment orders. It is limited to circumstances affecting cases in which the statutory child aggravation in section 4 has been proven, and it provides that regulations may provide for circumstances in which the court must consider making a non-harassment order to protect a child.

Although we understand the intent behind amendment 25, it seeks to provide the Scottish ministers with a wide power to, in effect, legislate by regulation so as to require certain sentencing decisions to be imposed by the court in a given case. The Scottish Government supports judicial discretion, as judges hear all the facts and circumstances of a case before a decision is made on sentencing. Therefore, as a matter of general policy, the Scottish Government does not support seeking to remove judicial discretion in the manner that is suggested by that enabling power.

In addition, we consider that, if the Scottish Parliament were to legislate to remove judicial discretion to determine sentencing decisions on the basis of the facts and circumstances of a given case, that should be done in the bill rather than through secondary legislation. We consider that such a step should not be taken lightly and should be given full parliamentary consideration.

On that basis, we ask Liam McArthur not to move amendments 17, 18, 20, 22, 23 and 25, and we ask the committee to support amendments 14 to 16, 19, 21 and 24, in Mairi Gougeon's name.

11:00

Mairi Gougeon: I have no further comments. I simply press amendment 14.

Amendment 14 agreed to.

Amendments 15 and 16 moved—[Mairi Gougeon]—and agreed to.

The Convener: Amendment 29, in the name of Linda Fabiani, is grouped with amendments 30 to 36. If amendment 31 is agreed to, I will not be able to call amendments 18 to 20, which were debated in the group on non-harassment orders as to children, because they will have been pre-empted.

Linda Fabiani (East Kilbride) (SNP): I come to amendment 29 and its consequential amendments with a background of many years dealing with victims of domestic abuse who felt that they had been let down by courts that did not grant non-harassment orders. I understand that position, which has been backed up by answers to my written parliamentary questions over the years; it certainly seems that the courts have issued fewer non-harassment orders than they should have. That situation often results in fear and dread for the victim, so people sometimes have to go down the civil action route. I understand that the committee has heard some evidence on that.

Amendment 29 is quite straightforward. It seeks to delete the words "consider whether to", so that the bill would read:

"The court must—

(a) without an application by the prosecutor, make a non-harassment order in the person's case".

In other words, making a non-harassment order would be mandatory. It seems to me that it is a fundamental principle that the onus should be placed not on the victim to justify the need for a non-harassment order, but on the convicted perpetrator to justify why such an order should not apply.

Amendment 30 is more or less consequential on amendment 29. It would delete, after

"give reasons for the decision reached",

the words

"including by explaining why there is a need or no need for the victim to be protected by such an order".

It would also insert a requirement to look at

"the terms of the order"

and

"the period for which the order is to run".

The other amendments in my name are more or less directly consequential on those that I have just described, and would make section 8 operable.

I asked a parliamentary question of the cabinet secretary last week, and I recognise that he is very keen to consider ways in which the bill could be strengthened. The committee has heard evidence from people who support the bill, including Scottish Women's Aid, the Police Scotland violence reduction unit and Victim Support Scotland. Most compelling of all has been the evidence and testimony from people who have been directly affected, physically in some cases and mentally in others, by a non-harassment order not being granted by the court. I will quote someone whom I know rather well. She has said:

"A criminal conviction for my husband was of absolutely no use to me as a victim since that conviction on its own contained no provision to protect me, keep him away from my home and family and protect me from further abuse, with legal consequences should he choose to ignore the court's order."

That is a great problem in the system. I find the case for mandatory non-harassment orders to be compelling.

Liam Kerr: It seems to me that decisions on NHOs should always rest with the court, rather than NHOs being mandatory, irrespective of the circumstances or the strength of the allegations. I am concerned that their being mandatory would have consequences in terms of the ECHR, as we discussed earlier.

Liam McArthur: I am conscious that having just spoken to an amendment that would remove judicial discretion, I am now about to raise concerns about amendments that would have a largely similar effect.

Linda Fabiani set out very well the frustration that is felt and the impact of failure to put in place non-harassment orders. Whether that can be addressed through the Lord Advocate's guidance or another mechanism is something that we might want to consider further in the context of the bill. However, I am concerned about the mandatory nature of the provision that amendment 29 and consequent amendments would introduce.

John Finnie: Linda Fabiani laid out very clearly some consequences of the present system. I know that the introduction of mandatory NHOs enjoys the support of Scottish Women's Aid, and I certainly support it.

The Convener: There is an issue. I understand why Linda Fabiani is seeking to introduce mandatory non-harassment orders—there has been a problem about non-harassment orders not being granted when they should have been granted. However, I feel that the bill has addressed that by ensuring that a non-harassment order must be considered—consideration will be mandatory—and if an order is refused, there must be a reason for that. I hope that that will go a

considerable way to addressing what is a very real problem, without necessarily breaching the ECHR or raising concerns under it.

I invite the cabinet secretary to wind up.

Michael Matheson: I am aware that Linda Fabiani has a long-standing interest in protection for victims of domestic abuse, which she has raised with me over an extended period of time. No one doubts her determination to try to improve how the system of non-harassment orders operates. However, I consider that the amendments that she has lodged go too far in seeking to remove discretion from our courts to consider what might be best in terms of an appropriate disposal when dealing with domestic abuse offenders.

Members will be aware that the bill includes non-harassment orders provisions that were warmly welcomed by stakeholders and others. The provisions will have the effect of requiring the court in every domestic abuse case to "consider whether to" impose an NHO, and "to give reasons for" why an NHO has or has not been imposed,

"including by explaining why there is a need or is no need for the victim to be protected by such an order."

The provisions will therefore ensure that, in every domestic abuse case, the court has to consider the need for protection for the victim as it considers whether to impose an NHO. In addition, the new sentencing provision in the bill means that, "When sentencing" in domestic abuse cases,

"the court must have particular regard"

for the safety of the victim. Taken together, those changes will enhance the operation of the system of NHOs so that more victims can be protected.

Although I am certain that Linda Fabiani's amendments are based on the best intentions, it is important to highlight their potential effect. They would remove all discretion from the court so that whenever a person was convicted of domestic abuse, an NHO would have to be imposed. There would be no exceptions: it would be a blanket requirement, as a matter of law.

Although it is certainly true that non-harassment orders have a key role to play in protecting victims of domestic abuse, it is also true that they might not be appropriate in all cases. For example, in a situation where the parties wish to reconcile following a prosecution, a non-harassment order might not be appropriate. There will be other cases where there is no reconciliation, but the victim might indicate that they do not feel that a non-harassment order is necessary and that they would prefer to have on-going contact with the accused, perhaps in relation to issues around children. The Crown Office prosecutes a wide range of domestic abuse cases, and non-harassment orders would not necessarily be appropriate or necessary in every case.

Fulton MacGregor (Coatbridge and Chryston) (SNP): In deciding on Linda Fabiani's amendments, I wonder what, in practical terms, will happen when the new legislation is implemented. Will more non-harassment orders be issued as a result of the legislation than are currently issued, and will there, perhaps, be a change in the culture of how the courts look at the orders?

Michael Matheson: I believe that that will be the case, because of the requirement at the time of sentencing for the court to consider an NHO and to state in open court the reasons for issuing or not issuing a non-harassment order. That will make sure that, at the time of sentencing, the safety of the victim is at the centre of the court's mind and is the focus when making the decision. The provision will help to change the culture.

Although non-harassment orders might well be appropriate in cases that involve a sustained course of conduct and repeated abusive behaviour, or when re-offending is likely, they might not be appropriate in cases that involve isolated incidents of conflict that are provoked by situational factors. In any event, it should be for the court to make that decision, rather than to have simply to apply the law in a blanket fashion.

There are potential human rights concerns about the amendments because they would require the court to impose a non-harassment order—we must remember that a non-harassment order can restrict someone's freedom—with no discretion whatsoever to assess whether it is necessary in the given case. Although I sympathise with Linda Fabiani and others in their determination to enhance protection for victims, our courts are there to use their judgment in making decisions of that sort day in and day out, and we should trust them to do so while taking into account the specific facts and circumstances of each case, which is what the bill provides for.

The steps that we have taken to make it mandatory for a non-harassment order to be considered in every case and for reasons to have always to be given in open court are significant; they provide a very clear message to the court of the importance of utilising non-harassment orders in appropriate cases.

Although the amendments are well-intentioned, they would go too far by removing the ability of judges to assess each case that they deal with and to make decisions that are based on the facts and circumstances of the case.

I am also concerned that the amendments could bring the system of non-harassment orders into disrepute. If non-harassment orders are imposed

in cases in which there is no justification for them, on the basis of consideration of the specific case, we run the risk of the credibility of non-harassment orders, as a disposal, being diminished in the eyes of the court and others. Given the important role that non-harassment orders play in protecting victims, that is not desirable.

I have made clear my objections to the amendments in the group. However, I sympathise with Linda Fabiani and others who seek to take further steps to strengthen the system of non-harassment orders. I am happy to work with Linda Fabiani and others ahead of stage 3 to see whether there are ways in which the provisions in the bill can be improved, while leaving appropriate discretion with the court.

On that basis, I invite Linda Fabiani to seek to withdraw amendment 29 and not to move amendments 30 to 36.

Linda Fabiani: I listened to what my colleagues on the committee said and I understand their concerns. I also listened very carefully to what the cabinet secretary said. I understand his concerns, too.

Clearly, the present system does not work for victims. Although the bill is taking some excellent steps forward, I am not convinced that it goes far enough. However, in the light of everything that has been said today, I seek to withdraw amendment 29, with a view to looking at how we might strengthen the bill at stage 3. I welcome the opportunity to talk that through and I wonder whether, in considering the matter further, the cabinet secretary and his team could consider the idea of there being a presumption that a non-harassment order would be granted.

11:15

Amendment 29, by agreement, withdrawn.

Amendments 17, 30, 31 and 18 not moved.

Amendment 19 moved—[Mairi Gougeon]—and agreed to.

Amendment 20 not moved.

Amendment 21 moved—[Mairi Gougeon]—and agreed to.

Amendments 32, 22 and 33 to 36 not moved.

Amendment 24 moved—[Mairi Gougeon]—and agreed to.

Amendment 25 not moved.

Schedule, as amended, agreed to.

Section 12—Ancillary provision

The Convener: Amendment 37, in the name of Claire Baker, is grouped with amendments 27 and 28.

Claire Baker (Mid Scotland and Fife) (Lab): There are three reasons for my lodging these amendments. First, there is frustration at the slow progress in the development of specialist domestic abuse courts. The one in Glasgow was established in 2004. That pilot resulted in a positive evaluation, and it was followed by the one in Edinburgh in 2012. We have four courts that cluster—Dunfermline, Ayr, Livingston and Falkirk—and although other courts operate a fast-track system there are large areas of the country that are not served by any kind of specialist court in domestic abuse cases. That is the case in Aberdeen and Dundee, and I know that members from across the Highlands and the Borders have raised the issue with the cabinet secretary in the chamber. In those areas a postcode lottery is operating in terms of victims' access to justice. Cases of that type need the appropriate expertise and sensitivity to deal with them, and there is evidence to show that specialist courts can deliver that.

Secondly, there are concerns about consistency in decision making and about confidence in decisions that are made. Members might be aware of a couple of recent cases involving multiple convictions for individuals for crimes committed against different partners that resulted in community sentences being given.

I have been contacted by the victims in those cases, who were very distressed by the sentences. Those sentences were not given out in domestic abuse court cases. I do not claim that the sheriffs' decisions would have been different if those victims' cases had been heard in a specialist domestic abuse court, but I think that the victims would have had more confidence in how the decisions were made.

In addition, there was a case last year in which the sheriff decided to send the alleged victim, who was a mother, to jail for two weeks under contempt of court because, according to the sheriff, she did not fully participate in the court proceedings. I felt at the time that if that case had been heard in a specialist domestic abuse court, that situation would not have happened. There is therefore an issue about consistency in decision making and the confidence of victims.

Thirdly, I am very supportive of the bill's introduction of the new offence and its inclusion of coercive and controlling behaviour and psychological abuse. I am aware that the stage 1 report indicated that a minority of the evidence that was given to the committee was from experts who

expressed concerns about possible challenges to the legislation in the courts and the discussion that there will be around the introduction of the offence of coercive behaviour. I would rather see the bill's provisions tested in a specialist court than in an ordinary court, because the specialist court would have better understanding of and expertise on what the Parliament seeks to achieve through the bill.

Amendments 37, 27 and 28 seek to ensure that the bill is given full effect. Currently, it is the sheriff principal who can decide whether to create a specialist court, but amendment 27 would give Scottish ministers the power to designate domestic abuse courts. I recognise and respect the independence of the judiciary in this area, but there is frustration at the lack of progress on establishing specialist courts. Amendment 37 would give the Government the power to use regulations to advance specialist courts. Amendment 28 seeks a review of the operation of the legislation, once the bill is passed, to compare how decisions are made in regular courts with how they are made in specialist courts.

Amendments 37, 27 and 28 therefore seek to push progress on specialist courts, recognise their advantages, ensure the best implementation of the new legislation and provide equal access to specialist courts for women and all victims across Scotland.

I move amendment 37.

John Finnie: I fully support Claire Baker's amendments. She is right that Rhoda Grant and I have consistently raised concerns about the issues that her amendments address. The only word in amendments 37 and 27 that might throw people is "specialist". However, if judicial training covered domestic abuse more or if individuals in the judiciary frequently dealt with domestic abuse cases, some of the very insensitive disposals that have been referred to would not have been made. It is not about new buildings; it is about case management, clustering cases and collaborative working between the public sector and the third sector. It is important that we spread the service throughout Scotland and that there is no lesser quality of service for some victims of domestic abuse on the basis of geography.

Fulton MacGregor: I have a lot of sympathy for Claire Baker's input, but I cannot envisage a situation where Scottish ministers would be better placed to make a decision on specialist courts than the Lord President. In any case, I believe that all courts should be specialist domestic abuse courts and I think that what John Finnie just said backs up that view. To return to what I said in my intervention on the cabinet secretary, I hope that the bill will lead to a culture change so that every court is a specialist court.

George Adam (Paisley) (SNP): Following on from what Fulton MacGregor said, I take on board everything that Claire Baker and John Finnie raised with regard to the issue. I want to ask a question that I hope that both the cabinet secretary and Claire Baker, in her summing up, can answer. Under the Judiciary and Courts (Scotland) Act 2008, the Lord President is the head of the Scottish judiciary. Are we changing that? Are we jumping ahead and putting a provision in the bill that allows the legislation to make decisions, as opposed to having the courts make decisions as directed by the Lord President? Has Claire Baker spoken to the Lord President about her amendments?

Rona Mackay (Strathkelvin and Bearsden) (SNP): I totally agree with Claire Baker about the slow movement on the creation of domestic abuse courts across the country. That is a concern. I also agree with John Finnie about the need for more specialist training in this area. However, the amendments would compromise the independence of the judiciary, and it is not for ministers to have power over the courts and the Lord President in that way.

Mary Fee (West Scotland) (Lab): I fully support the amendments that have been lodged by Claire Baker. I cast my mind back to some of the quite disturbing and distressing evidence that we heard when considering the bill at stage 1. We heard from victims who had requested special measures and arrived in court to find that the special measures were not in place and that the support that they had been assured they would be given was not there. Quite often, appearing in court left the victims feeling further traumatised because they did not get the support that had been promised to them. An aim of the bill is to support people and prosecute domestic abuse correctly. Going down the road of specialist courts would send out a signal to victims of domestic abuse and to witnesses who are coming forward that everything that they want will be automatically provided for them when they arrive in court, and it will remove what can often be a barrier or an obstacle that they have in their minds about appearing in court.

Liam Kerr: The approach of a specialist court is definitely interesting and worth exploring. It certainly moves us towards a system that we would all like to get to. However, I am not convinced that the amendments, as drafted, work on a practical level, nor that such an approach would work practically in more rural areas. Neither am I convinced that they reflect the realities of the resources available at sheriff court level. My significant concern is that the amendments could end up inhibiting justice by creating too rigid or inflexible a structure.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I commend Claire Baker for lodging amendments on the important issue of specialist domestic abuse courts. I share the concerns of my colleagues George Adam, Fulton MacGregor and Rona Mackay about the independence of the judiciary. I would also like to add that, if Claire Baker's amendments fall today, perhaps we as a committee should make a commitment to write to the Lord President expressing the views that were given today and proposing the implementation of more domestic abuse courts, where reasonable and prudent within financial constraints.

Liam McArthur: I also thank Claire Baker for lodging the amendments and allowing the discussion to take place. The frustration that she expresses about the progress that has been made is shared by all of us. From a personal perspective, I am looking at this in relation to not just the Highlands but the Islands as well, and I am thinking how effect could be given to such a provision. In Orkney, we are in the fortunate position of having a procurator fiscal and a sheriff who understand domestic abuse. Others have highlighted the need for training in this area not to be a specialism but to be central to the training that is provided across the board.

Ultimately the issue is about timely local access to justice. I am concerned that it would not necessarily be straightforward to make what we would put in place work in the parts of the country that I represent. That is a concern, because it the issue is about providing the timely and appropriate support and access to justice that Mary Fee, in particular, stressed in her remarks.

11:30

Michael Matheson: Amendments 27 and 37 seek to provide the Scottish ministers with a power to require a sheriff principal to designate one or more courts in their sheriffdom as a specialist domestic abuse court. Amendment 27 is framed so that that order-making power can be used only when the Lord President has consented to the order being made. Despite that, I have concerns about the amendments, which I will explain.

The Judiciary and Courts (Scotland) Act 2008, which was passed unanimously by the Parliament, provides that it is the responsibility of the Lord President, as the head of the independent judiciary and sheriffs principal, to ensure the efficient disposal of business through Scotland's courts, including sheriff courts. In addition, the 2008 act provides that the First Minister, the Lord Advocate, the Scottish ministers and members of the Scottish Parliament must uphold the continued independence of the judiciary. I am clear that the amendments have implications for the statutory responsibilities of the independence of the judiciary and the Lord President being responsible for the management of the courts.

Alongside those important constitutional principles, there is a good practical reason why the 2008 act operates in that way: the independent judiciary know better than anyone how cases can and should be managed through the courts.

When the Lord President, in consultation with the relevant sheriff principal, considers that it is appropriate to establish a specialism in domestic abuse cases in a particular sheriffdom, they are able to do so. For example, as we have heard, a specialism in domestic abuse cases operates in Glasgow and such cases are heard together. That happens in Edinburgh, too. The Lord President can do that without a requirement for the involvement or approval of the Scottish ministers or the Scottish Parliament, which is in line with the principles of the 2008 act that I have outlined.

It is difficult to envisage a situation in which the Scottish ministers or the Scottish Parliament would be better placed than the Lord President and the sheriff principal to assess whether such a specialist sheriff was required in a particular area. Therefore, it is not clear that that power would ever be used by the Scottish ministers.

Notwithstanding those issues, I am clear that specialist domestic abuse courts are one way in which the justice system's response to domestic abuse has improved and can continue to improve in the future. When the volume of cases means that it is not practical to have a dedicated court, the Scottish Courts and Tribunals Service provides specific ring-fenced slots in the court programme to deal with domestic abuse cases. That approach is taken in places such as Falkirk, Dunfermline, Livingston and Ayr.

Delays in dealing with domestic abuse cases were an issue around four years ago, but that is no longer the case. In the past three years, the Scottish Government has provided additional funding of £2.4 million per year to the Scottish Courts and Tribunals Service and the Crown Office and Procurator Fiscal Service to support their work to reduce waiting times for domestic abuse cases in all courts around Scotland. As a consequence, cases involving domestic abuse around Scotland now have trial diets set within the optimum timescale of eight to 10 weeks.

There is a clear expectation that court staff and the judiciary in all courts are able to deal appropriately and sensitively with cases involving domestic abuse. The Scottish Courts and Tribunals Service recently engaged with Victim Support Scotland to design and run victim awareness training events for staff. The training was provided to all front-line staff in the sheriff courts and High Courts who come into contact

with victims and witnesses during their attendance at court, and 264 members of the courts and tribunals service received training over 30 sessions during 2015 and 2016. Judicial training is a responsibility of the Lord President and training on domestic abuse for members of the judiciary is provided by the Judicial Institute for Scotland.

In addition to training, provisions in the Victims and Witnesses (Scotland) Act 2014 ensure that automatic access to special measures such as screens and videolinks are available in all courts for vulnerable witnesses, including victims of domestic abuse.

I have concerns that involving the Scottish ministers in arrangements for the operation of the courts could set a precedent for all specialist courts, and that is not the intention of the Judiciary and Courts Act 2008.

John Finnie: Cabinet secretary, you will recall that, following the closure of certain sheriff courts, remote facilities were put in place. It was intended that one of the major beneficiaries of that provision would be victims of domestic violence, but that has not been the experience in the Highlands. What assessment has been made of that? You commented on judicial training, but you will know of examples such as the appeal court judgment last year—the appeal was upheld—which made it quite apparent that there was a dearth of training or understanding of the issue.

Michael Matheson: I cannot comment on a particular disposal that was made by a court, including the appeal court, for obvious reasons.

A training package on domestic abuse cases is provided by the Judicial Institute of Scotland and is available to all sentencers, as is a whole suite of training on a range of other offences, such as sexual and violent offences, and family law matters.

I know that there have been issues in the Highlands, which have been discussed directly with Sheriff Principal Pyle. He has made it clear that the way in which they try to operate there is by clustering cases together. When there are a number of cases relating to domestic abuse that they can bring together to be considered at the court in Inverness, they try to do that. The challenge is that, given the number of cases that they deal with, they would have difficulty in sustaining a specialist court. That is part of the challenge in meeting the needs of remote and rural areas, which was highlighted in Liam McArthur's comments on island communities and how specialist courts could be sustained and maintained.

I understand that amendment 28 would require the Scottish ministers to publish a report on the operation of the new domestic abuse offence and of offences that are aggravated under section 1(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. The report would be required to be published at the end of the two-year period after the proposed legislation had received royal assent.

I agree that it is important that we monitor and evaluate the effect of changes that we make to legislation to ensure that those changes have the effect that we intended. That is true whether the legislation in question creates a new criminal offence or criminal offence aggravation or makes changes to criminal procedure or to the powers of police or prosecutors. However, much of the information that amendment 28 requires to be included in the report will be routinely published by the Scottish Government.

When a new offence or aggravation is created, existing publications, such as those concerning recorded crime and criminal proceedings, will collect information on the new offence or aggravation. That is already happening with the new intimate images offence and the domestic abuse aggravation in the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, which came into force earlier this year, and it will happen for the proposed legislation, too. That means that figures for the number of cases that are brought under, and the number of people who are convicted of offences under, section 1 of the bill will be included in annual statistics on criminal proceedings, as will the figures for cases in which there is an aggravation relating to partner abuse under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

Information about the length of time that it takes the courts to dispose of particular categories of cases is not routinely published. However, work is on-going to consider what additional data it might be useful to collect when the domestic abuse offence comes into force. It is important not to rush to lay in statute the specific details of what data must be recorded and published; it is better to consider that in the round in consultation with key interests. I would be happy to meet Claire Baker and others to discuss what might be possible ahead of stage 3, if that would be helpful.

Amendment 28 in its current form is not necessary. Such a reporting requirement would set us down the path of creating separate reports for different offences whenever a new offence is created, and that would risk increasing the burden on colleagues who collect criminal justice data while providing information that is already available in existing publications.

I know that the committee is keen to undertake post-legislative scrutiny of legislation that it has considered, and I expect and hope that the committee will revisit this important piece of

legislation in the years to come should it be passed by the Parliament. Adding more bureaucracy, as the amendment would do, is unnecessary to enable Parliament and committees to undertake the essential part of their role in holding the Government and those who operate legislation to account.

Amendment 28 also raises similar issues to those that amendment 27 raises in that it requires the Scottish ministers to involve themselves directly in matters such as the programming of our courts, which are appropriately the responsibility of the Lord President and sheriffs principal. Although I understand why members might be interested in the issues surrounding the use of domestic abuse courts and the clustering of cases in non-domestic abuse courts, given the impact that that has on the independent role of the Lord President, his office should be fully consulted on the matter before any changes are agreed. For those reasons, I am happy to discuss the matter further before stage 3 in order to allow more detailed consideration of the issue and to ensure that the Lord President's office has been given an opportunity to engage in the discussion and to consider the issues.

I invite the member to withdraw amendment 37 and not to move amendments 27 and 28.

Claire Baker: I thank all members, including the cabinet secretary, for their comments. The discussion about how we can make progress has been interesting, and I will try to cover some of the points that have been raised.

I agree that the cultural change has been slow. Members have made good points about judicial training and the gaps in training that have been identified. It is not possible to address that issue in the proposed legislation, which is why I have looked at domestic abuse courts.

I recognise the cabinet secretary's reservations about amendment 27 but, as he pointed out, the amendment specifies that an order could be made only with the consent of the Lord President. Although I also recognise and welcome the fast-tracking that happens in certain cases, it is not unreasonable to expect a specialist sheriff to operate in all areas around Scotland. That is necessary, and I am disappointed that we have not reached that point, given that we had a pilot in 2004 that was positively received. I understand the points that the cabinet secretary makes, but I intend to press amendment 27.

I also hope that ministers will reflect on the need for the post-legislative scrutiny of a review. Although the cabinet secretary outlined his reservations about the amendment being too specific and said that the information is already published, it can sometimes be difficult to find that information. A report that gathers together relevant cases would be better.

The Convener: We have not yet reached amendment 27; it is amendment 37 that you are speaking to.

Claire Baker: I have indicated what I intend to do when I am called to move amendment 27. I just wanted to let members know at this stage that I am keen to press that amendment.

Amendment 37, by agreement, withdrawn.

Section 12 agreed.

The Convener: That concludes our consideration of amendments at stage 2 thus far. The committee will consider the remaining stage 2 amendments on 5 December. I thank the cabinet secretary and his officials for attending.

11:43

Meeting suspended.

11:51

On resuming—

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill: Stage 1

The Convener: Agenda item 5 is our sixth and final evidence-taking session on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. I refer members to paper 3, which is a note by the clerk, and paper 4, which is a private paper.

I welcome to the meeting Annabelle Ewing, Minister for Community Safety and Legal Affairs, and the following Scottish Government officials: Hamish Goodall, civil law and legal system division; and Greig Walker, solicitor, directorate for legal services. I believe that the minister wishes to make an opening statement.

The Minister for Community Safety and Legal Affairs (Annabelle Ewing): Good morning, convener and committee members. I am grateful for the opportunity to make some opening remarks. Before doing so, though, I felt it appropriate on this occasion to remind members of my entry in the register of members' interests. It shows that I am a member of the Law Society of Scotland in that I hold a current practising certificate, although I am not currently practising.

We know from Sheriff Principal Taylor's review of the expenses and funding of civil litigation in Scotland that the potential costs involved in civil court action can deter many people from pursuing legal action even if they have a meritorious claim. There is therefore a need for more certainty as to the cost of exercising their rights. Three major reforms proposed in the bill will make the cost of civil litigation in Scotland more predictable and therefore increase access to justice: sliding caps on success fees; allowing solicitors to offer damages-based agreements; and qualified one-way costs shifting.

The first major reform, the introduction of sliding caps on success fees, has generally been welcomed, and I am minded initially to set the levels at those suggested by Sheriff Principal Taylor in his report. The second major reform will allow solicitors to offer damages-based agreements directly rather than through claims management companies. Damages-based agreements are very popular as they are simple to understand; basically, the client pays nothing up front. Instead, they pay a percentage of the damages awarded or agreed to the provider of the legal services, with the solicitor responsible for all outlays in personal injury actions. As Sheriff Principal Taylor stated in his evidence, one solicitor-owned claims management company has entered into 17,600 new damages-based agreements in the past three years and 23,800 in the past five. That might go some way to explaining the rise in the number of claims in Scotland over the past five years, which others giving evidence have flagged up.

On the subject of claims management companies, I appreciate that concern has been expressed that the bill makes no provision for their regulation. I am therefore pleased to be able to tell the committee that appropriate amendments to the Financial Guidance and Claims Bill have been tabled at Westminster and are expected to be voted on later today at the bill's third reading in the House of Lords. Claims management companies will therefore be regulated in Scotland more quickly than was first anticipated.

The third major reform is the introduction of qualified one-way costs shifting for personal injury cases, which will level the playing field as the vast majority of defenders are well resourced and the majority of pursuers are of limited means. Although very few claimants are pursued for expenses by successful defenders, there is always a risk that a pursuer might be liable for considerable expenses and possibly bankruptcy if they lose. Sheriff Principal Taylor confirmed that that is a real fear that stops too many meritorious claims from getting off the ground.

Qualified one-way costs shifting removes the risk as long as the pursuer and his or her legal team have conducted the case appropriately. The test of when the benefit of qualified one-way costs shifting can be lost has been the subject of varying views, as can be seen in the evidence that has been given. Defender groups have suggested that the bar is too high and pursuer groups have contended that the bar is too low. Both groups have expressed concerns that the provisions as drafted in section 8(4) will lead to satellite legislation. We will therefore consider amendments at stage 2 to make it clear that it is the tests envisaged by Sheriff Principal Taylor that are to be applied.

The bill also makes provision for third-party funding. Sheriff Principal Taylor recommended that all third-party funding be disclosed; however, only venture capitalists who have only a commercial interest in the case will be liable for awards of expenses. There have been concerns that awards will be made against trade unions and legal service providers. Trade unions do not have a financial interest in the proceedings, so they will not be subject to awards for expenses under the bill as drafted. We are considering whether an amendment is necessary to make it clear that providers of success fee agreements will not be subject to the provision.

Finally, I want to briefly mention the issue of group proceedings. As the committee will have seen, the proposal to introduce class actions to the Scottish courts has found broad support. I am convinced that the way forward is to introduce an opt-in system given that when introducing a new procedure in the Scottish courts it is prudent to select the option that will be easier and quicker to implement. However, that does not rule out introducing the opt-out procedure at a later date, and we will keep the issue under review.

That concludes my opening remarks. I look forward to the committee's questions.

The Convener: Thank you, minister. We will move straight to questions, starting with John Finnie.

John Finnie: Good morning, minister, and thank you for your opening statement. We are told that the bill's objective is to increase access to justice, but a number of witnesses have suggested to us that such access is not a problem. Why is the bill necessary, and how will it improve access to justice?

Annabelle Ewing: It is important to go back to the bill's first principles and reiterate what happens when someone tries to bring a personal injury action. The pursuer will want to know first of all what their solicitor will charge them, but it is also important for the pursuer to know their potential liability for the defender's expenses if they lose. Such a situation introduces considerable unpredictability with regard to the bill for the pursuer in trying to assert what they view as their legal rights. The bill is designed to deal with each of those areas of unpredictability in turn and to increase the funding options available to a pursuer seeking to take a claim through the courts.

In terms of greater predictability and certainty as to what a pursuer's solicitor could charge the pursuer, we have taken Sheriff Principal Taylor's approach and proposed a sliding cap on the percentage that can be taken by way of a success fee from any award received. That will be done on the basis set out by Sheriff Principal Taylor in his report, which is a maximum cap of 20 per cent for the first £100,000, although the solicitor would not be required to charge the maximum; a proposed cap of 10 per cent for the next £400,000; and a proposed cap of 2.5 per cent for sums above £500,000. That gives clarity to the matter.

With regard to outlays in personal injury actions, we propose in the bill that they be met by the pursuer's solicitor, which also provides clarity. As for the issue of liability for a defender's expenses and what has been called the David versus Goliath asymmetric relationship between the pursuer and the defender in personal injury actions, our proposal, which again takes up Sheriff Principal Taylor's recommendation, is for what is called qualified one-way costs shifting in personal injury actions. I know that the committee is now expert on that term of art, so I do not need to belabour the point.

12:00

That is what we propose for personal injury actions, with the important word here being "qualified". It is not an absolute but, assuming that the pursuer and their legal team have acted appropriately, the benefit of qualified one-way costs shifting should not be lost. It therefore gives predictability and certainty, and it removes the fear that by seeking to raise a court action the individual could be sequestrated if found liable for the defender's expenses.

As for the desire to create some equity in funding between the pursuer and the defender, the vast majority of cases are, as I have mentioned, seen as a David and Goliath battle involving a defender, who is either an insurance company or backed by an insurance company, and we expect the key principles underpinning the legislation to reflect that fact.

Another issue that I should mention is that the solicitor profession will be allowed to enter into damages-based agreements for the first time. All in all, we feel that the proposals allow potential pursuers to consider carefully whether they wish to pursue their rights in the courts by way of a civil claim instead of not pursuing a case simply because of worries about the cost and potential sequestration.

John Finnie: Thank you for that detailed answer. I think that there will be specific questions from my now fellow experts on the subject, but I want to stick with the generalities. We have had a lot of anecdotal evidence about the much-used phrase "access to justice", but there seems to be a dearth of up-to-date research on that. Will you commit to doing such research?

Annabelle Ewing: I have read the committee evidence carefully. The issue of statistics has come out in evidence; the number of claims recorded has certainly risen, but the number of cases being litigated has actually remained more or less the same since 2009-10. It is important to bear in mind that the civil justice statistics show a slight drop in the number of personal injury cases raised in 2015-16 compared with the figure in 2009-10. The number of personal injury cases before the court has remained more or less constant, although there has been an increase in claims, because many claims do not go anywhere or are settled long before they get to the courts.

On that basis, I am not necessarily convinced that the world is very different now from how it was

when Sheriff Principal Taylor was conducting his two-and-a-half-year review; his review was long and thorough and he had an impressive reference group who assisted him in his work. We also proceeded with a consultation on the bill, as we are required to do, in the first half of 2015; that was more recent, and at the time, more responses favoured proceeding with our key proposals than opposed them. We therefore feel that we have as reasonable a picture as we can get. At the end of the day, raising a civil action is a permissive choice on the part of the pursuer, and it is not something that we can anticipate in any great numbers.

When discussing in evidence whether there should be a delay to wait for the regulation of claims management companies through some vehicle—which is an issue that we will probably get on to—a representative of the Law Society of Scotland said that she would rather get on with the bill. I think that there is a feeling among key stakeholders that we just want to make some progress.

The Convener: I would be grateful, minister, if you could answer specific questions quite briefly, as we will get into more detail in later questions.

John Finnie: Finally—and I shall make this brief—trade union respondents highlighted the fact that court fees would remain a barrier for members pursuing personal injury claims. They proposed a QOCS-like solution, in which court fees would be paid only at the end of a case that the defender lost. Will the Scottish Government commit to investigating that?

Annabelle Ewing: You might be aware of the on-going consultation on court fees, which started in October and is due to close on 12 January. Those who wish to look at that issue have the opportunity to do so.

If court fees are not on a pay-as-you-go basis, somebody else—the Scottish Courts and Tribunals Service and the Scottish taxpayer—will have to pay them. That is something to bear in mind. Sheriff Principal Taylor's report quoted Lord Justice Jackson in England in making the point that 100 per cent cost recovery was never an accepted principle in the law of costs. It was felt that some discipline should be instituted in the system as a deterrent against frivolous claims and to keep costs to a minimum. As I have said, a consultation on court fees is on-going, and I imagine that some of those points will be raised in that context.

Rona Mackay: In your opening statement, you said that you were minded to approve the caps on success fees recommended by Sheriff Principal Taylor. Would that be done through secondary legislation?

Annabelle Ewing: We feel that that would be the better course than putting them in primary legislation, as it would give us the flexibility to keep them under review and to amend them in due course where appropriate. As I have indicated, we intend to proceed by way of secondary legislation, at the levels proposed by Sheriff Principal Taylor. Any such instrument would be affirmative, so there would be consultation on it.

Rona Mackay: Moving on to damages-based agreements and solicitors' conflict of interest, I note that Sheriff Principal Taylor recommended that a solicitor be required to write to a client, outlining all the funding options and giving reasons for their particular recommendation. However, it is unclear how those matters will be taken forward. What additional steps is the Scottish Government taking to address the issue of conflict of interest in damages-based agreements? Would that happen through secondary legislation or with the Law Society of Scotland?

Annabelle Ewing: Damages-based agreements would be a matter for the Law Society, which would need to look at the practice rules that are applicable to members of the solicitor profession. I understand that, according to Professor Alan Paterson, the Law Society has set up a working group to look at the issue.

I know that your question was about damages-based agreements, but it is worth pointing out that with speculative fee agreements, which have been in place for 25 years now, it has been accepted that a theoretical conflict is possible and that that has not precluded the operation of such agreements in practice. I think, therefore, that it will be fairly straightforward to come up with practice rules that secure the objective that is being sought.

Rona Mackay: At a general level, what influence does the Scottish Government have over the Law Society in this area? Can you direct or influence it?

Annabelle Ewing: As the Law Society is a representative body, it would not be appropriate for me as minister to direct it on practice rules, but I regularly meet its representatives—its chief executive and president—for wide-ranging discussions. I am always happy to raise issues, but I do not think that it is for the Scottish Government to direct the Law Society on particular practice rules that it might be considering.

Fulton MacGregor: I want to ask about compensation for future loss, which we know can be important in meeting pursuers' future care needs. Does the bill strike the right balance in allowing part of the award to be taken as a success fee?

Annabelle Ewing: I read that part of the Taylor review and the bill very carefully, and it is important to recall why Sheriff Principal Taylor felt that that would be a sensible way forward. It was considered that there was the potential to incentivise delay—in other words, people might seek to delay settling or bringing the case to a conclusion as more loss would be attributable to the past than to the future. It was felt that the proposed approach would make civil litigation more predictable, simplify the process and ensure greater access to justice. It was also felt that a lot of time could be spent trying to attribute past and future loss in the many cases, particularly those with settlements, that would not reach the £2 million mark to which Sheriff Principal Taylor referred, where the issue is very clearly about future loss.

It is important to point out that safeguards in this respect have been written into the bill. You talked about striking a balance, and such a balance has been recognised as necessary here. In the event that the future loss element of damages in a case exceeded £1 million, the safeguard would be that the court's approval would be required to treat that as a lump sum from which the success fee could be taken. Alternatively, with settlements, the safeguard could be to require an independent actuary to conclude that the payment should be made by way of a lump sum.

Lord Justice Jackson, who took an equivalent look at the costs and funding of litigation in England and Wales, concluded that the future loss element should be ring fenced. I understand from his evidence to the committee and his report that Sheriff Principal Taylor thinks that Lord Justice Jackson might have got cold feet after making that decision and felt that he might have responded to particular lobbying. I think that we have struck the right balance between two imperatives, and that is how we have drafted the bill.

Fulton MacGregor: Do you see any merit in the solution suggested by the Faculty for Advocates of a taper in the amount that can be taken as a success fee?

Annabelle Ewing: We have a quite straightforward taper. In claims of more than £500,000 up to £1 million, which will—quite rightly—not require court approval or independent actuarial approval, the rate will be 2.5 per cent. That is quite a good safeguard, and our approach is more straightforward than that suggested by the Faculty of Advocates.

Mairi Gougeon: My questions are on qualified one-way costs shifting. Your response on that to John Finnie's earlier question was interesting because we heard in evidence about one of my fears. We hear about the David and Goliath scenario, but in personal injury cases the pursuer may not always be up against a larger body. Evidence from the Faculty of Advocates suggests limiting QOCS to cases in which the defender is insured or is a public body. How do you respond to that? Have you taken cognisance of it?

Annabelle Ewing: I noted with interest that debate and what Sheriff Principal Taylor said in his evidence at the end of October. He made the important point that if there is a straw man—a defender who is not the insurance company or is not backed by an insurance company—what is the point of raising the action? No money will be recovered. That is a factor to bear in mind.

The fundamental objective of introducing qualified one-way costs shifting is to introduce predictability to the cost equation for a person who is considering taking an action and enforcing their rights. The predictability element for a person who has a no-win, no-fee and damages-based agreement is that if they lose, they do not pay anything. If they win, the arrangements are—as we know from the provisions of the bill—that the pursuer would meet the outlays. For the predictability objective of the bill, it is important that we maintain that position.

It was suggested by Sheriff Principal Taylor that, if we were to seek to make any qualification, that may not preclude circumvention by the defender, such as a defender who should get insurance but who has chosen not to, or who seeks a much bigger excess than in the normal commercial approach.

It is important to remember the evidence that was cited in Sheriff Principal Taylor's report, which referred to work that had been done for Lord Justice Jackson's report: of the sample of tens of thousands of cases, only 0.1 per cent involved cases in which the defender had recovered expenses. It is important to bear that in mind.

12:15

Finally, there is qualified one-way cost shifting in England and Wales, which was introduced in legislation in 2012. The UK Government tabled post-legislative scrutiny of that legislation at the end of October, during which no significant concerns were raised about QOCS. Taking all those factors into account, we have struck the right balance in the bill.

Mairi Gougeon: I thank you for highlighting the post-legislative scrutiny in England and Wales because I was not aware of that.

We also heard from witnesses about their concern that the tests for losing the QOCS protection lacked clarity and may lead to further litigation. What are the minister's thoughts on that? There was a particular concern that the tests do

not implement the Taylor recommendation on Wednesbury unreasonableness.

Annabelle Ewing: We have listened to the evidence that was presented in the recent submissions, and we intend to reflect further on the matter for stage 2. We want the bill to be as clear as possible, and we accept that clarity could be improved. Regarding the general thrust of amendments, which have still to be framed, our commitment was to introduce the test as it was envisaged by Sheriff Principal Taylor, which would have regard to the Wednesbury case. Suggestions have been made in evidence to the committee about phraseology; I am not in a position to say exactly what it will be. We are definitely seeking to implement what Sheriff Principal Taylor had in mind, in that regard.

Mairi Gougeon: That was helpful. Thank you.

Sheriff Principal Taylor recommended that QOCS protection should be lost in an additional scenario—when a case is summarily dismissed. He sees that as a protection against spurious claims. Is that something that you have taken into consideration and will you look at that?

Annabelle Ewing: Yes, we will look at that. Sheriff Principal Taylor made a fair point and we will reflect on how best the suggestion can be implemented.

Liam Kerr: I would like to carry on along the same lines as Mairi Gougeon. The bill does not deal with tenders. When he appeared before the committee, Sheriff Principal Taylor suggested that the bill should make it clear that failure to beat a tender would mean an exemption from QOCS. Does the minister accept that recommendation? If so, will she lodge amendments to deal with it?

Annabelle Ewing: Tenders are normally dealt with as a matter of court rules. I understand that the costs and funding committee of the Scottish Civil Justice Council has been reflecting on the matter and will have a meeting on 4 December. We will get a better idea of what its thinking is on potential court rules to deal with tenders in relation to QOCS after that meeting.

Liam Kerr: Can I take that as meaning that there will potentially be an amendment?

Annabelle Ewing: It is clear there is a desire for a clearer picture of what would happen when a tender is not beaten and the impact vis-à-vis QOCS. Thus far, the issue of tenders has been dealt with by way of court rules; the relevant court rules body is examining the matter, and we will be interested to see what it proposes further to the work that it is doing.

Liam Kerr: Defender representatives who appeared before the committee suggested that QOCS would encourage a compensation culture. They highlighted additional steps that could be taken to protect against that, including fixed costs and pre-action protocols. The situation is different in England and Wales, according to the review to which the minister alluded. Can she outline whether the Scottish Government will take action? Did she consider such steps in drafting the bill? If so, why were they not included?

Annabelle Ewing: Sheriff Principal Taylor's report refers to fixed costs and recommends that they be introduced for the new simple procedure—the amalgamation of summary cause procedure and small claims procedure. He also feels that that should be given time to bed down to see whether it will work in practice.

There is a mandatory pre-action protocol in place for claims up to £25,000 in the sheriff court. Pre-action protocols are a matter for court rules—the Scottish Civil Justice Council is the body that is designated to deal with such matters under the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. It is open to the council and its subcommittees to consider extending the mandatory pre-action protocol to different levels of claim threshold.

On compensation culture, it is fair to say that not all witnesses suggested that there is such a culture in England and Wales, and they do not feel that the bill will lead to such a culture. It is important to reflect that part of the evidence, too.

Liam Kerr: I will remain on the subject of compensation culture. Witnesses from several NHS boards suggested that there could be an increase in claims—which is, in some ways, the point of the legislation. Some boards have suggested that they do not have insurance to cover such claims and some have suggested that the increase in costs for clinical negligence claims would be very difficult to cover. Ultimately, an increase in budgets as a result of an increase in claims could have an impact on healthcare delivery. Do you have anything to say to those NHS boards about what I suggest are their legitimate concerns?

Annabelle Ewing: I am not aware of any NHS boards that do not have insurance. That would be quite worrying. I will check that with my colleagues, but I had thought that all boards would have insurance in place.

There are many factors. The committee is aware of the damages bill that was referred to in the programme for government, which we intend to introduce early in 2018. One of the elements of that bill will be to address mandatory periodical payment orders—that is where there is a catastrophic case in which it is necessary to make an arrangement for future caring arrangements and loss. Periodical payment orders allow that to

happen, and the provision in the forthcoming bill will make that mandatory—in other words it will override the views of the parties to the case. At the moment, both parties need to consent to a PPO being granted.

Members will recall that the bill already provides for the fact that where there is a future-loss element and a PPO is recommended, the damages cannot be taken from that element of the future loss. That is an important safeguard.

To go back to some of the points to which I alluded in my opening remarks, if a client goes to see a lawyer and there is no prospect of recovering any money, the lawyer will not take on the case. A lawyer is also an officer of the court and is subject to various rules and regulations, including on not clogging up court time with vexatious cases. The mandatory pre-action protocol will also help in that regard. Finally, the benefit of cost shifting can be lost, although only in certain circumstances—it is not an absolute. We should bear all those factors in mind.

Liam Kerr: Perhaps my question was not sufficiently clear. I am saying that NHS witnesses have told us that there will be more clinical negligence claims, greater cost to the NHS and more pressure on budgets. Do you have a response to that?

Annabelle Ewing: Starting from first principles, if someone has a right to bring a claim, they have a right to bring a claim: it will be for the parties to settle in advance or for the courts to determine the rights and wrongs of the case. I am sure that Liam Kerr would not suggest that if there has been a wrong and a failure to act, there should be no remedy for the citizens of Scotland. If one has a right, one should be entitled to seek enforcement of that right through the courts and so have access to justice.

As I said, the periodical payment element in the proposed damages bill will have a role to play in that the success fee cannot be taken from the PPO. That will help matters.

Maurice Corry (West Scotland) (Con): Good morning, minister. In respect of regulation of claims management companies, will you make a commitment that there will be no gap between the bill's provisions coming into force and a regulatory regime for claims management companies being put in place?

Annabelle Ewing: I am not in a position to do that. As I said at the outset, we have tabled amendments to the UK Financial Guidance and Claims Bill that will be considered in the House of Lords today. If they are agreed to and the legislation is passed, an arrangement will be set up by way of secondary legislation. I am not in charge of UK Government secondary legislation and have no control over its timing, but I expect that, if there is a gap, it will not be unduly long. However, it is important to note that when it becomes clear that regulation is imminent, that will have a significant impact on the pretensions of claims management companies, in that regard.

The Convener: I think that the point, minister, is that you have control over secondary legislation here.

Annabelle Ewing: Absolutely—I have control over that. What I am saying is that there are two pieces of the picture: what happens with secondary legislation in London and what happens with it here. However, I also make the point that even if there were to be a short gap, there would nonetheless be a clear signal that regulation was coming down the line, which I think would be a big game changer.

Maurice Corry: Claims management companies have been recognised as a significant source of nuisance calls. We should bear it in mind that it has been determined that there is a significantly greater number of them in Scotland than in the rest of the UK. The Taylor review made recommendations including banning cold calling and having a requirement that only regulated bodies can receive referral fees. What steps are you taking to implement those recommendations?

Annabelle Ewing: I imagine that the Law Society of Scotland's working group would wish to look at referral fees. The regulated bodies that are claims management companies will be a matter for the regulatory system under the Financial Conduct Authority, assuming that the regulations in question are passed and the legislation as a whole is passed at Westminster.

On Scottish Government action, jurisdiction over cold calls and texts is still reserved to Westminster, but the Scottish Government has been active in the area: we have set up a nuisance calls commission and we have been considering a number of pragmatic measures that can perhaps help. I believe that the Scottish Government has also set aside some funding to assist with call-blocking units for vulnerable groups.

There has therefore been activity on the issue on the part of the Scottish Government, but referral fees are a matter for the Law Society and, I presume, the FCA.

Mary Fee: I want to explore third-party funding in more detail. I am grateful for the comments on that in the minister's opening remarks. You will know from our evidence sessions that trade unions in particular have expressed concern that they will be caught by the provisions on third-party funding. If I understood your previous remarks correctly, you intend to lodge amendments on the

matter. Can you give us more detail on how the amendments will be framed so that there is absolute clarity on who will be caught by the legislation on third-party funding?

Annabelle Ewing: I am afraid that I cannot give you chapter and verse on what the amendments will say, because they are still to be drafted, as far as I am aware. However, we will seek to lodge amendments on third-party funding at stage 2 to address the concerns that Mary Fee has referred to, because we accept that we need to provide more clarity in that regard.

As far as trade unions are concerned, the current language of the bill's provisions on third-party funders would not catch them. However, we will reflect on all the points that have been made about third-party funding in order that we are 100 per cent sure that our reading of the matter is correct. We feel that there is also an obvious lack of clarity in the bill in respect of legal services providers, so we will look at that, too. However, we understand the points that have been made: it is absolutely not the Government's intention to catch trade unions or legal service providers in the third-party funding provisions. We want to ensure that the provisions will apply only to venture capitalists and commercial third-party funders.

Mary Fee: There will be a clear definition of who you are meant to be catching and not catching. Will you also make it clear what the requirements on third-party funders are compared to those for general funders?

12:30

Annabelle Ewing: On your first point, as I say, the drafting is still to be done. I fully understand the concerns that exist, which will be reflected in the drafting.

On your second point, transparency was to be an obligation on all third-party funders, so that the court and the other side would know what was going on in relation to the funding, but there was a concern that the issue had been conflated a bit with the liability issue. We will look again at that matter and hope to make it absolutely clear that transparency is an erga omnes obligation, whereas the liability issue is for the commercial funders of the venture capitalists.

Maurice Corry: Why does the Scottish Government consider the employment of court auditors by the Scottish Courts and Tribunals Service to be a better guarantor of independence than the use of self-employed auditors?

Annabelle Ewing: Is it a better guarantor? It would at least provide the same guarantee of independence.

My reading is that the issues tend to be about accountability. For example, the freedom of information process is not available at the moment, so there are issues of transparency to consider as well as the need to ensure better consistency. A number of practitioners are concerned that the situation can be a bit of a lottery and say that clear guidance would be helpful.

On the status of the auditors, we advocate that there should be salaried positions in the Scottish Courts and Tribunals Service. Auditors should not make a private profit out of a public service, which is the position at the moment.

The provisions that we have introduced will ensure greater transparency and consistency in this very important part of the court process.

Maurice Corry: Can you offer us an assurance that the current sheriff court auditors will be able to work under their present regulations and arrangements until they choose to retire or until they reach a specific age?

Annabelle Ewing: I am not sure whether the member's point is to do with the security of tenure, because the auditor of the Court of Session has security of tenure and that has been explained in the documents that we have submitted. The auditor of the Court of Session will remain in tenure until he reaches 65—which I think will be in 2022—or earlier if he decides to go sooner. The position is not the same for the sheriff court auditors, but they would be perfectly able to apply to be a salaried auditor in the Scottish courts and tribunals system. That option would be open to them. We will not be able to get new auditors in place, trained up and operating overnight, so there will be a bit of breathing space. As I say, they will be entitled to apply to become salaried auditors.

Maurice Corry: There will be some overlap until the new system is in place.

Annabelle Ewing: Yes, there will be transitional provisions. We are dealing with existing situations, and we must reflect that in the work that we are doing here.

Ben Macpherson: As the minister did, I remind the committee that I am a registered Scottish solicitor.

Good morning, minister. I have a number of questions about part 4 of the bill, which is on group proceedings. We have heard a variety of evidence, including last week, on the matter. You mentioned that an opt-in system would be easier to implement and more efficient in the short to medium term. You also said that you would be open to looking at an opt-out system in the future. Will you explain why the Scottish Government has

chosen to reject the option of an opt-out procedure at this stage?

Annabelle Ewing: The debate on group proceedings has gone on for many decades. I had not appreciated that until I did all my homework—I think that the figure of 30 years was mentioned in that regard. We are keen to make progress, and it was considered that it would be more straightforward to start with an opt-in system.

It is a new procedure for the courts in Scotland, because we do not have group proceedings as such at the moment. We felt that the prudent and more pragmatic course of action would be to start with an opt-in system, which is more straightforward as there is a defined group of claimants—that is not the case with an opt-out system—so we will proceed on that basis. I think that it was Paul Burns of the Legal Services Agency who remarked that, although his preference would be an opt-out system, if it was going to take five years he would rather start with an opt-in system so that we could make some progress. The fact that it is more straightforward to start with an opt-in system is driving our pragmatic approach.

Scotland is a smaller jurisdiction than some of the others that, by way of comparison, have been mentioned in reference to the issue. Court rules will need to be drawn up, which is not an overnight process. However, it will be more straightforward, over a shorter period of time, to come up with a package of court rules that deal with opting in than it would be to try to come up with a package of rules for opting in and opting out. That would take much longer given how long it has taken for a final conclusion to be arrived at for various court rules. There will be a consultation on the court rules, so there will be an opportunity for people to comment.

That is our thinking behind putting in the opt-in procedure at this point. As the member said, we will keep the opt-out approach under review, but it is important to start somewhere and to make progress on that basis.

Ben Macpherson: That pragmatic management approach is important. What is striking in the evidence is that the opt-in procedure is more accessible for communities but there might be an administrative burden when it comes to consumer and environmental cases, so it is reassuring that the Government will keep an open mind on that. I agree that the opt-in procedure was welcomed last week. There was also a sense that an opt-out system would be preferable in the longer term.

Witnesses also highlighted that funding group proceedings could be a problem and that, historically, it has been a problem. Does the Scottish Government plan to develop any support mechanisms to tackle that, perhaps with a specific fund?

Annabelle Ewing: The funding arrangements would be legal aid or success fees; that is the general approach. There would be a requirement to amend the current legal aid rules, and the on-going legal aid review might have certain views on that.

Going back to the general view of opt-in and opt-out approaches, it seems to me, from reading the evidence, that every stakeholder supports an opt-in system. That includes the Law Society of Scotland, which changed its mind on the issue. The one stakeholder that has not supported opting in and prefers opting out is the Which? organisation. It is important that the weight of stakeholder agreement suggests that, for pragmatic reasons, stakeholders would accept proceeding with an opt-in system in the first instance, although that is not how they would wish to proceed in the long term.

Ben Macpherson: You mentioned that the detailed rules on group proceedings will be developed by the Scottish Civil Justice Council. Will the Scottish Government have any control over that process?

Annabelle Ewing: It will not have control as such, because there is separation from the courts. However, we will have input to that process. We have representation on the Scottish Civil Justice Council and its various sub-committees, and there is wider representation on the Scottish Civil Justice Council of consumers and various other stakeholders. We will have input into the process, but we will not control it, as it is not appropriate for us to control the courts because of the separation of powers.

Ben Macpherson: Nevertheless, in the interests of access to justice, it is important to provide some reassurance to us and to stakeholders. There have been calls to develop a group proceedings element in Scots law for over 35 years, but it is happening only now. Although we welcome that, if the Government will not have—rightly, due to separation of powers, as you say—direct control over the process, are you confident that the latest initiative will not be bogged down in detail or kicked into the long grass?

Annabelle Ewing: I do not believe that it will be kicked into the long grass. People want it to happen, and now is seen as the moment for us to really get a shiftie on—sorry, that is perhaps not appropriate language for the *Official Report.*

As we have done before, we will issue a policy note that will give a clear idea of the Government's general sense of direction and its thinking on the matter. I am happy to reflect on whether there

might need to be some other language to that effect in the bill to give a clearer steer. The matter will definitely not be kicked into the long grass; we want it to happen and the stakeholders want it, too.

The Convener: Liam, do you have a declaration to make?

Liam Kerr: Yes. Forgive me, minister. Before I put my questions to you, I intended to declare an interest as a solicitor with a current practising certificate with the Law Society of England and Wales and with the Law Society of Scotland.

The Convener: There is one final question. The Delegated Powers and Law Reform Committee raised concerns about the unusually wide scope of section 7(4), which will enable amendments to be made to part 1 through secondary legislation. Can you provide specific examples to explain why the modification of part 1 under that delegated power is necessary and proportionate?

Annabelle Ewing: I know that officials are aware of those issues. I do not know whether Hamish Goodall would like to say something now or whether we could write to the committee on the matter. [*Interruption*.] I am getting advice that it is quite a technical issue, so perhaps we could write to the committee.

The Convener: The unusually wide scope of that section is certainly of concern.

Annabelle Ewing: We are happy to write to the committee, which we will do in short order.

The Convener: We will be happy to receive that advice.

As there are no further questions, that concludes our consideration of the bill. I thank the minister and her officials for attending.

Our next meeting will be on Tuesday 5 December, when we will take closing evidence from the minister on the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill and consider a draft report on stage 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. As we did not complete the stage 2 amendments on the Domestic Abuse (Scotland) Bill, we will complete those on 5 December, too.

Meeting closed at 12:42.

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