OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities and Human Rights Committee

Thursday 7 February 2019

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 7 February 2019

CONTENTS

	Col.
AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) BILL: STAGE 2	1

EQUALITIES AND HUMAN RIGHTS COMMITTEE
4th Meeting 2019, Session 5

CONVENER

*Ruth Maguire (Cunninghame South) (SNP)

DEPUTY CONVENER

*Alex Cole-Hamilton (Edinburgh Western) (LD)

COMMITTEE MEMBERS

*Mary Fee (West Scotland) (Lab)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Oliver Mundell (Dumfriesshire) (Con)
*Gail Ross (Caithness, Sutherland and Ross) (SNP)
*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Daniel Johnson (Edinburgh Southern) (Lab)
Maree Todd (Minister for Children and Young People)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities and Human Rights Committee

Thursday 7 February 2019

[The Convener opened the meeting at 09:15]

Age of Criminal Responsibility (Scotland) Bill: Stage 2

The Convener (Ruth Maguire): Good morning, and welcome to the fourth meeting in 2019 of the Equalities and Human Rights Committee. I ask that all mobile devices be switched to silent.

Agenda item 1 is stage 2 consideration of the Age of Criminal Responsibility (Scotland) Bill. Last week, we completed consideration of parts 1 to 3 of the bill, and today we will look at the remainder. I welcome Maree Todd, the Minister for Children and Young People, and her officials.

Section 23—Power to take child under 12 to place of safety

Amendments 25 and 24 not moved.

The Convener: Amendment 122, in the name of the minister, is grouped with amendments 123 and 60 to 63.

The Minister for Children and Young People (Maree Todd): Members have rightly taken a keen interest in the police power, under section 23, to take a child under 12 to a place of safety. During stage 1, I made it absolutely clear that the place-of-safety provision is an emergency power that is restricted to a clearly articulated lawful purpose, which is to protect people from

"an immediate risk of significant harm or further such harm."

I emphasised that a police station would be used only as a last resort and for the shortest time necessary before somewhere else could be found. I also confirmed that I would not object to an amendment that included the full definition of the term "place of safety" as set out in the Children's Hearings (Scotland) Act 2011, to make it absolutely clear that the same range of safe places could be used for the bill's purposes.

The committee's stage 1 report accepted that, in rural areas such as the one that I represent, it might be difficult to avoid the use of police stations entirely, and it asked me to lodge amendments to prohibit the use of cells in the context of police safety provisions. I completely understand that request, and I have made clear my views on the matter, but it would be challenging to completely prohibit that option where there was no safe alternative locally. In such situations, it would not be acceptable for a child to be transported hundreds of miles away, as might be the case in my region, simply on the basis that there was no safe place to take them to because we had prevented the use of the one possible safe place that might have been available for such discrete and limited circumstances. I accept—and I expect—that such situations will be extremely rare and that the data that is recorded about the use of the power will bear that out.

For those reasons, it would be wrong to prohibit the use of cells entirely, but I wish to place very clear limits on that. My amendment 122 will therefore insert two new subsections into section 23 to make it clear that, when a police station is used as a place of safety, a child must not be kept in a police cell unless, and only for as long as, it is not reasonably practicable for the child to be kept elsewhere within the police station. Amendment 123 is technical and is a consequence of amendment 122. I hope that the committee supports those two amendments.

Alex Cole-Hamilton's amendment 60 is intended to ensure that, when a police station was used as a place of safety, the child could not be kept in a police cell. Amendment 61 would have the same effect in relation to a child under the age of 14 and was consequential on amendment 2 having been agreed to on day 1 of stage 2. Amendment 62 would have the same effect in relation to a child under the age of 16 and was consequential on amendment 1 having been agreed to on day 1 of stage 2.

I have made clear my view on an outright prohibition, but Mr Cole-Hamilton's amendment 60 is also problematic because of the definition that it uses. In short, most police cells are not legalised police cells. Legalised police cells are cells in police stations that are far from the nearest prison and that can be used to hold individuals for longer than is normal for a police cell. The amendment would not prohibit the use of police cells except in the four locations—in Hawick, Lerwick, Kirkwall and Stornoway—where their use is legalised and cells are still in operation. Therefore, I hope that Alex Cole-Hamilton will accept that his amendment would not quite achieve the effect that he is seeking and that he will consider not moving it. If he decides to move amendments 60 to 62, I respectfully ask that the committee not support them.

Previously, I had committed to lodging an amendment that would provide a full list of places of safety, and I accept that Alex Cole-Hamilton's amendment 63 does so. It also reorders the list so that a police station is named last and should be

used only if no other place of safety is available. Section 23(5) already sets out, in different words, the limited circumstances in which police stations may be used as a place of safety, and I might wish to reflect on the precise implications of duplication before stage 3. However, subject to that, Alex Cole-Hamilton will be pleased to know that I will be very happy to support amendment 63 if he moves it.

I move amendment 122.

Alex Cole-Hamilton (Edinburgh Western) (LD): I am glad that we are debating this group of amendments today. I think that everyone will agree that the group stems principally from hearing Lynzy Hanvidge's testimony about the impact of her experience of being arrested, charged and kept overnight in a cell when she was taken into care. As I said at last week's meeting, in the middle of one adverse childhood experience, the state handed her another. We do not seem to have a great deal of information about how often cells are used, but we know that they are used. It is troubling that the level of use is not codified or understood anywhere.

I understand the semantic point about the term "legalised police cell", and I lodged my amendments following the advice of clerks. I will still seek to move them and then lodge additional amendments at stage 3 to catch the rest of the cell estate. This is about throwing one's cap over the wall. If we hint that cells might be used in certain circumstances, they will be. There will always be times, even in remote and rural areas, when the cell estate in a police station will be out of use or not appropriate, given that other offenders might be in the cell estate. At that point, police officers will need to come up with an alternative and better place of safety. If they will be forced to come up with a better place of safety in those circumstances, let us seek that from the start. We do not have anything to lose by ruling out the use of police cells and by allowing our friends in the police force to think more creatively in advance of such situations and to strategise about what they would do in certain scenarios. For that reason, I am keen to move my amendments.

I am grateful to the minister for lodging amendment 122. Initially, I thought that there was merit to it, because I quite liked the idea of the bill stating that a cell was not acceptable and should not be used. My anxiety came from the proposed new subsection (5B), which sets the parameters of when a cell needs to be used. I do not think that any legislation states that there is an appropriate time to put children in cells; it has just occurred by happenstance. My anxiety is that setting out when cells can be used in primary legislation will act as a gravitational pull and suggest to officers that, in a crisis situation, they might wish to consider using a cell. For that reason, I oppose amendment 122.

I am grateful that the minister has indicated her support for my amendment 63. She has articulated exactly why I lodged it. At stage 1, the majority of the committee shared my anxiety that, by virtue of the fact that police stations were the only place of safety to which the legislation referred—albeit that they should be used as a place of last resort—police stations might end up as the default place of safety. I am glad that amendment 63 has support, because it is important that the bill includes the range of places of safety that should be sought out before a police station is even considered.

For those reasons, I will move my amendments.

Oliver Mundell (Dumfriesshire) (Con): I am struggling to support most of the amendments in the group for a variety of reasons. The first thing that I would say to Alex Cole-Hamilton is that the idea that there is a better place of safety than a police station in rural communities is not necessarily correct. If we look at their best interests and what their wishes might be in those circumstances, a lot of children would rather remain in their home community than go to a residential facility or hospital outwith it. Therefore, I do not think that the use of a police cell should be ruled out altogether, probably for the same reasons as the minister.

I was inclined to support amendment 122. However, when I look at the reference to the use of a police cell when

"it is not reasonably practicable for the child to be kept elsewhere"

I do not know that that is the right language to use. I would prefer a test that looked at the child's best interests rather than just what was practical. I am happy to hear from the minister in her summing up about whether there is a reason for that wording.

On balance, we will probably support amendment 63, but I would be concerned by any suggestion that the list in it sets out an order of preference to be worked through. Again, in such difficult circumstances, we should look at what would be best for the child rather than what is immediately available. I am not sure that it is correct to say that "a residential ... establishment" would be preferable for a child to a

"dwelling-house of a suitable person"

who would be willing to help out. Nevertheless, I am happy to support the amendment today and to revisit that point at stage 3.

Mary Fee (West Scotland) (Lab): I will speak briefly in support of Alex Cole-Hamilton's amendments. He was right in saying that the evidence from Lynzy Hanvidge was, without

doubt, some of the most compelling that we heard in relation to the bill. That evidence, if nothing else, should persuade us that a child should never be held in a police station.

When I looked at the minister's amendment 122, I was initially supportive of it. However, I am slightly conflicted because, although the first section of the amendment says that

"a child must not be kept in a cell within a police station",

the second section almost gives permission for a child to be kept in a police station. We need to be absolutely clear in the legislation that, if a police station is to be considered at all, that should happen only when every other option has been ruled out. For that reason, I cannot support amendment 122.

Oliver Mundell: I hear what Mary Fee is saying, but does she recognise that, in some circumstances—for example, when a child is in danger of self-harming or of harming others—it might be better for them to be in a police cell than for them to be physically restrained or, in a rural community, waiting in a police van while police officers phone round to find an alternative option?

Mary Fee: No. I am sorry, but I do not accept those points. We have to look at the psychological damage that can be done to what may be a very troubled young person by holding them in a police cell. I press very strongly the point that a police cell is no place to keep a troubled young person.

Alex Cole-Hamilton: Does Mary Fee agree that we need to have a much wider conversation about the provision of crisis facilities for young people? One in nine children in this country will run away at some point in their life, but we do not have a refuge for young runaways in Scotland any more. We need to start building capacity in facilities of that sort right across Scotland, which could answer some of those needs.

Mary Fee: Absolutely, and in agreeing with Alex Cole-Hamilton I conclude my remarks.

09:30

Fulton MacGregor (Coatbridge and Chryston) (SNP): Most of us on the committee do not need to be persuaded that a police cell is no place for a child to be held, as Mary Fee and Alex Cole-Hamilton have said. The minister's amendments and Alex Cole-Hamilton's amendment 63 would achieve what we have talked about in committee in relation to the place of safety that is referred to in the bill. There is possibly an inference that a police cell would be the first place to be used, whereas the amendments send a clear message that a police cell should be used only if no other options are available. In addition, putting that option further down the list would take away that anxiety.

However, the bill should not be too prescriptive for local communities. Police officers, social workers and others who work in local communities have a better handle on resources and how to avoid unacceptable situations such as the one that Oliver Mundell mentioned. It would not be acceptable if, when a cell was the only available place, a young person could be stuck in a van instead.

Amendments 122, 123 and 63 alleviate my concerns about the issue and I am happy to support them. I cannot support amendments 60 to 62.

Gail Ross (Caithness, Sutherland and Ross) (SNP): When we started to take evidence on police cells, I was minded to take out the reference to their use altogether. I did a little bit of my own research and spoke to some people. I come from an extremely remote and rural area of the country where residents need to travel 104 miles to Inverness for nearly everything. I think that we are doing people a disservice in saying that, just because the use of police cells is allowed under the bill, people would use that option as the default. We have to trust our local authorities, social workers and police to understand that, as amendment 122 says, a police cell would be used only as a last resort.

Mary Fee talked about the psychological damage that is done by putting children in a cell, and I agree. It is also extremely psychologically damaging to put children into the back of a van and take them 104 miles away from their family and the people whom they trust.

On balance, the minister's amendments address the concerns. I really do think—and this is what local authorities are saying—that all options need to be kept open and the authorities need to be trusted to make the decisions case by case. I therefore support the minister's amendments.

The Convener: I ask the minister to wind up and to press or withdraw her amendment.

Maree Todd: I felt that my amendments addressed the committee's stage 1 concerns in a pragmatic way and would put in place a strong presumption against the use of police cells. I felt that it would be helpful to make it clear that children should not be placed in a police cell unless that is the only way to keep them safe, which I would expect to be a very rare occurrence.

However, I have heard the committee's views and I am listening to them, as I have throughout the bill process. If the committee is telling me that it has misgivings about the amendments, as I believe it is, I seek the opportunity to explore the

issues further with members ahead of stage 3. If the committee agrees to that, we can discuss how we might resolve the concerns and arrive at an agreed approach to defining a place of safety for the purposes of the bill.

If I do not have the committee's support, I will seek to withdraw my amendment 122. I ask Alex Cole-Hamilton not to move his amendments either.

Amendment 122, by agreement, withdrawn.

Amendment 123 not moved.

Amendment 60 moved—[Alex Cole-Hamilton].

The Convener: The question is, that amendment 60 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Cole-Hamilton, Alex (Edinburgh Western) (LD)
Fee, Mary (West Scotland) (Lab)

Against

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Maguire, Ruth (Cunninghame South) (SNP)
Mundell, Oliver (Dumfriesshire) (Con)
Ross, Gail (Caithness, Sutherland and Ross) (SNP)
Wells, Annie (Glasgow) (Con)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 60 disagreed to.

Amendments 61 and 62 not moved.

Amendment 63 moved—[Alex Cole-Hamilton]—and agreed to.

Section 23, as amended, agreed to.

Section 24 agreed to.

After section 24

The Convener: I welcome Daniel Johnson to the meeting. Amendment 100 is in a group on its own.

Daniel Johnson (Edinburgh Southern) (Lab): Thank you, convener. I thank all members of the Equalities and Human Rights Committee for welcoming me here this morning. It is always enjoyable being a visitor at a committee of which I am not a member.

My amendment 100 very much relates to the discussions that we have just heard. As a non-member of the committee, I have been struck by the seriousness and sensitivity with which the committee has approached issues around places of safety. It is important that we consider very carefully what places we use as places of safety and their impact on children: we must show sensitivity with regard to such matters.

I approach much of what we deal with in Parliament—as I did with what I dealt with in my previous working life—according to the very simple principle that if we cannot measure it, we cannot manage it. For the reasons that Alex Cole-Hamilton set out very eloquently, we need to take great care in managing how places of safety are used and, in particular, what types of places are used as places of safety for children.

It is therefore hugely important that we can measure how frequently the various places that are designated as places of safety are used and what type of places are used. My amendment 100 seeks to do that by introducing a requirement for an annual report, including a breakdown of use of places of safety by type, so that we can understand how they are being used. That would also ensure that we would be taking our collective duty of care seriously and could respond to requirements as they arise through having that information in front of us.

Further to that, I draw members' attention to subparagraph (2)(c) in amendment 100 regarding use of police cells. We have just heard about the issues around such use. There is a balance to be struck, and no one would choose to put a child in a police cell if other places were available. Amendment 100 would do nothing to reduce the possibility of a police cell being used as a place of safety, but it would make it very clear when police cells had been used in that way so that we could understand how frequently they were used as an option, and thereby take steps to mitigate that, as appropriate.

I ask committee members to support amendment 100 because it is important that we have a full and clear picture of how places of safety are used. I believe that amendment 100 would make that possible.

I move amendment 100.

Alex Cole-Hamilton: I welcome Daniel Johnson to the meeting. I am grateful to him for lodging amendment 100. In the context of my amendments, which have just fallen, on prohibition of police cell use, amendment 100 would provide the bill with a vital string to its bow. I think that every member of the committee was struck during our stage 1 consideration by the paucity of information on provision of places of safety right now. There are anecdotal references to children being kept in police cells overnight—we heard that in the evidence from Lynzy Hanvidge—but there is no empirical data. If a police officer or anyone else who was involved in providing a place of safety for a young person at a time of crisis was mindful that they would have to record, report and account for that use, perhaps decision making would happen in a different way. Daniel Johnson's amendment 100 is welcome.

Our agreeing to amendment 100 would not be incongruous with our having just disagreed to the amendments on prohibiting cell use, because amendment 100 would not prohibit cell use; it would just require the annual report to "confirm" that police cells had not been used, which suggests by extension that there would be a need to explain why the approach had been taken if they were so used.

For those reasons, I support amendment 100.

Oliver Mundell: In general, I support amendment 100. As with other aspects of the bill, it is important that we have information on which to base decisions. I note the issue to do with the term "legalised police cell". The provision might therefore be a little odd, but there is no reason why it could not be tidied up at stage 3.

I am conscious that, in relation to other provisions on reporting, the minister has committed to coming back at stage 3. I do not know whether the proposed new section that amendment 100 would insert would be better considered alongside other reporting and reviewing mechanisms. I will be interested to hear the minister's arguments in that regard.

Mary Fee: I support amendment 100, in the name of Daniel Johnson. If anything, it would strengthen the bill. Committee members—in all committees, I am sure—frequently hear about lack of data and information. Amendment 100 would strengthen the bill by ensuring that we would be given the information that we need to put in place the correct support mechanisms and the correct places to keep children safe.

Gail Ross: I agree: we need to gather that information. However, I agree with Oliver Mundell's point about the term "legalised police cell", which the minister talked about in the context of the previous group of amendments, and about the commitment to come back at stage 3 with amendments on reporting. Will the minister talk about the implications of amendment 100 in that regard?

Maree Todd: The committee has noted its concern that there is no requirement to monitor use of the place of safety power in section 23. In paragraph 298 of its stage 1 report, the committee said:

"we ask the Scottish Government to amend the Bill to provide for data about the use of the power to be recorded in such a way as to allow"

appropriate

"analysis".

In my response to the report, I acknowledged that use of the power needs to be monitored and evaluated.

However, amendment 100 relates to the rejected amendments, in Alex Cole-Hamilton's name, on the place of safety power, so it would be unhelpful if it were agreed to. I hope that Daniel Johnson will not press it.

Nevertheless, Daniel Johnson is right to ask that we have the debate. It is important that we have appropriate data about use of the power. I have acknowledged the need to have in the bill provisions that allow for much wider monitoring and reviewing of and reporting on the operation of the measures, as Oliver Mundell said. I have undertaken to lodge a suitable amendment on that at stage 3.

Amendment 100 would also require, in each case, the reasons for the use of the place of safety power to be included in the proposed report. The report would be laid before Parliament and would be a public document. I have talked about the importance of not revealing information about individual cases: I have serious concerns that it might be possible for members of the public to link such details to an individual child. I think that we all agree that that would be unhelpful.

Therefore, although I understand the intention behind amendment 100, for the reasons that I have set out I cannot support it. I ask Daniel Johnson to seek to withdraw it. If he agrees to do so, I give a firm commitment that I will address the matter through an amendment at stage 3, and will work with him and the committee on that. If he insists on pressing amendment 100, I hope that the committee will not support it and that members will allow me to lodge an appropriate amendment at stage 3.

Daniel Johnson: I hear the concerns that have been expressed. First, on the technical point about use of the term "legalised police cell", I think that the provision could be tidied up at stage 3. As it stands, it would still have some use. However, it is a technical definition from the clerks; such cells exist. The point of amendment 100 is really to ensure that the definition captures the full range of police cells, as is—I think—intended, and as has been discussed.

09:45

With regard to the other issues, a broad range of data is collected that could—were it interpreted and implemented in such a way—potentially reveal individual details. We have ways of wrapping those details up in categories such that individual details are not revealed. I do not believe that it is beyond the wit of the Scottish Government to come up with such a data collection and reporting mechanism. Indeed, data protection laws are in place and amendment 100 would do nothing to overturn those.

For those reasons, I believe that amendment 100 is important in the absence of alternative proposals. If the Government comes forward with alternative proposals, it will be perfectly possible for my amendment to be overturned, and I would accept that, at that point. However, in the absence of alternative proposals, I will press my amendment.

The Convener: The question is, that amendment 100 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Cole-Hamilton, Alex (Edinburgh Western) (LD)
Fee, Mary (West Scotland) (Lab)

Against

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Maguire, Ruth (Cunninghame South) (SNP)
Ross, Gail (Caithness, Sutherland and Ross) (SNP)

Abstentions

Mundell, Oliver (Dumfriesshire) (Con)
Wells, Annie (Glasgow) (Con)

The Convener: The result of the division is: For 2, Against 3, Abstentions 2.

Amendment 100 disagreed to.

Section 25—Search of child under 12 without warrant under existing enactment

Amendments 27, 26, 29, 28, 31 and 30 not moved.

Section 25 agreed to.

Section 26—Application for order authorising search in relation to child under 12

Amendments 33 and 32 not moved.

Section 26 agreed to.

Sections 27 to 30 agreed to.

Section 31—Limitation on police questioning of certain children

The Convener: Amendment 124, in the name of Gail Ross, is grouped with amendments 125 and 127 to 129. I point out that if amendment 127 is agreed to, I cannot call amendments 35 and 34, which are in the group entitled "Further increase in the age of criminal responsibility (and of prosecution): age, and timescale for increase".

I call Gail Ross to move amendment 124 and speak to all the amendments in the group.

Gail Ross: In speaking to the amendments, I am conscious that police officers play an important role in keeping our children and young people safe across Scotland every day, including children who—often because of their own adverse childhood experiences—unfortunately become involved in harmful, and occasionally serious harmful, behaviour.

Police officers can be the first point of contact out of hours, when other professionals are not available. Their engagement with vulnerable children and young people is about initiating conversations and encouraging them to desist immediately from potentially harmful situations. In the longer term, it is about encouraging them to make different choices, helping to bring children into contact with other agencies and professionals, and helping to divert them to more positive choices.

I hope that we can all agree that it is important that that work and those conversations can continue with children below the age of criminal responsibility, in particular where there are concerns about potential involvement in a serious incident.

The changes my amendment 124 would make to section 31 are designed to ensure that police officers who work in our communities to keep children and everyone else safe can be confident that they can still have such conversations. However, it remains the case that where a child is believed to have been involved in serious harmful behaviour, as set out in amendment 124, an investigative interview can be conducted only with a child interview order where, for example, there has been a loss of life and—if the minister's amendments in the group are accepted—where a child and a parent have agreed to an investigative interview. That is what amendment 125 seeks to make clearer.

My amendments are therefore designed to make it absolutely clear that the police may ask a child under 12 questions in relation to a serious incident at any time prior to the constable reasonably suspecting that it was the child who carried out the harmful behaviour. That provides an appropriate and proportionate approach that will ensure that children are not unnecessarily caught up in a formal process—which, as we have heard, can be quite traumatising. It will allow the police to carry out their functions and will not place an undue burden on resources. I hope that the committee will support amendments 124, 125 and 127.

On the minister's amendments 128 and 129, my understanding is that both amendments seek to provide clarity and to ensure further safeguards for children. I hope that that is the case and welcome it, but I look forward to the minister explaining that further.

I move amendment 124.

Maree Todd: Amendment 128 is a technical amendment that is designed to remove an apparent contradiction between the definition of an investigative interview in section 31 and the terms of section 36(2). It clarifies that the police planning of an investigative interview should always involve "the relevant local authority" rather than be planned fully by the constable. I know that the committee will welcome that clarity on the policy intention.

Similarly, amendment 129 seeks to provide greater clarity on the provisions about conducting an investigative interview. The purpose of the amendment is to close a potential loophole that would allow the police to plan an interview and then ask a social worker to question a child who is below the age of criminal responsibility, thus avoiding restrictions on the police questioning of a child who is below the age of criminal responsibility, as per section 1. Given that the policy intention behind amendments 128 and 129 is to provide greater clarity, I hope that the committee will support them.

Gail Ross's amendments 124, 125 and 127 are also in the vein of seeking to provide more clarity. It is important that the bill is unambiguous and that its measures are implemented in a way that limits when children may be brought into contact with authorities, but which also provides clarity for police officers that they can continue to engage with children in order to help to keep them safe, and to initiate initial conversations to establish whether an incident of serious harm involving a child who is under the age of criminal responsibility has taken place.

In every aspect of the bill, we should be seeking to give agencies and professionals confidence about how to act when the age is raised and what we continue to expect of them in their engagement with children and young people, and, crucially, to do all that we can to limit the circumstances in which children will be expected to engage with the formal process of investigation. I hope that the committee will support Gail Ross's amendments.

Fulton MacGregor: Gail Ross's and the minister's amendments are good. A lot of good work is being done in our communities by police officers. I saw a good example the other day, when I drove by a large group of young people talking to a couple of community police officers. They all seemed to be having a really good chat and it was very jovial. We want our officers to be able to continue such work: the amendments in the group will allow those conversations to continue.

The Convener: I call Gail Ross to wind up and to press or seek to withdraw amendment 124.

Gail Ross: I think that everything has been covered. I will press amendment 124.

Amendment 124 agreed to.

Amendment 125 moved—[Gail Ross]—and agreed to.

The Convener: Amendment 126, in the name of the minister, is grouped with amendments 130 to 141, 143 to 146, 148 to 152, 154 to 160 and 164. I invite the minister to move amendment 126 and to speak to all the amendments in the group.

Maree Todd: I am sorry. I have become confused about the process. I had not appreciated that the last amendment was agreed to without a vote.

The Convener: I will suspend the meeting briefly so that we can organise ourselves.

Maree Todd: Thank you.

09:55

Meeting suspended.

09:56

On resuming—

The Convener: Amendment 126, in the name of the minister, is grouped with amendments 130 to 141, 143 to 146, 148 to 152, 154 to 160 and 164. I invite the minister to move amendment 126 and to speak to all the amendments in the group.

Maree Todd: The amendments in this group create additional measures that would allow investigative interview by agreement. I assure the committee that I have given careful consideration to the issue. My overarching aim is to ensure that we do all that we can to raise the age of criminal responsibility in principle and in practice and that, when we still need to investigate serious harmful behaviour, we do so in a way that puts the child's needs and interests at the centre of that process.

The bill currently provides for a detailed formal process to be adhered to so that the option of carrying out an investigation and interviewing a child who is suspected of being involved in serious harmful behaviour would still be available. The amendments set out how such an interview might take place if the child and at least one of the child's parents agree to it. That would be consistent with the advisory group's recommendation that:

"In the most serious circumstances, it is important to provide the child with the opportunity to provide their account of events and identify all relevant risks and needs. A power should be created to allow for the interview of children, with appropriate safeguards, including where the support of a parent or carer is not forthcoming. Those safeguards should be based on the principles of Children Protection Procedures and Joint Investigative Interviews."

There are very sound reasons for allowing interviews to proceed if the child and their parent agree to them. A child who is involved in harmful behaviour is likely to be traumatised by that, and a formal process involving court proceedings might increase that trauma. Research also tells us that when a child suffers any kind of distress, early intervention is helpful in promoting understanding and allowing the focus to turn to restorative action. Given that the events in such serious cases might well have already caused the child significant trauma, having such a route available could be highly beneficial to them.

In situations in which agreement is clearly established, the amendments in this group facilitate a less cumbersome approach that would enable the child to move readily to tell their story in an appropriately supportive setting without the need for a court process first. That would be helpful in understanding what had happened and in informing the next steps in addressing any harmful behaviour as soon as possible. It would also prevent the child and their family from experiencing the additional stress that is associated with a formal court order process. The safeguards that are provided in sections 36 to 42 in relation to the planning and conduct of interviews would still apply, regardless of which route is taken.

Amendment 130 clarifies the limited circumstances in which an investigative interview by agreement should be undertaken. Crucially, the child and a parent must agree to it. The amendment provides details on the withdrawal of agreement by the child or the parent.

Amendment 131 places an obligation on the police to provide a range of information to the child and parent following their agreement to an investigative interview, and to provide a copy of the written information to the advocacy worker as soon as is reasonably practical. This provision ensures that, where agreement is given, the child and the parent understand what the agreement does and have information about what they have agreed to.

10:00

Amendment 138 seeks to clarify that a child has the right not to answer questions, irrespective of whether the interview is conducted by agreement or under a child interview order. Amendments 143 and 144 provide further clarification that in the case of an interview by agreement the supporter in the interview must be the parent who gave their agreement. If the person conducting the interview does not consider them to be an appropriate person, the agreement will be withdrawn.

Amendment 158 tidies up the layout of provisions, while amendment 159 provides for the guidance to cover the obtaining and withdrawal of agreement in relation to investigative interviews. The other amendments in the group are consequential in various ways on the introduction of interviews by agreement.

Taken together, the amendments enable an additional approach to carrying out interviews to investigate serious harmful behaviour, with the key aim of benefiting children by providing for a process by agreement with important safeguards to protect and promote their interests and rights in such a process. I therefore urge the committee to support the amendments.

I move amendment 126.

Amendment 126 agreed to.

The Convener: Amendment 127, in the name of Gail Ross, was debated with amendment 124. I remind the committee that if amendment 127 is agreed to, I cannot call amendments 35 and 34.

Amendment 127 moved—[Gail Ross]—and agreed to.

Amendments 128 and 129 moved—[Maree Todd]—and agreed to.

Section 31, as amended, agreed to.

After section 31

Amendments 130 and 131 moved—[Maree Todd]—and agreed to

Sections 32 and 33 agreed to.

Section 34—Child interview order

Amendments 37 and 36 not moved.

Section 34 agreed to.

Section 35 agreed to.

Section 36—Notification of child interview order

Amendments 132 to 136 moved—[Maree Todd]—and agreed to.

Section 36, as amended, agreed to.

Section 37—Conduct of investigative interview

Amendment 137 moved—[Maree Todd]—and agreed to.

Section 37, as amended, agreed to.

Section 38—Right not to answer questions

Amendment 138 moved—[Maree Todd]—and agreed to.

The Convener: Amendment 64, in the name of Alex Cole-Hamilton, is in a group on its own.

Alex Cole-Hamilton: Extending the section on the right not to answer questions to provide a right to silence might seem like a semantic point, but I propose doing so through amendment 64 for several reasons. It is fair to say that the committee had a lot of discussion about the subject at stage 1. A number of stakeholders suggested that they would like the rights of children who are interviewed in a formal context to be equalised with those of adults. The amendment would do exactly that.

I will describe simply the difference between the right to silence and the right not to answer questions. Saying, "Tell me what happened," is giving an instruction rather than asking a question. Interpretation is important to all legislation, and that might not be interpreted as asking a question.

In speaking to the previous group of amendments, the minister said that such interviews happen at times of great trauma, when a child might well be in the midst of an adverse childhood experience. Much empirical evidence shows that retelling events in granular detail can retraumatise children and young people.

Amendment 64 would simplify things and put children's rights on an equal footing with adults' rights in similar situations by extending the right not to answer questions to cover the right to silence. I believe that the stakeholders who we interviewed at stage 1 support such a change, which would go towards making the bill all the more progressive.

I move amendment 64.

Maree Todd: I listened carefully to the concerns about the issue, which I was clear about at stage 1. Amendment 64, which would change the language, is unhelpful and unnecessary. The right not to answer questions under section 38 has the same meaning and effect as the right to silence. I make it absolutely clear that we are not watering down children's rights.

The intention behind section 38 is to remove the language of the criminal law. We are removing children from the criminal justice system, and the language that the police who come into contact with them should reflect that. We do not want to increase the anxiety and distress of the children, who have already experienced much trauma before finding themselves in such a situation. We want them to be engaged with as children, which is what sections 35, 36 and 42 and amendment 131 from the previous group will deliver by requiring information to be provided at different points in the interview process in a way that is appropriate to the child's age and maturity.

Amendment 64 has technical issues. It refers to section 34 of the Criminal Justice (Scotland) Act 2016, which applies only when a person has been arrested and is in police custody. Neither condition will be met for a child who is under the age of criminal responsibility.

I hope that that explains why section 38 is drafted in the way that it is and why the amendment is neither helpful nor necessary. Accordingly, I hope that Mr Cole-Hamilton will seek to withdraw his amendment.

Throughout the bill's development, we have sought not just to decriminalise children technically but to change entirely their experience of contact with the criminal justice system and to decriminalise them in practice, too. Introducing the language of the amendment, rather than using the plain-English, child-appropriate version that is in the bill, would be a retrograde step that would provoke behavioural responses in those involved that would in effect recriminalise children.

I appreciate that some committee members feel strongly about the issue. If Alex Cole-Hamilton insists on pressing the amendment and if the committee agrees to it, I will reluctantly accept that decision and I will consider whether a stage 3 amendment is required to make the provision technically sound. However, I am not comfortable with the amendment, which would insert language from the criminal law in a bill that is intended to decriminalise children who are under the age of criminal responsibility.

Oliver Mundell: Will the minister reflect on the fact that there is a big difference between removing criminal provisions that are punitive to children and removing matters of criminal procedure that have been long established in the Scottish legal system and might make children feel more able to exercise their rights? The wording might be clumsy but is there a distinction between those two things?

Maree Todd: I think that I have made my views clear, but I am comfortable with the committee making a decision on this. I, for one, think that we always need to look at these children through a lens of wellbeing and not through a criminal lens.

Daniel Johnson: The minister makes the point about language well, and she is right. However, there is a mischaracterisation about where this language is important. The right to silence is not purely a matter of criminal law; it is a fundamental point of human rights. What is important here is that we embed human rights right the way through law, as indeed the Scottish Government accepts. The right to silence is a right that is well understood throughout society and is not just a matter of criminal law. Therefore, using different language runs the risk of creating confusion about

the distinction between the right to silence in this situation and in others. Will the minister reflect on that point?

Maree Todd: As I have said, I disagree with the amendment but I am content for the committee to make its own decision.

Alex Cole-Hamilton: I hear what the minister says about wanting to remove from the bill any semblance of criminality for children. However, if that was truly the Government's intent, we would have outlawed the use of cells because that is far more criminalising than the form of words that we use to communicate a person's rights in an interview.

Similarly, if we wanted to remove the criminalisation of children, we would listen to the United Nations or the European Council and lift the age beyond 12.

I accept that language is important, and it is especially important in such procedures. However, when we talk about extending the language that is found in adult criminal law to children, we are not talking about reading children their Miranda rights, or whatever that is called in Scotland. We are talking about addressing a power imbalance that means that children in that moment of heat and trauma feel that they really have to do what they are told.

The amendment would assure children that they have rights and, as Daniel Johnson said, the right to silence is integral to human rights in our justice system. That should apply to children as it should apply to adults. I press amendment 64.

The Convener: The question is, that amendment 64 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Cole-Hamilton, Alex (Edinburgh Western) (LD)
Fee, Mary (West Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)
Wells, Annie (Glasgow) (Con)

Against

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Maguire, Ruth (Cunninghame South) (SNP)
Ross, Gail (Caithness, Sutherland and Ross) (SNP)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 64 agreed to.

Amendment 139 moved—[Maree Todd]—and agreed to.

Section 38, as amended, agreed to.

Section 39—Right to have supporter present

The Convener: Amendments 140 to 144, in the name of the minister, have already been debated. I invite the minister to move amendments—[*Interruption*.]

I suspend the meeting briefly.

10:13

Meeting suspended.

10:22

On resuming—

The Convener: I welcome everyone back to the meeting. I think that we should now be back on track.

Amendments 140 and 141 moved—[Maree Todd]—and agreed to.

The Convener: Amendment 142, in the name of the minister, is grouped with amendments 147 and 153.

Maree Todd: Amendment 153, which is the substantive amendment in the group, seeks to address concerns that section 41, as currently drafted, could be interpreted as meaning that both the supporter and the advocacy worker must be present in the room when a child is being interviewed. Although sections 39(4) and 40(5) ensure that the supporter and advocacy worker will certainly not be denied access to the child at any time during the interview, it is sometimes not in the child's interests for both to be present in the room. For example, a child might wish to be open about the circumstances surrounding an incident involving sexual behaviour but might not be comfortable doing so if their parent is in the room.

It is also important that the legislation allows for such flexibility and for children to be supported in taking part in an interview in a way that meets their needs and interests. As a result, amendment 153 makes the bill absolutely clear that a child can be interviewed only as long as both their supporter and their advocacy worker are in attendance at the location of the interview but that the presence of one or other in the room where the interview is being conducted is sufficient. Amendments 142 and 147 simply make the technical changes that flow from amendment 153 to ensure consistency throughout the bill.

I urge the committee to support the amendments. I move amendment 142.

Oliver Mundell: What is the mechanism for deciding which of those two people will not be present in the room where a child under 12 is being interviewed? What would be the rights of the parent if they were concerned about their child

being in the room with just the advocacy worker, and how would any dispute or concern in that respect be sorted out? I understand the principle behind the amendments; I just want to find out what would happen in practice in those circumstances.

Maree Todd: The parent would never be denied access to the child. We are certainly open to discussing how the guidance around the issue is developed, but as I said in my opening remarks, it is sometimes not in the child's interests for both the supporter and the advocacy worker to be present in the room. What is important is that the child is able to give their version of events in a way that puts them at ease. I hope that the member accepts the intention in that respect.

Oliver Mundell: I am just trying to work out who will decide what is in the child's best interests. The general idea in Scots law—and not just criminal law—is that a child under the age of 12 might not always and in all circumstances be able to weigh things up and make such decisions. Who would make the decision in those circumstances?

Maree Todd: As I have said, we will make it clear in the guidance who makes that decision and what factors are to be considered. However, the voice of the child will be very important.

The Convener: As no other member wishes to comment, I ask the minister to wind up and say whether she wishes to press or withdraw amendment 142.

Maree Todd: I hope that the committee supports me and will agree to amendments 142, 147 and 153.

Amendment 142 agreed to.

Amendments 143 and 144 moved—[Maree Todd]—and agreed to.

Section 39, as amended, agreed to.

Section 40—Right to have advocacy worker present

Amendments 145 to 150 moved—[Maree Todd]—and agreed to.

Section 40, as amended, agreed to.

Section 41—Child not to be questioned while unaccompanied

Amendments 151 to 153 moved—[Maree Todd]—and agreed to.

Section 41, as amended, agreed to.

Section 42—Information to be provided to child

Amendments 154 to 157 moved—[Maree Todd]—and agreed to.

Section 42, as amended, agreed to.

Section 43—Appeal against decision under section 34

Amendment 158 moved—[Maree Todd]—and agreed to.

Section 43, as amended, agreed to.

Section 44—Questioning of child in urgent cases

Amendments 39, 38, 41 and 40 not moved.

Section 44 agreed to.

Section 45 agreed to.

Section 46—Guidance

Amendments 159 and 160 moved—[Maree Todd]—and agreed to.

Section 46, as amended, agreed to.

Section 47—Limitation on taking prints and samples from children under 12

Amendments 43, 42, 45 and 44 not moved.

10:30

The Convener: Amendment 161, in the name of the minister, is grouped with amendments 162 and 163.

Maree Todd: It is important that our legislation to raise the age of criminal responsibility does all that it can to safeguard the interests and rights of children.

Section 47 sets out the circumstances in which the police can take a sample and makes clear that the limits and requirements under sections 52 and 57, or any other enactment, apply. It also makes clear that the requirements do not apply where a child is a victim of an offence or seriously harmful behaviour.

Amendment 161 seeks to clarify the use that can be made of samples that are taken from a child under the age of criminal responsibility on the basis that they are a victim of an offence or seriously harmful behaviour of another child. It clarifies that a sample taken from a child under 12 on the basis that they are thought to be a victim cannot be used for the purposes of investigating any suspected seriously harmful behaviour of that child. It also allows for the use of the sample, if the child previously agreed that the sample can be

taken, to investigate an incident if the child is 12 or over. Amendment 161 will not affect the ability of the police to apply for a section 52 order or, in urgent cases, to use the emergency power in section 57 to obtain a new sample.

Section 55 provides for the destruction of samples taken under section 52, which applies to children under the age of criminal responsibility. However, section 55 does not specify what should happen to samples that are taken under the authority of a section 52 order that is appealed. The purpose of amendment 162 is therefore to specify that if the appeal is successful and the section 52 order is either quashed or altered in such a way as to mean that samples that were originally taken would no longer be authorised, those samples and all information associated with them must be destroyed as soon as possible. That will prevent authorities from keeping hold of samples from children under the age of criminal responsibility in such circumstances.

Amendment 162 will enable samples that are obtained before the appeal is lodged, or before the police are informed of the appeal, to be retained until the outcome of the appeal is known, although no use can be made of the samples until the appeal is decided. That means that if the appeal is unsuccessful, the sample can be used for the purposes of the investigation and thereafter destroyed in accordance with section 55 or the new section that will be inserted by amendment 163. The crucial point is that that avoids the need for a sample to be taken from the child twice if there is an unsuccessful appeal against the order. Amendment 162 seeks to make clear the process to be followed and to ensure that the child's interests are at the core of the process.

Section 48(1)(b) provides that samples may be taken with consent from a child aged 12 or over in relation to suspected seriously harmful behaviour of the child when they were under 12. However, the bill does not provide for the destruction of samples that are taken on that basis. Amendment 163 will apply to those cases the same requirements for the destruction of samples that are contained in section 55. That is, the samples and all information derived from them will be destroyed if a decision is made not to pass information to the principal reporter about the case or following the conclusion of children's hearing proceedings in connection with the case.

As I mentioned, the amendments in this group are technical, but they are very important and I think that they need to be made. I am happy to go into more detail if required, but I think that the proposed measures are important for protecting children's rights.

I move amendment 161.

The Convener: No members wish to comment on the amendments, so I invite the minister to wind up.

Maree Todd: As I said, the amendments are important. They are designed to protect the rights of the child by clearly setting out processes for retention and disposal requirements. I hope that all committee members will support my amendments.

Amendment 161 agreed to.

Section 47, as amended, agreed to.

Section 48—Limitation on taking prints and samples from children aged 12 and over

Amendments 47, 46, 49 and 48 not moved.

Section 48 agreed to.

Sections 49 to 56 agreed to.

After section 56

Amendment 162 moved—[Maree Todd]—and agreed to.

Sections 57 and 58 agreed to.

After section 58

Amendment 163 moved—[Maree Todd]—and agreed to.

Sections 59 and 60 agreed to.

Section 61—Additional powers and duties of constable

Amendments 51, 50, 53, 52, 55 and 54 not moved.

Section 61 agreed to.

Section 62—Offences

Amendments 57 and 56 not moved.

Section 62 agreed to.

Section 63—Interpretation of Part 4

Amendment 164 moved—[Maree Todd]—and agreed to.

Section 63, as amended, agreed to.

The Convener: I suspend the meeting briefly to allow the minister's officials to change over.

10:39

Meeting suspended.

10:40

On resuming—

After section 63

The Convener: Amendment 119, in the name of Mary Fee, is in a group on its own.

Mary Fee: I lodged the amendment following the oral and written evidence that we received when scrutinising the bill. We heard evidence from a number of experts who discussed the different stages of child and young adult development. Psychologists argue that the part of the brain that focuses on rationality does not fully develop until young adults are in their late teens or early 20s. In other words, although all children develop simultaneously, they do so at different rates, so each child has a different age of capacity for understanding the consequences of their actions.

Capacity is usually understood to have a cognitive and a conative component, which translates as the need to prove the presence of an understanding of wrongfulness and an ability to control one's behaviour in accordance with such an understanding.

The Law Commission takes the view that anyone who completely lacks criminal capacity should not be found criminally responsible. It draws out three capacities that are needed for the fair imposition of responsibility:

> "the ability rationally to form a judgment, the ability to understand wrongfulness, and the ability to control one's physical actions."

Children and young people may not be able to conform to some or all of those requirements, because of immaturity.

It is in such situations that my amendment 119 could be used. To assess whether a child has full capacity, a report would have to be obtained from an approved medical practitioner or psychologist. The assessment would provide further information for the courts and the children's hearings system in determining what action to take when dealing with a young person.

If we are serious about dealing with young people compassionately and providing them with the support that they need to move on from the acts that they may or may not have committed, it is important that we fully understand their capacity to understand the consequences of their actions.

I understand that there may be nervousness about using the term "diminished responsibility". My amendment seeks to differentiate between "abnormality of mind" and "developmental immaturity". However, we have a duty to ensure that children who are developmentally immature and who do not have the capacity to understand the consequences of their actions are supported. I urge the committee to support my amendment.

I move amendment 119.

Alex Cole-Hamilton: I support amendment 119. Amendments in my name to increase the age of criminal responsibility have not been agreed to. Mary Fee's amendment with its progressive angle strengthens the bill. It recognises that children may have a range of things going on in their lives that are sometimes beyond their control and that contribute to their actions.

The amendment speaks to those arguments that we have had about equalising the rights of children and those of adults. An adult with the mental age of 14 on trial would be dealt with differently from an adult who has the same mental age as their peers.

We also recognise that there is a science to the issue. At stage 1, we heard in great detail that adverse childhood experiences are responsible for offending or harmful behaviour—such behaviour is a reaction to those experiences. ACEs can alter children's brains at the molecular and genetic level and affect their ability to process joy and their understanding and intellect. If we are to continue to deal with 13, 14 and 15-year-olds in the children's hearings system on an offending basis and potentially give them criminal records, it is vital, in terms of equalising their rights, that we recognise that they may have diminished responsibility as a result of their mental capacity.

10:45

Fulton MacGregor: I have serious reservations about amendment 119. I can see where Mary Fee and Alex Cole-Hamilton are coming from in their progressive approach—to use Alex's words—to the bill, but I think that amendment 119 would be a retrograde step.

I say that for a few reasons. Currently, when a child presents to the children's hearings system, the reporter requests a report from the social work department, which contains a section on health. As part of that, a judgment is made about which health services will be asked for information. Not every child needs direct psychological support, but the reporter can make a request for such input.

I have concerns about a psychological assessment being made in every instance. As Alex Cole-Hamilton rightly pointed out, the vast majority of—if not all—children who become involved in offending or harmful behaviour are likely to be traumatised, and the psychological assessment process has the potential to retraumatise them. I know from my experience as a social worker that even the introduction of

psychological input for a young person has to be managed very carefully.

Alex Cole-Hamilton: Do you agree that, if we are to get the proper comprehensive suite of interventions for a young person who has exhibited harmful behaviour, for which the children's hearings system in Scotland is rightly celebrated, we need to understand the full picture of what is going on with the child, and an understanding of mental capacity is absolutely part of that?

Fulton MacGregor: I know where you are coming from, but I do not think that amendment 119 would have the effect that you are looking for. We did not take evidence on the issue as such, and I am not sure what the children's organisations that have supported some of your proposals would think about a standardised psychological assessment.

I ask Mary Fee not to press amendment 119 to give the minister time to consult and perhaps come back with a compromise. I have serious concerns about amendment 119 and I will not support it.

Gail Ross: I ask the minister what currently happens in the children's hearings system. Fulton MacGregor said that a psychological assessment is carried out if that is deemed necessary. I believe that all the child's circumstances are taken into account, so I would hope that the power to order a psychological assessment exists, so we need not make it a requirement to do that for every child.

I am also concerned about the use of the term "diminished responsibility". As far as I am aware, that is a special defence in criminal law in relation to murder and culpable homicide.

Oliver Mundell: I hear the points that Gail Ross made about the terminology but, although there might be things about amendment 119 that are not perfect, I support Mary Fee and hope that she will press it, because it will focus ministers' minds on the need to come up with a substantive amendment in the area at stage 3.

Amendment 119 is a practical step forward, which is about looking at the full facts and circumstances of a case. Professionals and others try their best and often look to the best interests of the child, but it is important that we have a system in which a psychological assessment is a requirement or can be requested by the child's representative as an automatic right. When it comes to disposal, such an approach will help to ensure that the right solution is found in individual cases.

We received a little evidence on special defences. We heard about the defence of infancy that was used in England. The area is worth exploring because, fundamentally, it is about children's rights.

Maree Todd: I have grave concerns about amendment 119, which conflates the plea of diminished responsibility in criminal proceedings with the broader concept of developmental immaturity. It is, therefore, important to say up front that the amendment cannot be supported, on account of the fact that it creates a new definition for a concept that is narrowly defined in Scots criminal law at the moment, and it would create great uncertainty in law.

The amendment seeks to introduce a new section on diminished responsibility. Diminished responsibility is defined in statute and is available only as a plea to a charge of murder, reducing the charge to one of culpable homicide. The amendment seeks to expand the presently available plea that is used in criminal proceedings in Scotland and make it available in relation to all cases in the children's hearings system. In expanding on that understood definition and use in our legal system by including developmental immaturity, the amendment appears to describe diminished responsibility as a condition either of abnormality of the mind or of developmental immaturity.

In Scots law, the plea can be used only in circumstances in which the following criteria have been established: there has been an aberration or weakness of mind; there is some form of mental unsoundness; there is a state of mind that is bordering on though not amounting to insanity; there is a mind so affected—

Oliver Mundell: Does the minister recognise that putting the further specifications into statute would just be expanding that defence? Saying that there is an existing defence does not mean that a defence cannot be changed or expanded. Obviously, Scots law in this area has expanded and changed over the centuries. My understanding is that diminished responsibility was a common law defence before it was one in statute. That means that statute has already defined and changed what diminished responsibility is.

Maree Todd: The defence of diminished responsibility is used only in the situation of murder, and I think that it is unhelpful to introduce it in this case. These children are not charged. We are all agreed that there is a bright line at the age of 12, and that, under the age of 12, children are not held criminally responsible.

Oliver Mundell: Under the proposal, they would not be held to be criminally responsible. In fact, the proposal would potentially allow for their actions to be fully explained and understood so

that the best assessment could be made. It is unhelpful to mix the two things—

Maree Todd: I agree—

Oliver Mundell: That is a mischaracterisation—

The Convener: I know that there is a lot to be debated, but I ask everyone to speak through the chair.

Maree Todd: I agree that it is unhelpful to mix the two categories, but I think that the amendment does that. The factors that we are discussing are not the same. The factors relating to diminished responsibility, as defined in Scots law, are not the same as a general concern to ensure that a child's development and maturity are understood and taken account of when we are thinking about how best to respond to an incident of harmful behaviour in a way that meets their needs. It is deeply unhelpful to conflate the two.

I sympathise with what I think is the intention behind the amendment, which is to ensure that all children who come into contact with the system have their specific needs understood and addressed, and I agree that, when that does not happen, it absolutely shows that there has been a failing in our system. However, I do not think that the amendment is the way to address the issue.

The amendment would require that a psychological assessment be carried out in all cases, regardless of the grounds. Whether the child has displayed offending behaviour or whether the child has been harmed, that is absolutely not appropriate in all cases. As has been alluded to, a psychological assessment could be a damaging experience for a child, as it would force them to immediately confront their acts in order to analyse their capacity to understand the consequences. It is also likely to result in unnecessary delays, which would serve only to increase the distress and anxiety of the child.

The Solicitor General made the point in evidence that children are different and need to be considered as individuals in individual circumstances. She said that the approach should depend on the background and circumstances of the child. I absolutely agree with the law officers on that point. I think that a universal psychological assessment of every child in the hearings system would be more damaging than beneficial.

Alex Cole-Hamilton: I heard that evidence from the Solicitor General, too. I think that she was asking us to get a picture in the round of every child who comes before a children's hearings panel. Judgment of mental capacity and maturity should be part of that picture; it will be different for every child, but that is why we need to assess it.

Maree Todd: We already assess it. It is necessary in some cases, and the Children's Hearings (Scotland) Act 2011 provides that a children's hearing can defer making a decision and make a medical examination order for the purpose of obtaining any further information or carrying out any necessary further investigation before the subsequent children's hearing. We also heard from the law officers at stage 2 that the Crown will carry out a psychological assessment in appropriate cases. To answer Gail Ross's question, there is already facility to carry out such an assessment, where it is considered helpful.

I want to reassure Mary Fee on the broader issue of children's mental health. In summer 2018, a specific task force on child mental health was launched, on the back of the Audit Scotland report "Children and young people's mental health", which said that

"a step change is required to improve children and young people's mental health".

It was pointed out that there is a strong indication of a gap in services for young people and children who do not meet the criteria for the most specialist help.

That unacceptable gap in our public services' response to children and young people with additional support needs is, I believe, what Mary Fee seeks to address in amendment 119. I assure her that specific work on that has begun, through a workstream in the children and young people's mental health task force that is considering at-risk young people, including those who are involved in offending behaviour. That group is expected to make recommendations to the task force on how at-risk people can receive improved access to mental health services. With respect, I suggest that amendment 119 does not deliver what the member intends. Specific concentrated work is already under way to address the current gaps in access to appropriate specialist services for young people.

My other concern about amendment 119, which my colleague Fulton MacGregor touched on, is about the possible unintended consequence of introducing the concept. If psychological testing can be used to show that older children are too developmentally immature to understand the consequences of their action, potentially, it could be used to establish that younger children are mature enough to do so. That causes me grave concern. It opens up the possibility of children under 12 being considered fit to stand trial.

As drafted, amendment 119 applies to all children—for example, a three-year-old would fall within its scope—and to all grounds of referral, regardless of whether the decision is about the child's conduct. The effect of all that is

unknowable. As drafted, the purpose of the amendment is unclear. It gives no clarity on how the medical report will affect the outcomes of the hearing or what the hearing is to do with the report.

As I said, amendment 119 suggests that it is possible for children of any age to be assessed to be of a sufficient maturity to determine or control their conduct. It appears to introduce an approach where children under the age of criminal responsibility could be assessed as having the capacity to understand the consequences of their actions. What then?

Amendment 119 would import a concept from murder charges into a child-centred process and could undermine the bill's key principle of decriminalisation. It would obscure the clarity of the bill's approach. The amendment's meaning and intent are unclear and its consequences are unknowable.

We all want to ensure that the best information is available when we take decisions about children. If there are concerns regarding a child's understanding, developmental immaturity or mental health, it is absolutely the case that the right information should be available at the right time. Medicalising all children is not an appropriate response to those challenges.

I am more than happy for me and my officials to sit down with Mary Fee to tease out exactly what the intent of amendment 119 is and to seek to bring something back at stage 3 that delivers on that intent. However, at present, I urge Mary Fee to withdraw amendment 119. If she does not, I would ask the committee to resist it.

11:00

Mary Fee: I have listened carefully to all the comments from my committee colleagues and the minister. I say at the outset that I absolutely understand the concerns that have been raised by some members and by the minister. Notwithstanding that, I still believe that we need to put in place a system that fully supports the welfare approach that we are taking to all children. The minister made a point about the gap in mental health services. There is such a gap and our young people are being failed by the mental health services that are available to them. I believe that the admission that there is a failure and a gap in our mental health services supports what amendment 119 proposes to do in the bill.

I accept that social work assessments are carried out on children when they go through the children's hearings system and I do not by any means intend to diminish the importance of the assessments that social workers do. However, they are not psychological assessments and do not deal with behaviour and capacity issues, which is what I am trying to rectify with amendment 119. All psychological assessments would be done with the child at the centre of them, the age of the child would be taken into account and there would be a child-centred approach. The assessments would not be a standard form of psychological assessment that would be done in the same format for every child, regardless of their age; they would be tailored to the individual child.

The issue is the equalisation of rights. If we truly want to take a welfare-based approach to all our children and fully use the powers that we have through the getting it right for every child approach—and we talk about GIRFEC all the time—we have to get it right for every child. As parliamentarians, we have a responsibility to ensure that we properly support all our children.

Fulton MacGregor: The minister has made Mary Fee a good offer. As I said, I know what Mary Fee is trying to achieve through amendment 119 but, through my previous experience as a social worker, I have real concerns that it will not achieve what Mary Fee intends. The minister offered to hold discussions with Mary Fee to help her to achieve what she is looking for at stage 3, and I think that that offer would work.

At the moment, a report comes into social work that goes back to the reporter, but amendment 119 would mean that there would also be a psychological assessment. However, a professional could say, for example, that a child was not suitable for a psychological assessment, because they had suffered far too much trauma. Where would that leave the psychological assessment? I honestly have real concerns about amendment 119 and I hope that Mary Fee will take up the minister's offer, as that would allow her to find a way to get the effect that she wants and to avoid the potentially damaging consequences of amendment 119.

Mary Fee: I appreciate the member's intervention but, if the convener allows it, I will continue.

I have the greatest sympathy for the concerns that Fulton MacGregor has raised, but I go back to my point about taking a welfare-based approach and using GIRFEC. My final point is that we are guarantors of human rights, which means the rights of everyone, no matter their age. The Parliament has a responsibility to ensure that the human rights of every individual are protected.

Maree Todd: Will the member take an intervention?

Mary Fee: I am just about to close.

Amendment 119 would ensure that those human rights are taken into account. I will therefore press amendment 119.

The Convener: The question is, that amendment 119 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Cole-Hamilton, Alex (Edinburgh Western) (LD)
Fee, Mary (West Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)
Wells, Annie (Glasgow) (Con)

Against

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Maguire, Ruth (Cunninghame South) (SNP)
Ross, Gail (Caithness, Sutherland and Ross) (SNP)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 119 agreed to.

The Convener: Amendment 120, in the name of Daniel Johnson, on review of the Scottish Children's Reporter Administration, is in a group on its own.

Daniel Johnson: At the heart of the bill—and of all the committee's comments, this morning and throughout the bill process—the importance of treating children with the care and respect that they need, and upholding their rights, is absolutely central.

At root, there is a consensus that we have a history in Scotland of taking a progressive approach to the treatment of children, especially when they come into contact with the authorities and the justice system. That approach is long established: in 1960, Lord Kilbrandon convened his committee and did his work to look at whether Scotland could take a different approach; and in 1971, the children's reporter first convened and undertook its work.

My concern is that, through our work and in other committees in which I have been involved, we do a large number of things that impact on the effectiveness of the children's reporter work, and more important, on the intent for it that Kilbrandon originally set out more than 50 years ago. Important as these changes to the law and our approach are, we should also take cognisance of the impact on the reporter system that the measures will have, whether it is with regard to the age of criminal responsibility or the Justice Committee's current work on vulnerable witnesses. Malcolm Schaffer, in his evidence to the Justice Committee on vulnerable witnesses, drew attention to the consequential impacts that there may be and questioned whether due thought had been given to the reporter system. Likewise, the Education and Skills Committee has done a thorough report and there was a great deal of concern that the reporter system is becoming litigious and legalistic in nature.

The purpose and central premise of amendment 120 is:

"(2) The matter is whether the Scottish Children's Reporter Administration continues to perform its role to a satisfactory standard in consequence of the additional responsibilities conferred upon it".

This is a probing amendment. I recognise that the Government cannot accept reviews and reports in every bill, and perhaps it cannot accept one that is as widely stated as this. However, I urge the Government to take my point seriously and to consider a full and proper review of both the functioning of the reporter administration and the resources that it has available to do its very important work. It is the very foundation of our approach to children in Scotland's justice system.

I move amendment 120.

Maree Todd: I appreciate the thinking behind the amendment, as I did with Mr Mundell's amendment 118. I agree that it is crucial to monitor the changes that the bill will bring, and to ensure that the information is collated in order to properly evaluate the bill's impact on the children's lives that it will affect.

There are clear and established mechanisms to analyse cases that involve children who are reported to the children's reporter, including on offence grounds, and the investigations and decisions that flow from that. The SCRA publishes its annual report at the end of every October, which the principal reporter provides to the Parliament. Online and published statistical analysis is available, with data on children and cases that have been referred to the children's reporter and decisions that have been taken. An online statistical dashboard provides further accessible information.

A focus on the role of just one agency, when others are involved in supporting children, would not cover the full picture. As I said on day 1 of stage 2, we need a strategic approach to collating, monitoring and reporting on measures in the bill, which will take into account all the public services that are involved. I have indicated my willingness to bring forward appropriate amendments in that regard at stage 3, so I hope that Mr Johnson will agree with that approach and not press his amendment. If he presses it, I ask members to resist.

Daniel Johnson: I accept that there is information, but does the minister accept that my amendment proposes a holistic look at the role and functioning of the reporter system and whether it is still upholding the purpose that it was

set up to deliver? I do not believe that the statistics provide that picture.

Maree Todd: In relation to the bill, we need to take a wider and more strategic look at the information that we collate. The issue that you raise is slightly separate, but I am more than happy to discuss it and see whether we can find a way forward before stage 3. I agree that we need to understand well what is happening in the children's hearings system, what decisions are being made and how we can further improve our approach to responding not just to children's deeds but to their needs.

Daniel Johnson: I set out my case at length in opening on amendment 120. I do not really have anything to add. The children's reporter system is a cherished part of our justice system that needs to be examined, but I will seek to withdraw my amendment.

Amendment 120, by agreement, withdrawn.

Sections 64 and 65 agreed to.

Section 66—Regulation-making powers

Amendment 98 moved—[Maree Todd]—and agreed to.

Amendments 74, 73, 121, 76 and 75 not moved.

Section 66, as amended, agreed to.

Section 67—Ancillary provision

The Convener: Amendment 99, in the name of the minister, is in a group on its own.

Maree Todd: Amendment 99 makes a minor technical correction of an omission that the Delegated Powers and Law Reform Committee highlighted. The amendment inserts the words "giving full effect to" in section 67 so that the power is consistent with other such ancillary provisions. That will ensure that the power provides the Scottish ministers with the necessary flexibility to give full effect to the bill and provisions that are made under it.

I move amendment 99.

Amendment 99 agreed to.

Section 67, as amended, agreed to.

Section 68—Commencement

Amendments 78, 77, 79, 81 and 80 not moved.

Section 68 agreed to.

Section 69 agreed to.

Long Title

Amendments 59 and 58 not moved.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the minister and her officials for their attendance.

The committee will next meet on Thursday 28 February, when we will begin to take oral evidence on the Children (Equal Protection from Assault) (Scotland) Bill.

Meeting closed at 11:14.

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