COMMUNITIES COMMITTEE

Wednesday 12 May 2004

Session 2

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CONTENTS

Wednesday 12 May 2004

COMMUNITIES COMMITTEE
18th Meeting 2004, Session 2

CONVENER

*Johann Lamont (Glasgow Pollok) (Lab)

DEPUTY CONVENER

*Donald Gorrie (Central Scotland) (LD)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Patrick Harvie (Glasgow) (Green)
*Mary Scanlon (Highlands and Islands) (Con)
*Elaine Smith (Coatbridge and Chryston) (Lab)
*Stewart Stevenson (Banff and Buchan) (SNP)
*Ms Sandra White (Glasgow) (SNP)

COMMITTEE SUBSTITUTES

Shiona Baird (North East Scotland) (Green)
Christine May (Central Fife) (Lab)
Shona Robison (Dundee East) (SNP)
Mike Rumbles (West Aberdeenshire and Kincardine) (LD)
John Scott (Ayr) (Con)

*attended

THE FOLLOWING ALSO ATTENDED:

Bill Aitken (Glasgow) (Con)
Paul Martin (Glasgow Springburn) (Lab)
Mrs Mary Mulligan (Deputy Minister for Communities)

CLERK TO THE COMMITTEE

Steve Farrell

SENIOR ASSISTANT CLERK

Gerry McInally

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 2

Scottish Parliament

Communities Committee

Wednesday 12 May 2004

[THE CONVENER *opened the meeting in private at 10:03*]

10:15

Meeting continued in public.

The Convener (Johann Lamont): I welcome everyone to this meeting of the Communities Committee. Today we are all conscious of a great sadness in one of our communities, for the people who rose to go to their work yesterday in Maryhill and were caught up in such terrible events. Our thoughts go to all those who were involved and their families, to those who have lost people, those who are injured and those who are still fighting in the hope of saving people who are still trapped at the scene of the terrible accident in Maryhill. It is appropriate for us to rise for a minute's silence to reflect on what has happened.

Subordinate Legislation

Home Energy Efficiency Scheme Amendment (Scotland) Regulations 2004 (SSI 2004/188)

10:16

The Convener: Agenda item 2 is consideration of the Home Energy Efficiency Scheme Amendment (Scotland) Regulations 2004. Members have been provided with copies of the regulations and the accompanying documentation. Does anyone have comments?

Stewart Stevenson (Banff and Buchan) (SNP): It is appropriate to welcome the extension of the scheme to people aged over 80 who have partial or inefficient central heating systems; that has been an issue for a number of my constituents. However, the regulations could be a missed opportunity. In areas of Scotland where social inequality is greatest, people tend to die earlier and although I am delighted that, in rural areas such as that which I represent, many people will benefit from the change, it would be appropriate to find a way of including in the regulations people under the age of 80 in areas of significant social inequality who have partial or inefficient central heating. I hope that the Executive will consider extending the scheme further to cover such people in the future. I am happy to support the changes.

Scott Barrie (Dunfermline West) (Lab): I have absolutely no problem with the content of the Scottish statutory instrument. Appendix 1 to the note on the regulations, which contains excerpts from the Subordinate Legislation Committee's report, raises the issue of the need for consolidation of the regulations. The Executive's response states:

"The Executive has no information on the consolidation exercise for England and Wales and so cannot comment on the comparative position."

I wonder whether there has been further investigation of the position in England and Wales, where the regulations appear to have been consolidated, and whether it is the Executive's intention to consolidate regulations here.

The Convener: We can perhaps pursue that later, but there is no opportunity for us to question the Deputy Minister for Communities on it just now.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I welcome the extension of the scheme. My point is similar to Stewart Stevenson's: many people throughout the country have benefited from

the scheme and now have central heating and cosy, energy-efficient homes, but many others have partial systems that are certainly not energy efficient.

I raised that matter with Jackie Baillie, who was the Minister for Social Justice when the scheme was introduced. We should be conscious that we are talking about an energy efficiency scheme and we should start to include in the scheme people with partial and old systems. Will the minister comment—

The Convener: The minister cannot comment.

Cathie Craigie: Will the minister take note of my point? I have written to the Scottish Executive Development Department to raise the point that some councils have been unable to take advantage of the scheme because their housing stock already has central heating and to ask whether a trade-off could be made to channel funds into the private sector.

The Convener: The Deputy Minister for Communities is here only in relation to agenda item 3—that is why she cannot answer questions on this item. The procedure is that we must deal with this item without discussion with the minister. However, the points that members have raised will be in the *Official Report* and the minister and officials will reflect on them.

Members have the report on the instrument and they might want to reflect on paragraph 6, which makes the point that Scott Barrie made, on the importance of consolidating the regulations. If members have no further comments, is the committee content with the order?

Members *indicated agreement*.

The Convener: Is the committee therefore content to make no recommendation on the order in its report to the Parliament, but to make the point about consolidation, as the report indicates?

Members *indicated agreement*.

Antisocial Behaviour etc (Scotland) Bill: Stage 2

10:21

The Convener: Agenda item 3 is day 4 of our stage 2 consideration of the Antisocial Behaviour etc (Scotland) Bill—we will have an opportunity to ask the minister questions about that.

Before we consider the amendments, I outline the correct procedure with regard to whether officials can speak to the committee during the stage 2 debate. I do not think that that circumstance arose in the previous meetings, although we offered officials the opportunity to speak through the minister. We are advised that non-members of the committee must not speak during the stage 2 debate, because the process is a formal parliamentary debate rather than an evidence-taking session. I apologise for stating at our most recent meeting that Executive officials would be allowed to speak in the proceedings; clearly, that was not the case and it was a terrible, criminal suggestion on my part. I hope that the situation is clear.

Stewart Stevenson: I have a suggestion that might be helpful to the committee. If we judge that we need to hear from officials, could the meeting be suspended to allow a short, informal briefing? I believe that that would be acceptable under standing orders. Of course, such an informal briefing would not be included in the *Official Report*, but it might enable us to deliver the best possible legislation, given the political constraints.

The Convener: I hear what you say. If it is necessary to suspend the meeting at any time, I will do so. However, we are in danger of making rather a large mountain out of a very small molehill. I tried to suggest at our most recent meeting that it would be easier for officials to speak directly to the committee rather than into the minister's ear, but I recognise that in a formal debate everything should come through the minister. We can only hope that the minister's capacity to take in information and communicate it to us at the same time is up to its usual standard. If the minister thinks at any point that it would be worth while to suspend the meeting, I will be happy to do so. However, we should bear it in mind that we will work two full shifts this week and we want to get through as much of the bill as possible while producing the best possible legislation.

Section 20—Guidance

The Convener: Amendment 68, in the name of the minister, is grouped with amendments 69 and 70.

The Deputy Minister for Communities (Mrs Mary Mulligan): I am grateful to the convener for the clarification on procedure.

Amendments 68 and 69 are technical amendments that clarify the position in relation to ministerial guidance under section 20. On reflection, we decided that we need to provide only for the particular legal effect that we want that guidance to have, which is that a person who uses the power of dispersal shall, in the exercise of that power, have regard to the guidance that is issued in respect of part 3 of the bill. The guidance will help to ensure that use of the dispersal powers is appropriate and proportionate and that the correct balance is struck. It will be prepared in collaboration with the police and local authorities. Officials have already begun that work with the police associations and the Convention of Scottish Local Authorities.

Amendment 70 introduces a duty on ministers to lay the ministerial guidance on the dispersal provisions before the Scottish Parliament. In the course of its scrutiny of the bill, the Subordinate Legislation Committee asked the Executive whether a case could be made for laying the guidance that will be produced under section 20 before the Parliament. As I said, the guidance will be a collaborative effort and I would be happy, as part of that process, for the Communities Committee to see the guidance at the draft stage. Equally, I am content to lay the final version before the Parliament for information. I therefore invite the committee to agree to amendments 68 to 70.

I move amendment 68.

Amendment 68 agreed to.

Amendments 69 and 70 moved—[Mrs Mary Mulligan]—and agreed to.

Amendment 5 not moved.

Section 20, as amended, agreed to.

Section 21—Directions

The Convener: Amendment 6 was debated with amendment 1. Does Bill Aitken intend to move the amendment?

Bill Aitken (Glasgow) (Con): Not moved.

Scott Barrie: I will move it, then.

Bill Aitken: Sorry, that is the amendment that the minister agreed to support—I will move it.

Scott Barrie: I came to your rescue, Bill.

Amendment 6 moved—[Bill Aitken]—and agreed to.

Section 22—Interpretation of Part 3

Amendment 271 moved—[Donald Gorrie]—and agreed to.

Amendments 386 and 7 not moved.

Section 22, as amended, agreed to.

Section 23—Authorisation of closure notice

The Convener: Amendment 272, in the name of Patrick Harvie, is grouped with amendments 273, 274 and 280.

Patrick Harvie (Glasgow) (Green): I will speak principally to amendments 272 and 273, which are in my name and which are a result of proposals that were brought to me by Shelter Scotland and the Chartered Institute of Housing in Scotland. The amendments would mean that closure orders could not be applied to homeless accommodation or care homes. The argument behind them is that people who live in short-term and hostel accommodation are already required to comply with the rules and regulations and that breach of the regulations results in either exclusion from the premises for a fixed period, or eviction. No evidence exists to suggest that hostels or care homes have become crack dens, but the persistent selling of illegal drugs on such premises must be prevented and, in those circumstances, eviction or exclusion would be quicker and easier than serving a closure notice.

Participants in a recent Shelter seminar on hostel dwellers' rights maintained that the appropriate response to drug selling in hostels was exclusion, which is the accepted practice. Closure notices are therefore unnecessary. If applied, they would ultimately have an impact on other hostel residents who have not engaged in antisocial behaviour, as denying them access to premises would make them homeless and stop their access to other services that are provided in the accommodation.

Care homes are defined in legislation as accommodation in which nursing, personal care or personal support is provided for vulnerable people who have a particular need. If accommodation users were denied access to such premises, those services would also be denied.

I move amendment 272.

10:30

Donald Gorrie (Central Scotland) (LD): I have much sympathy with the point that Patrick Harvie makes. I am sure that the bill's authors did not intend such accommodation to fall within the bill's scope, but the bill could be interpreted, at least in theory, as saying that action could be taken in the care homes and hostels to which he refers. It would help if the bill made it clear that such housing is not intended to fall within its scope. I hope that the minister will respond favourably to that.

My amendments 274 and 280 make two different points. The bill says that a closure notice may be served if an officer

"has reasonable grounds for believing that … at any time during the immediately preceding 3 months a person has engaged in antisocial behaviour on the premises".

The proposition that a closure notice could be served after one instance of such behaviour is far too loose. The next sentence adds that

"the use of the premises is associated with the occurrence of relevant harm".

Another bit of the bill says that relevant harm is "significant and persistent disorder". It is extraordinarily foolish that section 23(3)(a)(i) says that premises can be closed after one instance of antisocial behaviour, but that subparagraph (ii) requires significant and persistent disorder. We either have one or the other. The point in subparagraph (i) about one instance is irrelevant. As in subparagraph (ii), subparagraph (i) should refer to persistent antisocial behaviour. Paragraph (a) contains two different requirements and amendment 274 would address that anomaly.

Amendment 280 concerns a point about licensed premises that was made by the Law Society of Scotland, which thinks that licensed premises would be better left to the forthcoming licensing law reform bill that we have been promised. Having discussed the matter with many people, I think that the society has a point, but it could be argued that licensed premises should be covered in the bill because that would allow more rapid action to be taken to deal with misbehaviour in licensed establishments than is possible under the existing licensing system. As a result of further discussion, I do not expect to move amendment 280, but I think that I have a point with amendment 274, to which I would like the minister to respond.

Scott Barrie: Section 23(2) says that

"The Scottish Ministers may by regulations specify premises or descriptions of premises in respect of which an authorisation under subsection (1) may not be given".

Is it necessary, therefore, to be as specific as Patrick Harvie's amendment 273 is? That seems to cover Patrick Harvie's point. I do not envisage anyone using, or wishing to use, a closure notice for a care home. Given that the provisions of section 23(2) can cover the two types of premises to which amendment 273 refers, sufficient protection seems to be built into the bill.

Stewart Stevenson: I find myself in considerable agreement with Patrick Harvie. In particular, amendment 273 builds on the decision that we made last week in relation to, I believe, Elaine Smith's amendment 168, whereby we agreed that the actions of one or a number of people should not penalise others who were not party to the action. That is exactly the line of argument that Patrick Harvie has properly pursued in promoting amendment 273 and the associated amendment 272. Unless the minister can give us compelling assurances that the issue to which amendment 273 refers will be otherwise dealt with, I am certainly minded to support Patrick Harvie.

Similarly, I believe that Donald Gorrie makes a good point with amendment 274. However, I have questions about exactly where amendment 280 is coming from, so I will be content to slipstream behind whatever Donald Gorrie decides to do on that amendment.

Ms Sandra White (Glasgow) (SNP): I am minded to support Patrick Harvie's amendments 272 and 273, but I ask for clarification from the minister on, first, the subject of care homes. As Patrick Harvie said, care homes are covered by legislation and I do not imagine that much drug dealing is carried on in them, particularly in homes for elderly people. I am greatly concerned that, if the closure provisions are agreed to without certain assurances and clarifications from the minister, that will cause worries in care homes, particularly in homes for the elderly, which also deal with all sorts of medical problems, such as dementia and Alzheimer's disease. I am worried about how the closure provisions would be perceived within care homes and similar residences.

Secondly, I have great concerns about how the closure provisions would affect hostels. The residents of hostels are very vulnerable people and if the closure provisions were agreed to without clarification and assurances, the homelessness problem could be exacerbated. There are antisocial behaviour problems in the larger hostels, but we are moving away from that type of hostel, particularly in Glasgow. I would be worried about the effect on the rest of the people in the hostel if one person's antisocial behaviour exacerbated the homelessness problem.

I am minded to support Patrick Harvie's amendments 272 and 273, if I do not get assurances and clarification from the minister on the closure provisions.

Elaine Smith (Coatbridge and Chryston) (Lab): I have sympathy with the points that Patrick Harvie made and with his amendments 272 and 273. However, I believe that other types of premises might not be covered by those amendments. I do not have section 2(3) of the Regulation of Care (Scotland) Act 2001 in front of me, so I do not know whether children's homes, for example, are included in its provisions.

I am keen to hear how the minister feels about Patrick Harvie's points and how she might address the issue that he raised. For example, would examples of exempted premises be included in

the guidance that we have just discussed? There could be a list of examples, but the phrase "and others" would have to be added, otherwise the list might be too prescriptive. I would certainly be comforted if the minister commented in that fashion.

Mary Scanlon (Highlands and Islands) (Con): I do not have much sympathy with Patrick Harvie's point, because of the existence of the Regulation of Care (Scotland) Act 2001 and the Scottish Commission for the Regulation of Care. The care commission has extensive powers and authority and, in my experience, it responds quickly to any problems related to care homes. I would not like there to be another piece of legislation that would contradict the care commission's work and authority. I look forward to hearing what the minister says about amendments 272 and 273. I believe that we would be going down a dangerous road if we agreed to those amendments. The care commission has extensive powers and authority to deal with antisocial behaviour and I would not like something to override those powers.

Cathie Craigie: I cannot support Patrick Harvie's amendments. I have checked the bill and the policy memorandum and I do not think that there is any intention to suggest that we have a serious problem with antisocial behaviour in care homes or premises that are controlled by local authorities. I hope that the minister will clarify the Executive's intentions in part 4. It seems to me that the bill and the notes make those intentions clear enough, but there is obviously a doubt in the mind of Shelter, which proposed an amendment. I hope that the minister will put that doubt to rest.

The Convener: As Scott Barrie said, the bill gives ministers sufficient power to identify premises on which it would not be appropriate to use a closure notice; if it did not, one would need to list all the places in relation to which people might consider it appropriate to act in certain circumstances. Section 23(2) probably covers the matter just as well.

Stewart Stevenson said that we were concerned in earlier discussions that people who have not been involved in difficult behaviour should not live with the consequences of such behaviour by other people. I understand that, but equally we cannot get into a situation in which people have to live with the consequences of other people's antisocial behaviour because we are unable to act. Not dealing with antisocial behaviour can also have consequences for other people, and I would not want vulnerable people to end up being left in difficult situations because we think that it is better to leave them than to act in some way.

I ask the minister to comment on Scott Barrie's point that the matter is covered elsewhere.

Mrs Mulligan: I understand why Patrick Harvie lodged amendments 272 and 273 and we have some sympathy with his reason, but the bill's provisions on the closure of premises are intended to have a significant impact on serious disorder or nuisance. They are in no way intended to cause further harm to vulnerable people. As the convener said, it is important for us to recognise those who are vulnerable in a property as well as those who live alongside it, but we should not use that as an opportunity to take no further action. It is important to bear in mind the aims of the provisions. We have made it clear throughout the discussions and debates that the measures should be seen as a last resort for high levels of persistent antisocial behaviour. Where criminal activity is taking place, the police should act.

We can all identify premises that are a constant source of disorder and nuisance, such as drinking dens in unoccupied properties and places in which drug dealing goes on, but removing the drug dealer or the people who are drinking simply leads to others taking their place. Part 4 aims to address that problem, and it is vital for the bill to provide the police, in consultation with local authorities and ultimately the courts, with powers to take swift and effective action to provide relief to communities.

We recognise that there are some premises that, for good reasons, should not be subject to the provisions. That is why the bill includes a power to enable ministers to make regulations that will enable certain premises, or types of premises, to be excluded from the police power to authorise the serving of a closure notice. The examples that Patrick Harvie gave are among the cases that are most likely to be included in that. The committee and the Parliament will have the opportunity to consider such regulations in due course. We intend that to be done through the negative procedure, but if the committee is so minded we could change it to the affirmative procedure so that the committee would have the opportunity to debate the matter.

10:45

We have some concerns about the effect of Patrick Harvie's proposals. For example, people who are housed as a result of being both priority need and unintentionally homeless under section 31(3)(a) of the Housing (Scotland) Act 1987 would not be excluded from closure orders. However, those who are housed temporarily and are not in priority need would be. Premises that are used to meet local authorities' obligations under section 29 or section 31(3)(a) of the Housing (Scotland) Act 1987 can include premises over which the local authority has no direct control. It is conceivable that privately let premises that are used to provide temporary accommodation could be occupied by

people who had been evicted from elsewhere, perhaps as a result of antisocial behaviour. In such circumstances, it could be important to have the closure power available. That is the sort of issue that we will examine in more detail when drafting the regulations.

Regulations under section 7 of the Housing (Scotland) Act 2001 are under consideration and will be consulted on shortly. Until those regulations are finalised, the effect of Mr Harvie's proposals is unknown. We would need to consider not only care home services but other services that come under the Regulation of Care (Scotland) Act 2001, such as school care accommodation services, independent health care services and secure accommodation services. It would be inappropriate to consider exempting such accommodation at this stage. If there were a case for exemption, we could use the subordinate legislation powers in the bill for that purpose and consider each suggested exempted category in detail. The committee would have the opportunity to do that.

More generally, we want to be careful to ensure that we do not inadvertently create a loophole that the unscrupulous could exploit, at the same time as we protect those who need support to live in safety in our communities, which is our ultimate aim. I hope that Mr Harvie will consider withdrawing amendment 272 and not moving amendment 273.

Amendment 274 relates to the conditions that must be met before a senior police officer can authorise the service of a closure notice. Instead of a senior police officer having to have reasonable grounds for believing that

"at any time during the immediately preceding 3 months a person has engaged in antisocial behaviour on the premises"

before a closure notice can be served, the test would be that there must have been repeated antisocial behaviour. I suggest to Donald Gorrie that the amendment is unnecessary, because a second condition must be met before the service of a closure notice can be authorised. That condition is that

"the use of the premises is associated with the occurrence of relevant harm"—

a point that the member himself made. "Relevant harm" is defined in section 36 as "significant and persistent disorder" or

"significant, persistent and serious nuisance to members of the public."

That clearly requires there to have been repeated antisocial behaviour before the service of a closure notice can be authorised. I invite Donald Gorrie not to move amendment 274.

Donald Gorrie has indicated that he will not move amendment 280, which seeks to exclude licensed premises. I am pleased by his decision, because there are occasions when it might be useful for the police to have this tool and I would like to leave it on the table.

Although I accept that Patrick Harvie has concerns about the groups that he has mentioned, it is important that we do not close down any options at this stage. However, it will be possible subsequently for the committee to debate the exceptions that need to be made. We need to do that in a fully informed way, so I suggest that the committee should not agree to the amendments today. If we are keen to protect people who are vulnerable, we should not rule out any of the circumstances in which those people may need protection.

Patrick Harvie: I thank members and the minister for a useful discussion. Bearing in mind the minister's comments, especially on the likelihood of the kinds of accommodation to which amendment 273 refers being included in regulations and on our being able to debate those regulations, which are welcome, I will seek leave to withdraw amendment 272. However, I reserve the right to return to the issue at stage 3 if, after studying the minister's words and discussing the matter with colleagues, I find it appropriate to do so.

The Convener: Members can lodge any amendment that they wish at stage 3, but it will be for the Presiding Officer to decide whether it is selected for debate.

Amendment 272, by agreement, withdrawn.

Amendment 273 not moved.

The Convener: I ask Donald Gorrie to move or not move amendment 274.

Donald Gorrie: I still think that the wording that amendment 274 seeks to change is daft, but I will not move my amendment at the moment.

Amendment 274 not moved.

Section 23 agreed to.

Section 24—Service etc

The Convener: Amendment 181, in the name of the minister, is grouped with amendments 182 and 183.

Mrs Mulligan: Amendment 181 is a technical amendment, which is designed to aid clarity. Amendments 182 and 183 are consequences of the fact that hearings for applications are to be covered by summary applications, which are likely to require some amendments to accommodate the nature of those procedures. There is, hence, no need to make provision in the bill as to

"the date and time when, and the place where, the application is to be heard"

as the rules will do that.

The same is true of all the other orders that are covered by this part of the bill—from an order seeking to extend a closure notice, to an order seeking to allow access to any part of a building or structure in which a closed premises is situated. Nor is it necessary to state in the bill to whom notice of any hearing shall be given, because all such matters will be addressed by the summary application rules.

Procedures in civil courts in general are governed by rules of court. When documents are intimated to litigants, they contain information on the action that the person in receipt of the information requires to take. That will allow the procedures to be transparent and, therefore, we do not feel that the provision needs to be made in the bill.

I move amendment 181.

Stewart Stevenson: From what the minister said, I understand that people who are subject to closure notices will receive notification so that they will be able to dispute them, but that that will be covered by the rules rather than included in the bill. Will the minister make that absolutely clear?

Mrs Mulligan: Yes, that will be covered by the rules.

Amendment 181 agreed to.

Amendments 182 and 183 moved—[Mrs Mary Mulligan]—and agreed to.

Section 24, as amended, agreed to.

Section 25—Application to sheriff

The Convener: Amendment 184, in the name of the minister, is grouped with amendments 186 and 187.

Mrs Mulligan: Amendments 184, 186 and 187 are largely technical and tidying amendments that are designed to aid clarity, consistency, sense and accuracy. [*Laughter.*]

Stewart Stevenson: Who wrote that?

Mrs Mulligan: Amendment 187 removes unnecessary words and aligns the provision with the equivalent provision in the Anti-social Behaviour Act 2003 for England and Wales. In so doing, it marginally extends the overall period before which the application for a closure order must be determined.

I move amendment 184.

Stewart Stevenson: It is interesting that the minister might have suggested that, without the amendments, we would not have sense in the bill. Some of us have argued that in the past about certain parts of the bill. I am happy to support the amendments.

Amendment 184 agreed to.

Section 25, as amended, agreed to.

Section 26—Closure orders

The Convener: Amendment 185 is grouped with amendments 188 to 191, 261, 199, 200 and 201.

Mrs Mulligan: Amendments 185, 188, 189, 190, 191, 261, 199, 200 and 201 are largely technical. For example, they rationalise references to closed premises throughout part 4 of the bill. There are also some consequential changes as a result of that tidying. I invite the committee to approve amendment 185.

I move amendment 185.

Amendment 185 agreed to.

Section 26, as amended, agreed to.

Section 27—Application: determination

The Convener: Amendment 275 is grouped with amendments 276, 277 and 278.

Patrick Harvie: Amendments 275 and 277 arise from issues that were brought to me by the Chartered Institute of Housing in Scotland and Shelter Scotland. The policy intention of closure orders is to deal with persistent antisocial behaviour, but the CIHS and Shelter are concerned that they will have the unintended consequence of increasing household debt, rent arrears and, potentially, homelessness.

As a closure order will not end a tenancy, a tenant will still be liable for the rent on a closed property while being required to find alternative accommodation for the period of the closure order. A person who is temporarily absent from a property can receive housing benefit for their closed property for up to three months, but they cannot claim for two properties for more than four weeks. After the four-week period, they will be unable to meet the rental obligations on their closed property and on their alternative accommodation. That could lead to rent arrears and, potentially, homelessness. As well as increasing household debt, that will have implications for the property's landlord, who will see rental income stop and arrears increase, with little or no hope of the debt being paid off. Amendments 275 and 277 will ensure that in considering whether to make an order, sheriffs will take into account the ability of the household to find alternative accommodation.

There is a concern that closure orders will impact on people within the household who did not

carry out the antisocial behaviour that led to the order. In some households, individuals could be intimidated by members of their own family into tolerating antisocial behaviour. That could be particularly true if the household contains children, the elderly or individuals with care needs who are unable to prevent the behaviour in question. In instances where the granting of a closure order will have a detrimental effect on household members who are not responsible for the behaviour, other measures should be used to tackle the problem. The second impact of amendments 275 and 277 is that they will ensure that sheriffs must take into account the vulnerability of individual members of the household before granting an order.

The Executive has already suggested—and the minister may do so again—that courts would take accommodation needs and vulnerability into account without amendments 275 and 277. However, one of the main criticisms of the current court process is the inconsistency of sheriffs' rulings. Amendments 275 and 277 will ensure consistency, and that the vulnerable are protected from debt and homelessness across the board.

I move amendment 275.

Donald Gorrie: My amendments 276 and 278 both say the same thing. I am concerned that the closure of premises is a heavy response. It may be necessary in certain cases, so I am not opposing the whole idea, but it would be helpful if we ensured that the sheriff had to consider whether the closure

"is proportionate in the circumstances."

There may be other ways of tackling the problem without the closure of the premises. The sheriff has to make his own judgment and, as Patrick Harvie said, sheriffs are human and make varied judgments. I think that it would help in guiding them if one of the points that they have to consider is that the closure should be "proportionate in the circumstances". That wording was suggested to me by the Law Society of Scotland, and amendment 276 tries to express my concern that we should not enter into closure orders lightly or inadvisedly. That is my argument for amendments 276 and 278. I have some sympathy for the point that Patrick Harvie is making in his amendments and I shall be interested in the minister's response to them.

11:00

Stewart Stevenson: Once again, Patrick Harvie has lodged amendments that touch upon the issue of whether innocent bystanders can be caught up in action that is properly being taken against people who are instigating antisocial behaviour. The minister will be able to persuade me not to support Patrick Harvie's amendments only if she is most convincingly able to show that such people's interests will be protected. It is a recurring theme throughout certain parts of the bill. I do not think that the Executive's policy intention is to penalise such people, but the wording of the bill may have that practical effect. That is a serious issue and one that I shall continue to pursue.

Elaine Smith: I, too, am extremely concerned about that. I have listened to Patrick Harvie's point about the consistency or otherwise of sheriffs' rulings, and I think that there are concerns there. The problem is that some vulnerable people can be used, and we have heard stories about that happening. Elderly people or people with mental health problems can be used by others because they are in a vulnerable situation. Of course, they need help to get out of that situation, but I am not sure that the right approach is for them to have their houses closed.

Patrick Harvie also touched on there being others in the household. For example, women and children who are intimidated by domestic abuse could be affected by the provision. Although I understand the Executive's thinking and rationale in drafting section 27, I am gravely concerned about it and I look forward to hearing what the minister has to say on the matter.

Mary Scanlon: I would like to make a brief point in support of Donald Gorrie's amendment 276. In determining whether to make a closure order in respect of premises, the sheriff should, in seeking to comply with the European convention on human rights, consider not only whether the order is necessary but whether, as Donald Gorrie said, it is proportionate in the circumstances. I seek clarification in relation to the ECHR.

Ms White: I support all the amendments lodged by Patrick Harvie and Donald Gorrie. Members have already mentioned the fact that some people may be vulnerable or suffering domestic violence, and that is important. I am reminded of the answers that the minister gave us on closure orders for care homes and hostels. Section 27 takes another step forward in extending such orders to families and individuals. The police already have powers to remove a so-called violent person from a household, and I feel that a closure order is a hammer to crack a nut in circumstances in which everyone in a family home is punished for one person's behaviour. That seems to be a running theme throughout the bill and I am extremely worried about it.

My other point is about the attitude to debt. If there is a closure order on a family where domestic violence has been taking place or where there are elderly people or children in the household, they would all be punished by being removed when that house was closed. They would

then be punished further by basically being made homeless, and they might not be able to afford rented accommodation because they could not get the money. It is a very worrying provision—more worrying, perhaps, than the provision for care homes and hostels, because there is legislation for rectifying that through councils. I worry that individuals will be severely penalised if section 27 is agreed without Patrick Harvie's amendments, and I would like to hear the minister's explanation of why it is worded as it is.

The Convener: I would be interested to know whether guidance will indicate what other steps would need to be taken. With domestic abuse, for example, a range of options is available to the police and other agencies to support a vulnerable family before such a stage is reached. The danger is that nothing might happen because, as Elaine Smith said, people who have been exploited and are vulnerable are involved and the sheriff simply would not act. That would leave only the status quo. I would be interested to know what is proposed for the guidance. I do not think that there is any suggestion in the bill that closing the premises is the first thing that the police should do. A range of other things might normally and reasonably be done before that stage is reached.

Cathie Craigie: We are all aware of the issue that Elaine Smith has raised about sheriffs in different courts interpreting the law differently and I know that the Executive is trying to address that through training for sheriffs. However, the bill makes it clear that the sheriff would have to take into account all the circumstances surrounding the application for a notice. Furthermore, section 23 of the bill mentions

"prohibiting access to premises by any person other than—

(a) a person who habitually resides in the premises; or

(b) the owner of the premises."

I think that that makes matters clear. Perhaps the concerns of Patrick Harvie, Shelter Scotland and the Chartered Institute of Housing in Scotland would be addressed by the first part of part 4 of the bill.

However, I look forward to hearing what the minister has to say about guidance, as we clearly do not want to make homeless those who are not causing any problems. On the other hand, we must protect people such as those pensioners in my constituency who live in a block of eight flats and for whom one person is causing serious problems. If the people who regularly visit that person's home to drink were prevented from coming in and out of the premises, the quality of everyone's lives would be improved. I do not want to be over-prescriptive, but we should ensure that we are firm and that we deal with the problems that drinking or drug dens cause in our local areas.

Mrs Mulligan: I would like to clarify that issues relating to domestic abuse are dealt with separately and there is provision for those who are at risk of violence in their homes to be supported through the housing benefit system in a different way. I do not think that we necessarily want to deal with that issue today, although I appreciate the point that members are making, which is dealt with elsewhere.

We should concentrate on Patrick Harvie's amendments. I appreciate that those amendments aim to ensure that the sheriff takes into account the interests of occupants of residential premises that are the subject of an application for a closure order. However, they are not necessary in order to ensure that those interests are considered. I hope to reassure the committee about that, although there is still an outstanding issue to which I will perhaps return.

The implementation of the proposals in the bill will achieve that in three stages. First, the decision to make a closure notice and seek an order will be taken by the police, who have long experience of taking welfare implications into account when deciding on a course of action. Secondly, the police are obliged to consult the local authority, which will undoubtedly consider the welfare of the household that is affected, including how it would deal with a homelessness application. We will reinforce those points in guidance to the police and the local authority. Thirdly, as a matter of normal practice, the sheriff will consider whether the order would be proportionate to the circumstances.

Possible homelessness and an impact on vulnerable family members would be relevant circumstances. The primary issue for the sheriff—which perhaps relates to the point that Cathie Craigie made—is to consider whether the order is needed to prevent the occurrence of serious disorder or nuisance. We think that that is the right test. The main consideration for the court in making a closure order will be the necessity of the order for the prevention of serious disorder or nuisance.

On the point about housing benefit, we expect that if a vulnerable person is in premises that justify a closure order, the circumstances will be so bad that a permanent move elsewhere would be highly desirable. In those circumstances, housing benefit for the premises can continue for up to 13 weeks, even though the claimant has moved out. However, housing benefit is available on two properties for up to only four weeks, if there is an unavoidable overlap.

That takes us back to the concern that I mentioned at the beginning of my comments about those who may wish to return to their property. I would like to take time to consider the point that

the committee raised because it relates to different circumstances. I would not want somebody who was likely to return to their property in the longer term to be disadvantaged or to find themselves with an onerous burden of rent. We need to consider that matter further—I hope that the committee will accept my assurances that we will do so.

Donald Gorrie's amendment 276 relates to the conditions that must be met before a sheriff can make a closure order in respect of premises following an application from a senior police officer.

Stewart Stevenson: May I intervene, convener?

The Convener: I will let the minister finish, but I will let you back in.

Mrs Mulligan: As the bill is drafted, the sheriff must be satisfied that three conditions have been met before a closure order is made. The first is that a person must have engaged in antisocial behaviour on the premises; the second is that the use of the premises must be associated with the occurrence of relevant harm, which is defined; and the third is that the sheriff must be satisfied that the making of the order is necessary to prevent the occurrence of such relevant harm for the period that is specified in the order.

Amendment 276 seeks to add a fourth condition—that the sheriff should not only consider whether the order is necessary, but whether it is proportionate. However, a series of checks and balances is already in place to ensure that the use of the power will be intrinsically proportionate. First, consultation must be carried out with the local authority; secondly, the senior officer must apply to the court for the closure order; thirdly, the court will make a closure order only if it is necessary; and finally, in making its decision, the court will take into account the nature of the premises and anybody who lives there.

In addition to the safeguards that are built into the bill, the court, as a public authority, is obliged to act in accordance with the European convention on human rights and to reach a decision that is proportionate. I think that that is the reassurance that Mary Scanlon seeks. Together with the checks and balances in the bill, that obligation will ensure that the power will be used proportionately, which makes amendment 276 unnecessary. I therefore ask Donald Gorrie not to move it.

Amendment 278 would have the same effect as amendment 276, but in relation to the conditions that must be met before a senior police officer can make an application to extend a closure order in respect of premises. The amendment seeks to add the extra condition that the senior police officer should not only consider whether the extension is necessary, but whether it is proportionate in the circumstances. However, the series of checks and balances that I mentioned also apply to any attempt to seek an extension to a closure order. In addition to the safeguards that are built into the bill, the senior police officer, like the court, is obliged to act in accordance with the European convention on human rights. I ask Donald Gorrie not to move amendment 278.

Stewart Stevenson: It might be useful if the minister clarified whether, in discussing the limitation that people can claim housing benefit for two properties for only four weeks, she had it in mind to persuade her Westminster colleagues to change the housing benefit regulations. We are touching on reserved matters.

Before Patrick Harvie sums up, it might be useful if you could develop slightly the options—either those that fall within the powers of the Scottish Parliament or those that you would seek to operate with your Westminster colleagues—that you believe are available to you to address that.

11:15

Mrs Mulligan: I am conscious that the committee is fully aware of this Parliament's powers and therefore knows that we cannot change the present housing benefit rules. I was seeking to assure the committee that I recognised Patrick Harvie's concern that someone who had been moved out of a property because of a closure notice might not have the ability to pay their rent because they had to pay for two properties for more than the four weeks.

My concern is that we should consider how we can ensure that the process is enacted in such a way that a person would not be left for longer than the four weeks and would therefore not find themselves in circumstances in which they were left with an onerous rent burden because they were having to be moved out of a property that had been the subject of a closure order. At this stage, I do not want to speculate on how we could do that. I can only give the committee the reassurance that I acknowledge the difficulty that some people might face. Given that I have already said that the closure of premises is a high-order tariff, I suspect that it would be used very rarely, which means that a whole host of the cases that we are discussing would not arise. However, for anyone in those circumstances, we need to be able to say how such cases would be dealt with. At this stage, my assurance is that we will consider the matter further and come back to the committee with a suggestion on how to resolve such situations.

Patrick Harvie: I am grateful to the minister for her comments. I take at face value her assurance

that she recognises the seriousness of the issue and that she will make efforts to remedy it. I think that I will press amendment 275. I cannot remember who described amendments 275 and 277 as over-prescriptive, but my main argument is that they require sheriffs only to take factors into account; they do not make it impossible to make a closure order in certain circumstances. Even if factors change, there may still be reason to take them into account.

The Convener: The question is, that amendment 275 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Gorrie, Donald (Central Scotland) (LD)
Harvie, Patrick (Glasgow) (Green)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)
White, Ms Sandra (Glasgow) (SNP)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)

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

As the result is tied, I will use my casting vote to resist the amendment.

Stewart Stevenson: Can we have a full recount, please?

The Convener: I apologise—I miscounted. The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 275 agreed to.

Amendment 276 not moved.

Amendment 277 moved—[Patrick Harvie].

The Convener: The question is, that amendment 277 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Gorrie, Donald (Central Scotland) (LD)
Harvie, Patrick (Glasgow) (Green)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)
White, Ms Sandra (Glasgow) (SNP)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 277 agreed to.

Amendments 186 and 187 moved—[Mrs Mary Mulligan]—and agreed to.

Section 27, as amended, agreed to.

Section 28 agreed to.

Section 29—Extension

Amendment 278 not moved.

The Convener: Amendment 279, in the name of Donald Gorrie, is grouped with amendments 192, 193, 194, 196 and 197.

Donald Gorrie: Amendment 279 is straightforward. If an application for a closure notice comes before the court those who are opposed to it have the right to appeal. Under the bill, if an extension is proposed they do not have that right. Amendment 279 regurgitates the wording that establishes the original right to appeal and applies it to extensions.

People such as a tenant in the premises who did not understand the full implications of the original decision and failed to appeal or to appeal intelligently against it may, in the light of experience, wish to appeal against an extension. It is only fair and consistent that people who are affected by closure orders should have the right to appeal against an extension. If the procedure is initiated early enough, it will not delay the extension.

I move amendment 279.

The Convener: I invite the minister to speak to amendment 192 and to the other amendments in the group.

Cathie Craigie: Convener, will other members have an opportunity to speak?

The Convener: Yes.

Cathie Craigie: After the minister?

The Convener: Yes.

Mrs Mulligan: Amendment 279 seeks to ensure that the sheriff may postpone for a period determination of an application for extension of a closure order to allow interested parties to show why an extension of the order should not be granted.

The Executive has lodged amendments to make it clear that all hearings for applications, including extension orders, will be covered by summary application rules, which are likely to require amendment to accommodate the procedures. It is likely that the Sheriff Court Rules Council will direct that an application under section 29 of the bill should be made by minute in the process in which the closure order was originally made.

Minute procedure has its own timescale. An application by minute for extension of a closure order will need to be made well in advance of the expiry of the order, to allow for intimation to be made and a hearing to be held. That may be the kind of timescale that Donald Gorrie is seeking.

There is no need to make provision on the face of the bill specifying the date, time and place for hearing an application for an extension to a closure order, as the rules will meet that requirement. Similarly, it is not necessary to state on the face of the bill to whom notice of any hearing shall be given. All such matters will be addressed in the summary application rules. As a result, interested parties will have an opportunity to make written or oral representations to the court, which will, therefore, be in possession of all relevant information when assessing whether it is appropriate to extend an order. I hope that that reassures Donald Gorrie.

Amendments 192, 194 and 197 are largely technical. They provide references to closed premises that are rationalised throughout part 4 of the bill.

There are also some consequential amendments. Amendment 193, like amendments 182 and 183, to which I have already spoken this morning, is consequential on the fact that hearings for applications will be covered by summary application rules. For the reasons that I have just given, there is no reason to make such provision on the face of the bill. Amendment 196 simplifies the appeal provisions in part 4 of the bill to cover all the appeal routes in a clear, transparent manner.

The Convener: I will take a moment to clarify procedure. The person who has the first amendment in a group moves that amendment. Then the other amendments in the group are moved. Members without amendments in a group speak at my discretion—I will call everybody who wants to speak. If the minister does not have an amendment in a group, she is called before the person who has the first amendment winds up, because people are interested in what the minister has to say. Does any member wish to speak?

Members: No.

The Convener: In that case, I invite Donald Gorrie to wind up and to indicate whether he wishes to press or withdraw amendment 279.

Donald Gorrie: I seek agreement to withdraw the amendment. The minister has explained the situation and I have learned a little more about the legal system.

Amendment 279, by agreement, withdrawn.

Section 29 agreed to.

Section 30—Revocation

Amendments 188 and 189 moved—[Mrs Mary Mulligan]—and agreed to.

Section 30, as amended, agreed to.

Section 31—Access to other premises

Amendments 190 to 194 moved—[Mrs Mary Mulligan]—and agreed to.

Section 31, as amended, agreed to.

Section 32—Reimbursement of expenditure

Amendment 261 moved—[Mrs Mary Mulligan]—and agreed to.

Section 32, as amended, agreed to.

Section 33—Appeals

Amendments 196 and 197 moved—[Mrs Mary Mulligan]—and agreed to.

Section 33, as amended, agreed to.

Section 34 agreed to.

11:27

Meeting suspended.

11:39

On resuming—

After section 34

The Convener: Amendment 198, in the name of the minister, is in a group on its own.

Mrs Mulligan: Amendment 198 will provide the police with the power of arrest without warrant in relation to the offences associated with the closure of premises in part 4 of the bill. An example of such an offence is where a person without reasonable excuse remains on or enters premises in contravention of a closure notice or in respect of which a closure order has effect. The provision mirrors those at section 10 in respect of offences associated with antisocial behaviour orders and at section 19 in respect of offences associated with the dispersal of groups. Although common-law powers could be used in the case of such offences, amendment 198 will put beyond doubt the power of arrest without warrant, as in the case of offences associated with the dispersal of groups and with ASBOs.

I move amendment 198.

Donald Gorrie: I dare to reveal my ignorance of the law. Is amendment 198 about extending the existing powers of the police? I understand from what you said that the police have the right to arrest without warrant for the offence of breach of

the peace. Is amendment 198 in line with existing practice, which is being extended to cover the offences that you mentioned, or will it extend the powers of the police?

The Convener: Does anyone else wish to come in before I ask the minister to respond?

Elaine Smith: I have a quick question to ask on the back of what Donald Gorrie asked. If the police have that power, will we still have a need for corroboration by two officers?

Mrs Mulligan: The simple answer is yes. Donald Gorrie asked whether the police's powers are being extended. That would depend on whether the police already have the power. In some cases, they would already have the power, in which case we would not be extending their powers. In other cases, in order to be clear, the powers might be extended.

Amendment 198 agreed to.

Section 35 agreed to.

After section 35

Amendment 280 not moved.

Section 36—Interpretation of Part 4

Amendments 199 to 201 moved—[Mrs Mary Mulligan]—and agreed to.

Section 36, as amended, agreed to.

Section 37—Application of noise control provisions to local authority areas

The Convener: Amendment 202, in the name of the minister, is grouped with amendment 254. Amendment 254 would be pre-empted by amendment 18 in the next group of amendments.

Mrs Mulligan: Amendment 202 is a technical amendment that replaces the reference to section 42 with a reference to section 47, to reflect the fact that all of sections 39 to 47 are the noise control provisions that will apply to a local authority area where the local authority resolves to apply them using the power in section 37. Amendment 254 is a technical amendment that will move section 47 to follow section 42, so that the enforcement provisions in part 5 follow on from each other in a logical sequence.

I move amendment 202.

Amendment 202 agreed to.

The Convener: Amendment 203, in the name of the minister, is grouped with amendments 281, 204, 282, 205, 283, 206 to 210, 284, 211, 285, 212 and 213. I have some pre-emptions to point out, of which members might want to take a note. It says on my script to read them out slowly. If amendment 204 is agreed to, I cannot call amendment 282. Amendment 205 pre-empts amendment 283, amendment 210 pre-empts amendment 284, and amendment 211 pre-empts amendment 285.

11:45

Mrs Mulligan: Amendments 203 to 213 adjust the timescales and publication requirements that a local authority must follow if it resolves to apply, revoke or vary the noise control provisions in respect of its area under sections 37 and 38.

A local authority may resolve under section 37 to apply the noise control provisions to its area, or it may decide under section 38 to revoke or vary such a resolution. Amendments 203 and 209 reduce from three months to two months the earliest date after which a decision under section 37 or 38 respectively can come into effect. The length of time that that takes is for local authorities themselves to determine, but we concluded that the minimum period of three months was unnecessarily long. In consequence, amendments 205 and 211 reduce from two months to one month the minimum period for the publication of such decisions by newspaper advertisement before the decisions take effect.

Amendments 204, 206, 210 and 212 reduce from two months to one month the minimum notice period that local authorities must give to Scottish ministers before a resolution to adopt or a decision to vary or revoke the noise control provisions comes into force. That is because ministers are to have no formal role in the decision-making process, which is entirely a matter for the local authority. The amendments also make provision for similar notification to be given to adjacent local authorities, in the light of section 39(6), which makes provision for the enforcement of noise control provisions in respect of noise emitted over local authority boundaries.

Amendments 208 and 213 require the recipient authority to

"take such steps as it considers necessary for the purpose of making persons in its area aware of the contents of the notice."

Amendment 207 requires the notification of a decision to apply the noise control provisions to a local authority area to include specific information about certain key aspects of the enforcement provisions that will underpin the noise control provisions, such as permitted levels of noise—as prescribed under section 43—approved measuring devices and fixed-penalty notices.

The amendments will speed up the process of adopting, varying or revoking the noise control provisions. They will ensure that ministers and adjacent local authorities receive adequate

notification and that the decisions are adequately publicised. Overall, the amendments seek to enhance the transparency of the decision-making process.

Donald Gorrie's amendments 281 to 285 would also adjust the timescales and publication requirements that local authorities must follow if they resolve to apply or to revoke or vary noise control provisions in their areas under sections 37 and 38. As I said, Executive amendments 203 to 213 amend those timescales and publication requirements, so I hope that Donald Gorrie will not move his amendments.

Given the significance of the new noise control provisions, amendments 203 to 213 achieve a more appropriate balance between the effective operation of the provisions and the need to ensure that the decision-making process is transparent. I hope that the committee will agree to them.

I move amendment 203.

Donald Gorrie: Amendments 281 to 285 in my name would amend the bill to reduce the minimum period of time before the noise control provisions could come into effect from three months to three weeks and the notification periods in relation to those provisions from two months to two weeks.

I welcome the fact that the minister has recognised that three months is an unnecessarily long period to wait before the noise control provisions can come into effect, but I think that two months is still too long. If a nuisance has been identified, it is important that the public authorities are seen to respond as quickly as possible. A response time of two months, during which the people who are causing the trouble can continue to belt out whatever noise it is, will not make local democratic control attractive to the people who are affected by noise.

I think that three weeks is a much more reasonable time for the bureaucratic wheels to turn, for people to have the necessary opportunity to complain, object or appeal and for the rules to take effect. This is not a third-world-war issue, but I feel that the quicker it can be done, the better. In my view, it could be done within three weeks, so I would prefer three weeks to two months, although even two months is a lot better than three months, so we have advanced a bit. However, I feel that my amendments are worth supporting.

Mrs Mulligan: I accept Donald Gorrie's concerns about the length of time. However, it is not the case that nothing will happen during that time. Other noise provisions could still be enacted during that period, although the new provisions would not necessarily come into force until that time. As I said in my closing paragraph, it is a question of getting a balance between action and transparency. We feel that our proposals are a good balance at this stage, although we will obviously need to keep the matter under review.

Amendment 203 agreed to.

Amendment 281 not moved.

Amendments 204 to 208 moved—[Mrs Mary Mulligan]—and agreed to.

The Convener: Amendment 8, in the name of Bill Aitken, is grouped with amendments 9 to 20. Amendment 18 in this group pre-empts amendment 254, which was debated in a previous group.

Bill Aitken: The purpose of these amendments is to leave out part 5 of the bill—the part relating to noise nuisance. I fully appreciate and sympathise with what the Executive is seeking to do. Noise nuisance affects a great many communities throughout Scotland. It can make life miserable for those who live next door to, upstairs from or downstairs from people who have so little consideration for their neighbours that they conduct themselves in a manner that inevitably causes an awful lot of grief to all concerned. We are totally sympathetic towards anything that will ease that difficulty.

The problem is that we do not think that part 5 is workable. We also think that the legislation that is in place at the moment is perfectly adequate to deal with the problem. The common-law offence of breach of the peace encapsulates much antisocial behaviour, and there can be no doubt whatever that playing loud music, singing songs and having loud conversations and arguments in the early hours of the morning would constitute a breach of the peace.

A breach of the peace is prosecutable under summary complaints and can attract, at worst, a sentence of six months' imprisonment, although in most cases a fine would be imposed. However, breach of the peace legislation includes a useful provision that makes it possible for the court to order the confiscation of the musical instrument, compact disc player or whatever caused the particular difficulty. In my experience, that provision is fairly effective in dealing with people who have committed such offences.

Even if one leaves aside breach of the peace legislation, one can turn to section 54 of the Civic Government (Scotland) Act 1982, which, inter alia,

"allows a uniformed police constable to require a person making a noise 'giving any other person reasonable cause for annoyance' to desist. No specific noise level has to be proven and the police can take immediate action. The noises covered are … sounding or playing of musical instruments … singing or performing and … operating any sound producing device."

If the noise maker does not desist after a warning, the police officer can charge them with an offence

under the 1982 act. It should be noted that the locus of such an offence would include private property, such as a private dwelling-house or flat.

I submit to the committee that legislation is already in force. If I sought support in that respect, I could do little better than to look at Scottish Office housing and area regeneration circular 16/1998, entitled "Housing and Neighbour Problems". That circular encapsulates and argues the position very well—in fact, I could have written it in preparation for this morning's meeting. It says clearly that offences of noise nuisance should be dealt with by means of a breach of the peace charge or under the Civic Government (Scotland) Act 1982. I am not certain what has happened in the five years since that circular was written and the passage of the Anti-social Behaviour Act 2003 last October to make the minister change her mind. The law is in place.

Let us go further and consider what is likely to happen when somebody commits such an offence. Once the procedure of the local authority officer calling and giving the appropriate warning has been gone through, a fixed-penalty notice would be issued. I draw members' attention to the recent publicity that surrounded the effectiveness of fixed penalties and fiscal fines. I am sure that the convener will agree that it is unfortunate that we have many instances of antisocial noise nuisance in Glasgow, but in the Glasgow area, only 20 per cent of fiscal fines and fixed penalties are paid. I suggest that those people who do not pay their fines when the procurator fiscal imposes them will not rush to pay the local authority either.

I suggest in the strongest possible terms that this area is best left alone. We must deal with enforcement, but that should be pursued by the Executive from another direction, to ensure that the police carry out their duties, respond to calls of complaint, issue the appropriate warnings and take the appropriate action when such warnings are not heeded. Thereafter, the matter is for the courts, which are in a position to enforce payment of fines.

I move amendment 8.

Stewart Stevenson: In his remarks, Bill Aitken has failed to address why the existing legislation is not dealing with noise nuisance. It is my experience, and the experience of people in my constituency, that noise nuisance is not dealt with effectively, notwithstanding guidance and legislation and the existence of the common law. I will need some persuading that we should not act in this area. Bill Aitken has yet to deploy effective arguments to that end.

In particular, I point to the escalator that the legislation appears to provide, whereby people continue to move closer to more severe penalties, which means that there is a way of sending out sufficient early-warning signs.

This part of the bill differs in many ways from the part on dispersal powers—I share Bill Aitken's belief that those powers should not be included in the bill—in that, during the consultation period, neither the committee nor the Executive heard people saying that the current provision is highly effective and we should not introduce new powers, which is what we heard on dispersal. I am strongly minded not to support the deletion of section 37, because it appears to contain useful additional powers. If it were to create a more effective noise management regime in my area of the country, I would welcome that, and I am sure that many of my constituents would do likewise.

12:00

Donald Gorrie: I support Stewart Stevenson, in that it is clear that the present arrangements do not work satisfactorily, so the status quo is not a good option. Nobody can tell whether such parts of a bill will work well, but one useful effect that it will have will be to show councils and the public that the Parliament and the Executive take noise nuisance seriously—the issue will be given louder attention, so to speak. I hope that it will also lead to the Executive providing, or helping councils to provide, better equipment for measuring noise, so that complaints can be dealt with more speedily. Bill Aitken might be right and, in the end, the provision might not work all that well, but it is an improvement on the current position and it advertises the issue in a useful way.

Scott Barrie: Not for the first time, I find myself totally disagreeing with Bill Aitken. As Stewart Stevenson and Donald Gorrie said, it is patently obvious that the current regime does not work effectively, given the number of complaints about noise nuisance that local councillors and national politicians receive. We need to send out a signal that the Parliament takes the issue seriously. For too long, people whose neighbours create noise nuisance have been literally knocking their heads against the wall trying to get something done about it, but there has been no abatement. I do not think that there is anything wrong with giving local authorities increased powers, which is what part 5 of the bill proposes. That will not replace the existing legislation but can be seen as complementary to it. It will ensure that an issue that has plagued too many people for too long will be dealt with more effectively.

Patrick Harvie: My thoughts are also in line with Stewart Stevenson's comments. I am not tempted to support the proposal to strike out section 37, largely because we have not heard a chorus of opposition from people who feel it to be particularly offensive. It is not the only aspect of

the bill that is open to the criticism that it merely reproduces existing powers, which is the main argument that Bill Aitken makes. I agree with other members that the current provision does not work, but I ask the minister to reflect on the need not only to send out a signal to say, "This is not working so we need to do it again," but to ask and understand why the current situation does not work. The same criticism applies to dispersal, and it might be worth while to reflect on it in this case too.

Cathie Craigie: I am not at all persuaded by Bill Aitken's argument in support of his amendment 8, which seeks to delete section 37. He said that there is existing legislation to deal with the matter and pointed to the offence of breach of the peace, which is the catch-all offence. He is knowledgeable about the law, but we know that senior legal figures regard the definition of breach of the peace as too wide; even then, it would be impossible to list in the definition everything that people would like to include in it.

We need detailed and understandable legislation and part 5, as amended by Executive amendments, would be clear and understandable. For a start, that would let people who suffer excessive noise problems in their community know at whose door they can chap and that they can expect support from their local authority, which will have clearly defined powers to allow it to take action. To remove part 5 from the bill would be a backward step.

Elaine Smith: I, too, disagree with Bill Aitken, but I suppose that at least he is being consistent in his arguments.

I agree with what Stewart Stevenson said, but his argument is rather strange, given his opposition to the power of dispersal. The same principle applies to noise nuisance as applies to the power of dispersal. The existing powers are not working in many communities. Stewart Stevenson seems to agree with the principle in this case because he has had experience in his own patch of noise nuisance. Perhaps he has not experienced the kinds of antisocial behaviour that others experience in their constituencies and communities—for example, when groups act in a threatening manner and intimidate people, but nothing is done about it. I believe that the same argument holds for noise nuisance as for antisocial behaviour; I agree with that argument.

Mrs Mulligan: The provisions on noise nuisance that we are considering have been favourably received to date, as all members said, both during the original consultation and during stage 1. Therefore, I am surprised that Bill Aitken has lodged amendments 8 to 20.

The noise nuisance provisions will deliver commitments that will be enabling and flexible. Local authorities will be able to adopt the provisions, depending on their own circumstances and on whether they deem the provisions feasible. The provisions are also designed to complement existing noise control legislation rather than replace it. Where existing legislation works, it will continue to do so; where it is not working, part 5 of the bill will complement it.

On Patrick Harvie's point, we expect that the use of more effective equipment will enable more prosecutions for noise offences, which will be a deterrent to others who might seek to cause noise offences. We hope to see a reduction in instances of noise problems. I should mention that additional resources will be available for local authorities to tackle the issue, which should enable that reduction.

Both local authority officers and the police will be able to utilise the new provisions, which are designed to be a quick and effective deterrent that will curb noise nuisance within a property. We regard part 5 as responding to the genuine concerns that people have made known to us.

In his opening comments, Mr Aitken sought to suggest that the use of fixed-penalty notices will be ineffective because nobody pays them, but he was selective in his example. City of Edinburgh Council officials recently informed me that they have in excess of a 90 per cent collection rate for notices issued for dog fouling—it was a former colleague of Mr Aitken who introduced the Dog Fouling (Scotland) Bill. Therefore, there are examples of fixed penalties being an effective measure and we can take some comfort from that in taking forward the proposals in part 5.

I recognise that, as ever, the Conservatives seek to reduce Government involvement in day-to-day life, so perhaps Mr Aitken is being consistent, but he is incorrect. We are here to respond to the concerns that communities throughout Scotland have expressed about noise. That is why we have introduced the provisions.

Bill Aitken: The bulk of the argument that has been made against amendment 8 and related amendments is that existing legislation does not control noise nuisance effectively. That argument is correct. However, if the legislation has been ineffective, surely we should address why it has been ineffective and what measures we should take to make it effective.

Such matters encapsulate a much wider argument about the Scottish Executive's failure to acknowledge that we do not have enough police officers out on the beat and about the fact that we do not have a beefed-up prosecution service that can cope with the large number of police reports. That is the nub of the argument. If the legislation is not working, that is the Executive's responsibility,

because the Executive has failed to provide the appropriate resources to the police and the prosecuting authorities.

Elaine Smith said that my arguments were the same arguments as could have been advanced about the powers of dispersal, which we discussed last week. I remind her that I made exactly those arguments last week. I said that the crime of breach of the peace could deal with the problem that we discussed, so those powers were also unnecessary.

If the measures are to work, they must have a deterrent effect. We agree on that. I suggest that, although 90 per cent of those in Edinburgh who admit allowing dog fouling pay their penalties, that involves only 10, 20, 30 or 40 cases—certainly not many. Throughout Scotland and especially in urban areas, imposing fixed penalties is an open question. They are not terribly effective because of the high non-payment rate.

The common law and the Civic Government (Scotland) Act 1982 have a power of arrest. In the Glasgow vernacular, the prospect of a night in the jail would probably be a much more effective deterrent than a fixed penalty and whether or not to pay it.

As the minister conceded, the measures will place more responsibility on local authorities, which will have a cost consequence. I have no doubt that the Executive will compensate for that through a grant—or perhaps not. If the existing situation is unsatisfactory, as all members agree, the matter should be followed up by ensuring that the existing law is enforced, rather than by passing more law that will be even more difficult to enforce.

The breach of the peace point that Cathie Craigie made is a little bit of a red herring. What is being discussed at the High Court at the moment would not include the cases that we are discussing. Case law has been well laid down in cases of breach of the peace following rowdy parties and the playing of loud music. I was the judge at first instance in at least one of those cases. The appeal court has upheld decisions that such offences can be more than adequately dealt with under the catch-all breach of the peace charge. I will press amendment 8.

The Convener: The question is, that amendment 8 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Scanlon, Mary (Highlands and Islands) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Harvie, Patrick (Glasgow) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)
White, Ms Sandra (Glasgow) (SNP)

The Convener: The result of the division is: For 1, Against 8, Abstentions 0.

Amendment 8 disagreed to.

Section 37, as amended, agreed to.

Section 38—Revocation or variation of resolution under section 37

Amendments 209 to 213 moved—[Mrs Mary Mulligan]—and agreed to.

Amendment 9 not moved.

Section 38, as amended, agreed to.

Section 39—Investigation of excessive noise from a dwelling

12:15

The Convener: Amendment 214, in the name of the minister, is grouped with amendment 216.

Mrs Mulligan: Amendment 214 seeks to remove the power of local authorities to investigate excessive noise on their own initiative, without having received a complaint—a power for which section 39(1) makes provision. It is anticipated that, in most cases, noise complaints under part 5 will originate from the owner or occupier of neighbouring buildings. As it should be possible for local authority officials to take measurements from the complainant's building, with their permission, it is unnecessary to retain the power in section 39(1).

Amendment 216 is a consequential amendment, which seeks to remove the reference to a local authority instigating an investigation without having received a complaint.

I move amendment 214.

Ms White: I listened carefully to the minister's explanation, because I was a bit concerned and confused about why she would want to remove the power in section 39(1), which seems perfectly sensible to me. There might be a situation in which noise is coming from a private dwelling that does not have immediate neighbours or from the only house in a close. People might not make a complaint against the occupant of such a house, because they are frightened of that person. I would like more clarification of why the police cannot simply act by themselves, without an incident having to be reported. It might be the case that the people who are making excessive noise come from a group that is terrorising the

neighbourhood, so people are frightened to report them. In such circumstances, why would the police not be able to act under their powers?

Donald Gorrie: My point is basically the same. Is it not possible that the immediate neighbours might wish to complain unofficially rather than officially, because of fear of victimisation? If they could do so, the council could respond, even though an official complaint had not been made. That aspect is worth considering.

Patrick Harvie: I back that up. It will not come as a surprise to anyone to learn that there are several themes in the bill with which I am very uncomfortable and which I oppose. However, I do not think that anyone has a problem with the taking of action to ensure that people are not unnecessarily subjected to antisocial behaviour as a result of their unwillingness to report it, because of intimidation or fear.

I listened to what the minister said, but I am struggling to understand the reason for the removal of section 39(1). I ask her to give a clearer explanation.

The Convener: Section 39(3) says:

"A complaint under subsection (2) may be made by any means."

I ask the minister to clarify whether that means that a complaint can be made in confidence.

Mrs Mulligan: The convener is absolutely correct to say that a complaint could be taken in confidence. There is no reason to disclose from where the complaint has come. Sandra White and Donald Gorrie referred to people who for various reasons might not want to be known to be complaining. I understand about intimidation and people's fears, whether real or just perceived, and we need to account for them. However, the example that the convener gave is of a complaint that has been made and which would therefore be covered by these measures. There are also other enabling powers in environmental legislation that could allow action to be taken.

The reality of the situation is that noise detection equipment, if used, needs to be placed somewhere. Without a complaint being made by someone, it would be difficult to find somewhere to place the equipment. It is important that we have that initial contact so that we know where the noise is being transmitted to and the area in which concern is being caused—that need not necessarily be in a building but could be outside. However, we need to have the complaint to take the issue forward. That is all that the measures do. I reassure people that they can make complaints and remain anonymous, so they need not feel afraid to complain.

Amendment 214 agreed to.

The Convener: Amendment 215 is grouped with amendments 217 to 227, 229 to 231, 233, 243, 245 to 253 and 256 to 260. Amendments 229 and 230 are pre-empted by amendment 287, which is to be debated in a later group.

Mrs Mulligan: Convener, you will appreciate that there are a lot of amendments in the group, although I will try to keep my comments brief.

The main amendment in the group is amendment 256, which seeks to insert a section on the meaning of "relevant property" and "relevant place". Amendment 256 clarifies and expands the definitions concerning the places from where noise can be emitted—that is, the "relevant property"—and the places where noise can be measured—that is, the "relevant place". As originally drafted, the definition of the places from where noise could be emitted was modelled on the definition of "dwelling" in the Noise Act 1996, and aimed to tackle noise emitted from domestic dwellings. However, in response to consultation, the definition has been expanded to cover places other than dwellings.

The amended definition—of "relevant property" as opposed to "dwelling"—covers: accommodation, including permanent and temporary accommodation; land belonging to or enjoyed exclusively with that accommodation, including private gardens; common land, such as a common garden; and other common property, such as the common stair within a tenement.

On the definition of "relevant place", research commissioned by the Executive concluded recently that at present it is not technically possible to measure noise from outside, so the definition of "relevant place" has been restricted to require measurement to take place from within a building. In practice, that will allow local authority officers to measure noise levels from a building that is in close proximity to the place from which the noise is being emitted.

Amendment 256 also seeks to insert provisions to enable the definition of "relevant property" and "relevant place" to be amended in future if technical developments in the measurement of noise make that possible. Given the importance of such future possible changes, amendment 260 seeks to insert a reference to the new section on the meaning of "relevant property" and "relevant place" into section 108, which would require any order amending those definitions to be subject to the affirmative procedure.

In light of those amended definitions, there is a substantial number of consequential amendments to other sections in part 5, particularly concerning the replacement of references to "dwelling" with references to "relevant property". I have a list of those amendments, convener, which I will read out

if you wish me to, but I will spare the committee at this stage.

I have listened to local authorities during the consultation and the amendments should ensure that local authority officers are able to tackle noise nuisance in respect of a wide range of properties, taking account of the practicalities of being able to measure noise levels effectively.

I move amendment 215.

Patrick Harvie: I would like you to clarify something. The definition is being expanded to include private gardens, yards and similar areas, but I was not clear from what you said whether it would be possible for someone to make a complaint about the noise that they hear from the neighbouring garden or yard when they are in their own garden or yard. Could they make a complaint only about the noise inside a house?

The Convener: The minister can respond to that later. Do you want to say anything else?

Patrick Harvie: No. That was the only issue that I wanted to clear up.

Stewart Stevenson: I apologise for missing some of what you said, minister. I had to go out briefly because of an urgent constituency matter.

I am sure that I heard you say that we can measure noise effectively only within premises, but I am slightly puzzled by that. If the unacceptable level of noise is confined to noise inside the premises, that is not, of course, an issue for those who are outside the premises, whom we are seeking to protect from the effects of such noise. I am susceptible to further explanation, but I would have thought that it would be important to measure the noise where it affects the people whose peace we are seeking to protect. However, it is perfectly possible that I have misunderstood what you said. I am anxious to protect people from noise, but there seemed to be a logical inconsistency in what you said, which I invite you to clarify.

Donald Gorrie: I would like one matter to be clarified. If in the summertime a family plays in their garden very loud music that is totally unacceptable to the people next door, will the measurement relate to the noise in the garden of the people next door or to the noise in their house? They might be in their house, but they, too, might like to be in the garden during the summer. That is a small point, but I would like the matter to be clarified.

Mrs Mulligan: I understand members' concerns and am sorry if I was unclear. The equipment that is currently used to measure noise can be used only within a property. It can therefore be used in a house to measure noise outside, but not in a garden to measure noise in another garden. However, I suggested that that might become possible in the future, which is why we want to leave things open. We could then return to the matter and deal with it at a later stage when the technology has progressed.

Stewart Stevenson: May I intervene to raise a point for clarification? The level that would be measured would be the level within the premises in which the noise is seated rather than the level at the place at which the noise is heard by the person who sees it as antisocial behaviour.

Mrs Mulligan: The level is what a person hears from where they are rather than what is actually happening at the place in question. That is why we are saying that the noise needs to be measured within a building. I hope that that clarifies matters.

The Convener: So if a person was out in their garden, there could be a level of noise inside someone's house that could be deemed to be intolerable outside.

Mrs Mulligan: Yes.

The Convener: I am not sure whether we are sure about the matter, but we shall press on.

Amendment 215 agreed to.

Amendments 216 and 217 moved—[Mrs Mary Mulligan]—and agreed to.

The Convener: I suggest that the meeting should now be suspended for 30 minutes—at most—for lunch.

12:30

Meeting suspended.

13:05

On resuming—

The Convener: We continue with day 4 of stage 2 consideration of the Antisocial Behaviour etc (Scotland) Bill. Amendment 172, in the name of Elaine Smith, is grouped with amendment 173.

Elaine Smith: Amendment 173 is the main amendment in the group, so I will speak to that. I appreciate that part 5 of the bill is necessary to protect communities from excessive noise nuisance. However, amendment 173 has been promoted by the National Autistic Society Scotland, because of concerns about unintentional consequences of the provisions in this part of the bill.

I will give a couple of examples. In oral evidence to the committee on 7 January, Jennifer Turpie from Children in Scotland said that she was aware of a case, albeit one in England, of a child with autism making so much noise—by knocking on walls and so on—that the neighbours complained

and an ASBO was applied for. Such behaviour by a child could constitute antisocial noise nuisance but, if the case went to the sheriff, that would cause distress to their parent. The noise is not deliberate and I find it difficult to see how such behaviour, which is due to a medical condition, could change and adjust in the future.

Shelter Scotland gave another example, although I am not sure that it was presented to the committee. A woman contacted the organisation following a bid to have her evicted from her home when her neighbours in the flat below made complaints to the council. She is the single mother of an autistic toddler who made a lot of noise running around her small flat. The council would not transfer her to another property because she had some rent arrears. It also stopped her housing benefit because her neighbours said that she was not using the flat as her main address. In fact, because she was trying to live as quietly as possible and not to disturb her neighbours, she was keeping her child out of the flat for long periods.

It is because of such examples that the National Autistic Society has concerns about this part of the bill. I invite the minister to comment on those concerns and on how guidance might help to allay the society's fears.

I move amendment 172.

Stewart Stevenson: I am very seized of the weight of the arguments that Elaine Smith makes. I, too, noted the evidence that the committee was given at stage 1. However, I have concerns about the amendment, which Elaine Smith may be able to allay.

The amendment seeks to prevent a notice being served. A notice simply states that the noise that is being emitted—which, presumably, is reasonably regarded as antisocial behaviour by another person—should cease. Might it not be more appropriate, in those circumstances, for a duty to be placed on the local authority to solve the problem in a way that does not disadvantage autistic children or other sources of such difficulties but deals with the situation faced by those who are subjected to the noise? I am interested to hear what the minister has to say on that subject. People should have the right to live free from unreasonable noise, even if the cause of that noise is in a sense reasonable. The minister should seek to address how we might achieve equity for both parties in such cases.

Mary Scanlon: I have a lot of sympathy with the points that Elaine Smith raises and I understand the difficulties that arose in the circumstances that she outlined. However, I have problems with amendment 173, which says:

"Before serving a notice about the noise under section 40 the officer shall have regard to all of the circumstances".

I would have thought that the police, given the training that they receive and the additional guidance that I hope the bill will make available, would have regard to all the circumstances, including any disability, irrespective of whether the amendment was agreed to. I would have thought that that would be part of the professional policing role that the bill envisages. Will the minister clarify that the police will always take any disability into account?

Cathie Craigie: I understand the National Autistic Society's real concerns that the people that it represents might become the victims of the powers in the bill. It is disturbing that, in one of the cases that Elaine Smith cited, which we heard about in evidence, the action of the housing department had gone such a long way before it was realised that the person had difficulties that might be adding to the noise. I hope that professional housing officers and police officers in Scotland would do a better job than that and that they would be able to get to the bottom of the problem. Will the minister assure us that the guidance will spell out what should be done in such situations in a bit more detail, if that is necessary?

Donald Gorrie: The issue is one of a number that have been raised by organisations that help people who have various disabilities. I know that the minister has met those organisations and has tried to assuage their fears, but it would be worth while for her and her officials to meet some of those concerned groups again to discuss the various points that they have raised about situations in which the people whom they support might be unfairly treated. Perhaps the minister could consider pursuing that before the bill is passed.

Mrs Mulligan: I understand the intention behind Elaine Smith's amendments 172 and 173 and I recognise the genuine concerns that she raised in the examples that she gave. However, I believe that the amendments are unnecessary and I will try to explain why.

The new noise offence will be measured objectively against permitted levels; it will not be based on the subjective opinion of the investigating officer. Although under section 39(2) local authorities will be under a duty to investigate complaints about excessive noise, the provisions that follow, including the provisions on warning notices in section 40, are framed in a way that will give local authorities sufficient flexibility to respond appropriately to instances of excessive noise, as the circumstances of the particular case require.

As is the case with the existing statutory nuisance powers, we expect local authorities to take into account all the relevant circumstances that surround the emission of the noise, including

any disability of the perpetrator. Local authority investigation officers—and the police, to respond to Mary Scanlon—will use their experience and common sense and will be able to consider other possible approaches to resolving the problem, such as mediation.

In any event, we also intend to issue noise management procedural guidance to accompany the act. Those who are responsible for enforcing the provisions will be required to take account of that guidance. In response to Cathie Craigie and Elaine Smith, I say that the guidance will reinforce the need to take appropriate account of people who have special needs.

13:15

At stage 1, we listened carefully to the evidence from the National Autistic Society Scotland, which argued for the need for an explicit concept of intent in the interpretation to ensure that powers are not used inappropriately against people with autism. I reiterate the commitment that we made at stage 1 to ensure that guidance on the implementation of provisions of the bill would address concerns about the potential for inappropriate use of powers against children and young people with autism or other special needs.

Since stage 1, I have met the cross-party group on autistic spectrum disorder and I know that officials have met it separately. We have open dialogue with the group and we will continue to monitor the situation. I hope that Donald Gorrie feels reassured in that respect. At the group's most recent meeting, members talked about how the measures that we are putting in place will provide additional protection for people with autism and they were reassured by the provisions that we are putting in place to prevent discrimination.

In the unlikely situation that a warning notice is served and results in a prosecution in respect of a person with special needs, the bill ensures that the defence of "reasonable excuse" is available, which is provided for in section 41(3) and could apply in a situation where the noise was caused as a result of the person's disability. That addresses the point that Stewart Stevenson made about striking a balance between responding to the noise and the problems that it was causing and acknowledging that particular reasons for the noise would have to be considered, too. As he said, a balance needs to be struck. The training and experience of the officers responding will ensure that such situations are dealt with sensitively.

Elaine Smith: Stewart Stevenson asked about the notice being served, which, in itself, would be disturbing for a parent of a child with ASD or other conditions or disabilities. I note the minister's comments about mediation, which I think is a sensible route to take. I would expect the antisocial behaviour task force in Coatbridge to carry out mediation and I believe that it does. I agree with Donald Gorrie's suggestion that it would be helpful to have other meetings with the relevant persons. I am heartened by what the minister said. I note particularly that she talked about incidents being objectively measurable. I have moved other amendments and have not pressed them and, given her assurances and arguments, I will not press amendment 172 and I will not move amendment 173.

Amendment 172, by agreement, withdrawn.

Amendment 173 not moved.

Amendments 218 and 219 moved—[Mrs Mary Mulligan]—and agreed to.

The Convener: Is Bill Aitken moving amendment 10, which was debated with amendment 8?

Bill Aitken: Given that the principle has been established, I will not move amendment 10.

Amendment 10 not moved.

Section 39, as amended, agreed to.

Section 40—Warning notices

Amendments 220 to 225 moved—[Mrs Mary Mulligan]—and agreed to.

Amendment 11 not moved.

Section 40, as amended, agreed to.

Section 41—Offence where noise exceeds permitted level after service of notice

Amendments 226 and 227 moved—[Mrs Mary Mulligan]—and agreed to.

The Convener: Amendment 228, in the name of the minister, is grouped with amendment 286.

Mrs Mulligan: Amendment 228 is a technical amendment to section 41. Section 41(3) contains the defence of "reasonable excuse", which is available to a person charged with an offence under section 41(1). The amendment makes it clear that an evidential burden, rather than a more onerous persuasive burden, is placed on the accused. In other words, the accused must show sufficient evidence of a reasonable excuse for the act for which he or she has been charged. However, the onus of proof remains with the prosecution.

We considered that, given the circumstances of the section 41(1) offence, the imposition of an evidential burden is sufficient and it is unnecessary to spell out how and to what extent the accused should raise the section 41(1)

"reasonable excuse" defence as an issue before the court in a specific case. The onus will remain on the procurator fiscal to prove that the offence has been committed, notwithstanding that such an issue has been raised. It will then be for the court to determine the matter having heard all the evidence. I hope that members will support amendment 228.

In contrast, Donald Gorrie's amendment 286 would remove the provision in section 41 that enables a person to be convicted of a noise offence on the evidence of one witness. The bill's provisions envisage that sufficient evidence that a noise offence has been committed will be obtained through evidence of the measurement of the noise level by an approved device, together with the evidence of one witness. Paragraph 4(8) of schedule 4 amends schedule 9 to the Criminal Procedure (Scotland) Act 1995 to that effect.

That does not, of course, affect the requirement for corroboration in Scots criminal law, as two independent sources of evidence—the objective measuring machine and the evidence of the witness—are still required. Amendment 286 therefore proceeds on the mistaken assumption that no corroboration is required. I understand that, in most cases, it is envisaged that, for health and safety reasons, local authority investigation officers will work in pairs. In practice, therefore, there will be two witnesses in the majority of cases who can speak to a measurement of excessive noise. However, it seems unnecessary to require evidence from two witnesses in all cases, given the requirement for corroborative evidence on the noise measurement.

The requirement for only one witness also removes the fear of retribution by the offender on the complainant, as the latter will not be required to act as a witness. I therefore ask the committee to reject amendment 286.

I move amendment 228.

Donald Gorrie: What the minister has just said is helpful, but the bill as it stands does not say that the witness cannot be the complainant or that the witnesses must be a professional witness. Moreover, section 41 does not say—although it may be said elsewhere—that one has to have a witness and a machine. That certainly strengthens the point that I am making. However, if the witness or witnesses have to be officers of the council dealing with the noise detection machine, the bill should specify that. As it stands, the bill suggests to a person reading it that a complainant without any professional or machinery support can complain and get the person prosecuted because he or she has broken the noise restrictions that were imposed by the council. The wording of section 41 is defective. The minister clarified it a bit, but I would be obliged if she would get her people to study the wording and to make clearer exactly what is meant.

Stewart Stevenson: Let me deal with Donald Gorrie's amendment 286 and the minister's remarks on it. I am unclear whether courts would be able, if challenged, to conclude that an officer and a machine for measuring noise constituted the necessary corroboration. I will explain why, in my view, that is so, so that the minister can respond.

Unlike the case with a traffic camera, for example, one is unable to determine from the machine the location and time at which the measurement was taken, except by relying on the evidence of the person who was with the machine and conducting the measurement. Therefore, that of itself does not represent corroboration. The machine is simply an instrument for measuring sound, just as a tape measure is a machine for measuring distance. There is no more independent corroboration that a tape measure was used at a particular place and time than there is independent evidence that a machine measuring sound corroborates what the officer is saying. Traffic cameras are different, because they are engineered to provide a picture, which gives an evidential base of location to a degree that can be tested; moreover, they have clocks, imprints and so on, so the mechanisms involved provide a different quality of evidence.

If we reject Donald Gorrie's amendment 286, I am concerned that, were the provision in section 41(4)(a) to be applied, defence counsel would challenge it in court and would, I suggest, be relatively successful. Deleting section 41(4)(a), as Donald Gorrie proposes, would protect the Executive's policy intention. Unless the minister has some compelling arguments, I feel strongly that I will support Donald Gorrie's amendment 286.

The minister made two further remarks. She said that mostly two officers will be involved. If that is the case, the administrative and operational inconvenience caused by deleting the provision to ensure that more than one person will be involved must be relatively trivial. She also made the point that complainants will not be required to provide evidence. That is correct, but there is a variety of ways of ensuring that complainants do not have to give evidence. The best of those is to involve two professional officers in the measurement process, who could attest to the standards of operation of the measurement equipment—which I am sure will be an important part of the evidence—and the time and location.

That is all I have to say on amendment 286, but I have a brief comment on amendment 228. As is sometimes the case immediately after lunch, I have not paid as much attention as I should have, but I think that the way in which the minister

explained amendment 228 was rather legalistic. I have a simple question. Does the person who is seeking to rely on section 41(3)—which is to say, a person who believes that they have a "reasonable excuse"—have to prove that they have a reasonable excuse or, if they have given what they regard as a reasonable excuse, does the prosecution have to prove that it is invalid? If the minister could express her answer in more laymanlike terms, that would be of value to me and, I suspect, others around the table in deciding our attitude to amendment 228.

13:30

Mrs Mulligan: In response to Stewart Stevenson's last point, I should explain that the person using a "reasonable excuse" would not have to prove that. However, if he or she could produce evidence when faced with an alternative suggestion, that would obviously be of assistance to his or her case. As I said, it will be for the procurator fiscal to prove that something happened.

Stewart Stevenson asked why we were arguing about the number of witnesses when, usually, two people will be involved. The reason is that we are saying that, although cases will generally involve two witnesses, there will be instances when that is not the case, for a variety of reasons. We would not want to discount evidence for that reason if we also had the evidence from the machine. That would provide two sources of evidence, even if there were not two individuals. That does not contradict Scots law and I think that the person who was experiencing the noise nuisance would appreciate that possibility remaining open.

I have some sympathy with Stewart Stevenson's concerns about the use of the machine. However, the bill says that the office of the local authority would have to certify the time and place of the noise measurements. I suggest that that would give the reassurance about when the event took place and that, therefore, the evidence could be accepted as a second element of the witness presentation.

Amendment 228 agreed to.

Amendment 286 moved—[Donald Gorrie].

The Convener: The question is, that amendment 286 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Gorrie, Donald (Central Scotland) (LD)
Harvie, Patrick (Glasgow) (Green)
Scanlon, Mary (Highlands and Islands) (Con)
Stevenson, Stewart (Banff and Buchan) (SNP)
White, Ms Sandra (Glasgow) (SNP)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 286 agreed to.

Amendment 12 not moved.

Section 41, as amended, agreed to.

Section 42—Fixed penalty notices

The Convener: Amendment 287, in the name of Donald Gorrie, is grouped with amendments 241, 242 and 244. Amendment 287 pre-empts amendment 229 and 230, which have already been debated.

Donald Gorrie: Having failed dismally on points of law on previous occasions, I shall state that I think that my argument is not about law but about the meaning of English.

The text that I am trying to delete, section 42(3), says:

"If a fixed penalty notice is given to a person in respect of noise emitted from a dwelling in the period specified in a warning notice, no further fixed penalty notice may be given to that person in respect of noise emitted from the dwelling during that period."

My argument is that it is wrong to say that a further fixed-penalty notice could not be issued during the period specified in the warning notice. We then get into an argument about what that period is. Section 40(3)(b) refers to

"the end of the noise control period during which the warning notice is served".

If members look at section 37(3)(a), they will learn that the noise control period can be the whole week. Therefore, as I understand it, if a noise control period is in effect and somebody makes a huge noise on a Monday and receives a warning notice, he or she can then make as much noise as they like for the rest of the week and nobody will issue a second notice. Full legal procedures could be followed under current law, but not under the proposed new law. That seems to be an invitation to people to misbehave.

Does the council have to specify each week separately in the warning notice or can it just say that the provisions apply to the whole week from then until whichever date it specifies? If councils have to itemise each week or certain times in each week and they have to repeat that in the document for each week, that seems to me not very intelligent and unduly bureaucratic. Even if the bill is as tight as some might argue that it is, the shortest noise control period is given as a week. It

is a mistake to say that one cannot take out a second notice against somebody who offends again in that week. That provision is foolish and should be deleted.

I move amendment 287.

Mrs Mulligan: I will deal with amendment 287 first, which proposes to remove the prohibition in section 42(3) against serving more than one fixed-penalty notice during the period specified in a warning notice, which has already been served in respect of noise emitted from a property. The fixed-penalty notices are designed to be a quick and effective deterrent against the making of excessive noise, but they are not designed to be used repeatedly over the same period if the offender does not stop making the noise. If the offender continues to make the noise, it is intended that use should be made of other enforcement provisions in the bill—for example, the seizure of offending equipment or reporting to the procurator fiscal to consider criminal prosecution. It is not the case that somebody could make a noise, receive the fixed-penalty notice and then do it again—there will be an escalating range of measures to try to deal with the problem.

The time period for taking such measures is at the discretion of the local authorities. However, should they take those measures for a specific period and then find that the problem arose again, there is nothing to stop them reintroducing that notice to stop the noise. That would allow the local authorities flexibility to respond to the problem as they see fit.

I hope that Donald Gorrie is reassured that the intention is not to allow the perpetrator the opportunity to cause nuisance again, but to deal with the problem in a sequence of ways to ensure that it is adequately dealt with to everybody's satisfaction.

Executive amendments 241 and 242 are technical and make clearer the difference in timing and effect of the fixed-penalty notice procedure as a precursor to criminal proceedings for an offence under section 41. Amendment 244 amends section 46 to enable Scottish ministers by order to increase the amount of the fixed penalty that is payable under section 42 to an amount not exceeding level 2 on the standard scale. The amendment follows comments by the Subordinate Legislation Committee and is considered necessary to ensure consistency with amendments of the penalty provisions in part 6 of the bill.

The Convener: I ask Donald Gorrie to wind up and to indicate whether he intends to press or to seek leave to withdraw amendment 287.

Donald Gorrie: I still think that I am right, but I have obviously failed to rouse much enthusiasm for my amendment in the committee. I will not go to war on the issue.

Mrs Mulligan: If the wording of the bill is causing Mr Gorrie problems, we will re-examine it. We are all aiming for the same end result.

Donald Gorrie: That is extremely helpful and assists me to be in pacific rather than warlike mood. With the committee's leave, I will withdraw amendment 287.

The Convener: We understand that you are not doing that because you do not think that you are right.

Amendment 287, by agreement, withdrawn.

Amendments 229 to 231 moved—[Mrs Mary Mulligan]—and agreed to.

The Convener: Amendment 387, in the name of Mary Scanlon, is grouped with amendments 388 to 390.

Mary Scanlon: These amendments have been suggested by the Law Society of Scotland and seek to extend the information that will be contained in the fixed-penalty notice to include reference to the fact that legal advice can be sought and legal aid may be available, and to the consequences of accepting the fixed penalty in relation to certificates issued by Disclosure Scotland.

The Law Society believes that before a person accepts a fixed-penalty notice, they should be aware that they can seek legal advice. The consequences of accepting a fixed-penalty notice will vary from individual to individual. It is important that, prior to accepting the notice, individuals are aware of the implications for them. There is an understanding that although the fixed-penalty notice will not be registered as a criminal conviction, it can form the basis of information that is contained in an enhanced disclosure certificate issued by Disclosure Scotland. That information may be relevant if the person subsequently applies for certain jobs. The amendment seeks to ensure that the recipient of the fixed-penalty notice is fully advised of all the circumstances surrounding it before accepting the notice.

I move amendment 387.

13:45

Ms White: The minister will provide clarification to Mary Scanlon, but I, too, seek clarification. During consideration of the Housing (Scotland) Bill, amendments were passed to give tenants the opportunity to speak to housing officers about obtaining legal aid, assistance from solicitors and so on. Where does that come into the bill? What rights do people have to see a solicitor and are they able to get legal aid? I am not sure that I take

on board what Mary Scanlon said about Disclosure Scotland, but I would like to be reassured that acceptance of a fixed-penalty notice will not have an effect on whether someone gets a job. I do not think that it will, but I would like to be reassured on that point all the same.

Mrs Mulligan: I suggest to the committee that it is unnecessary for the bill to be so prescriptive on the content of fixed-penalty notices in order to safeguard people's legal rights. For example, in other statutory regimes that use fixed-penalty notices, such as those for vehicle-emission testing, dog fouling or littering, such matters do not require to be stated expressly in the notice. The proposed noise nuisance and fly-tipping regimes are based on the existing littering regime, which section 88 of the Environmental Protection Act 1990 introduced. The 1990 act makes no provision for including the suggested information. I note that similar amendments have not been lodged to section 50 of the bill, which deals with the littering regime.

Regardless of a fixed-penalty notice's content, anyone who is issued with such a notice can seek legal advice in the usual way and may be able to do so under the advice and assistance scheme in part II of the Legal Aid (Scotland) Act 1986. In addition, amendments 388 and 390 are technically incompetent, as part V of the Police Act 1997 refers to enhanced criminal record certificates, rather than enhanced disclosure certificates. Moreover, it is the Scottish ministers who have the duty to issue those certificates although, in practice, that is undertaken through Disclosure Scotland, which is part of the Scottish Criminal Record Office.

It is a theoretical possibility that information such as whether a fixed-penalty notice had been paid could be disclosed in an enhanced criminal record certificate that Disclosure Scotland issued on behalf of the Scottish ministers, but the issuing of such certificates is restricted to positions that involve a high degree of contact with children or vulnerable adults, such as those for training, supervising or being in sole charge of young people. Non-conviction information that the police hold may be disclosed only when it is relevant to the post that is being sought. It is not clear what relevance the payment of a fixed penalty for noise nuisance or fly-tipping might have.

In view of the amendments' questionable necessity and to maintain consistency, I suggest that the committee should not support them.

Mary Scanlon: I am happy with the clarification and the explanations that have been given. I am delighted that I said that the Law Society proposed the amendments and that it is the society, rather than me, that has been deemed technically incompetent. On that basis, I will ask to withdraw amendment 387.

Amendment 387, by agreement, withdrawn.

Amendments 388 and 13 not moved.

Section 42, as amended, agreed to.

Section 43—Permitted level of noise

The Convener: Amendment 232, in the name of the minister, is grouped with amendments 234 to 239.

Mrs Mulligan: Amendments 232 and 234 to 239 amend sections 43 and 44 to reflect comments that the Subordinate Legislation Committee made at stage 1 and which the Executive has accepted. The setting of permitted levels and the approval of noise-measuring devices will be crucial to establishing whether an offence has been committed and are therefore important in the operation of a noise nuisance scheme as a whole. The amendments will change the procedures for setting permitted noise levels and for approving noise-measuring devices from, respectively, ministerial direction and simple approval to, in both cases, approval that is subject to regulations that are made under the negative procedure.

Given the significance of the Scottish ministers' powers to determine permitted noise levels and to approve noise-measuring devices, it is felt appropriate that those powers should be exercised through regulations as opposed to directions and approval.

I move amendment 232.

Mary Scanlon: I have a few problems with the permitted level of noise. First, it has been raised with me that sometimes it may not be the level of the noise that is the problem, but its persistency, which can be extremely irritating. I think that it is called the dripping-tap syndrome.

My second point, which I make no apologies for raising again, relates to our national musical instrument. It is most unlikely, according to this section, that the bagpipes would ever fall within the permitted level of noise. A point related to that is that the bagpipes have no volume control. I am not complaining about the bagpipes—I think that they are wonderful, although I am not sure that I would want to hear them being played outside my house at 3 in the morning. A lady in Argyll said to me that she loves "Highland Cathedral", but that she now hears it being played about 20 times a day. We should be aware that, while there are persistent offenders, there are also persistent complainers. There is general concern that there is no way in which the bagpipes will fall under any permitted level. Will the regulations take account of that? Perhaps we are looking at an exemption for our national musical instrument.

Stewart Stevenson: Amendment 239 appears to delete the requirement that approval of

measuring devices be given in writing. How is it intended that approval will be given, should it not be in writing? Does one say to one's children, when they are being particularly noisy, "I have approved this device, for the purposes of noise control provision," or is approval given by some other method? It seems a rather strange provision to be deleting, but I am sure that there is something behind it. I did not hear it mentioned in the minister's opening remarks.

Donald Gorrie: The bill says:

"the permitted level may be determined partly by reference to other levels of noise."

In one of PG Wodehouse's novels, a golfer blames his bad shot on the noise made by butterflies in the next field. This is obviously different, and I think that the bill is trying to address the issue. I presume that a different volume of noise is acceptable to someone who lives next to a busy railway line than is acceptable to someone who lives miles from anywhere, except perhaps for one neighbour. Will the minister clarify whether there will be a subjective judgment, or will the machines measure the background noise of railways and so on? How is the permitted level of noise to be determined? I am in favour of what the Executive is trying to do, but I am trying to find out how you will do it.

The Convener: I would welcome the minister's comments on whether some of those issues might be dealt with elsewhere in antisocial behaviour legislation. If a noise is made out in a field and there is no one about, that is reasonable. If it is made in the middle of the day, that is reasonable. However, noise that is made at 10 o'clock at night, near somebody who has a very young baby whom they have only just got to sleep, should not be loud. The problem is not really the decibel level of the noise, but whether it is appropriate for someone to make it at a particular time, and whether it causes distress. Others have had the same experience of people complaining about persistent disturbance. Could such complaints comfortably be dealt with elsewhere?

Mrs Mulligan: In response to Donald Gorrie's point, on how the noise is measured, there will be a technical measurement, but we have to bear in mind the impact of that noise. That will depend on where someone is and what the circumstances are. As Mary Scanlon has pointed out, sometimes just the persistence of the noise has an impact. The impact will need to be taken into account as well as the level of noise that can be measured.

We should bear in mind the fact that, although we are dealing with legislation on noise today, there are other pieces of legislation—environmental acts, in particular—that also cover noise issues. We will consider the appropriate response to the issues of what a noise is and what complaint is being made about a noise as part of that package.

As members can see from the amendments before them, the Executive is not proposing to exempt the noise of bagpipes. However, the regulations will be considered by the Communities Committee and what is included in those regulations will be determined at that stage—not that I am seeking to prompt anyone to make such proposals.

I know that it is very warm in here, but I have to say that Stewart Stevenson's point is rather pedantic. The relevant approval will not be given in writing because it will be contained in the regulations. Although I did not say in the same breath that approval would not be given in writing and that it would be included in the regulations, I thought that Stewart Stevenson might have made the connection. I have now clarified the matter, so I hope that he is happy with that resolution.

Amendment 232 agreed to.

Amendments 233 to 235 moved—[Mrs Mary Mulligan]—and agreed to.

Amendment 14 not moved.

Section 43, as amended, agreed to.

Section 44—Approval of measuring devices

Amendments 236 to 239 moved—[Mrs Mary Mulligan]—and agreed to.

Amendment 15 not moved.

Section 44, as amended, agreed to.

Section 45—Power to provide funds to local authorities

The Convener: Amendment 240, in the name of the minister, is in a group on its own.

Mrs Mulligan: Amendment 240 is a technical amendment, which seeks to replace the phrase "local authorities" with the phrase "a local authority". That is to ensure that there is consistent reference to a single local authority throughout part 5 of the bill.

I move amendment 240.

Amendment 240 agreed to.

Amendment 16 not moved.

Section 45, as amended, agreed to.

Section 46—Fixed penalty notices: supplementary

Amendments 241 to 244 moved—[Mrs Mary Mulligan]—and agreed to.

Amendment 17 not moved.

Section 46, as amended, agreed to.

Section 47—Powers of entry and seizure of equipment used to make noise unlawfully

Amendments 245 to 253 moved—[Mrs Mary Mulligan]—and agreed to.

Amendment 18 not moved.

Section 47, as amended, agreed to.

Amendment 254 moved—[Mrs Mary Mulligan]—and agreed to.

After section 47

14:00

The Convener: Amendment 255, in the name of the minister, is in a group of its own.

Mrs Mulligan: Amendment 255 seeks to insert a new section after section 47, requiring persons who exercise functions under the noise provisions to have regard to guidance that Scottish ministers will produce. The application of these noise control provisions will be a new function for any local authority that takes them up. As we said in relation to amendments 172 and 173, in the name of Elaine Smith, we expect local authority officers to use common sense when exercising their powers under the provisions and to take account of all circumstances including the earlier example of individuals with special needs.

Nevertheless, it is considered appropriate to insert a requirement for local authorities to have regard to any ministerial guidance, as that will seek to ensure that the application of the new provisions is consistent. The Executive has now let a research contract to noise consultants, who will draw up detailed procedural guidance in time for the introduction of the new provisions.

I move amendment 255.

Amendment 255 agreed to.

Schedule 1

POWERS IN RELATION TO EQUIPMENT SEIZED UNDER SECTION 47

The Convener: Amendment 288, in the name of Donald Gorrie, is in a group of its own.

Donald Gorrie: For amendment 288, members will have to turn to paragraph 5 of schedule 1 on page 65, which concerns the forfeiture of equipment that has been seized in connection with the noise prevention rules in the bill. Paragraph 5 says:

"If in proceedings for a noise offence no order for forfeiture of related equipment is made, the court may (whether or not a person is convicted of the offence) give such directions as it thinks fit as to the return, retention or disposal of the equipment by the responsible … authority."

I realise that I am again trespassing on the law, but it seems unreasonable that if a person is not convicted of an offence, his equipment is still forfeit and is not returned to him. My amendment seeks to change the phrase "whether or not" to "where", because if someone is not convicted, he or she should automatically have their equipment returned to them. It is a simple point of justice.

I move amendment 288.

Mrs Mulligan: If agreed to, amendment 288 would restrict the exercise of the power outlined in paragraph 5 of schedule 1 to circumstances in which a person was convicted of a criminal offence. However, the provision itself must be seen in context. Schedule 1 enables courts to make three classes of order on equipment that is seized following enforcement of the noise control provisions. The first class of order is retention of the property pending the conclusion of any criminal proceedings in relation to the noise nuisance offence; the second class is forfeiture of property following a conviction, which might give rise to disposal of the equipment; and the third class is return of the property in the event that no proceedings are taken. In the light of those powers, paragraph 5 will confer on the court a broad power to return, retain or dispose of any noise-making equipment as is appropriate in the circumstances of the particular case.

If a person is acquitted, the court is likely to order return of the property, assuming that its owner can be identified during the six-month period that is referred to in paragraph 6. However, if no identifiable owner comes forward, the local authority that seized the equipment has a discretion to dispose of the equipment. The power to return would arise only in the absence of a conviction. The same applies in relation to the power of seizure, as that is intended to be an interim order pending conclusion of the proceedings, which may or may not result in a conviction.

To remove the general power of the court to give directions as to what local authorities should do with seized equipment in cases in which a conviction is not obtained would unnecessarily restrict the discretion of a court to make a direction to order retention or return of the property in an appropriate case, as those powers are not dependent on a conviction for the noise nuisance offence.

Therefore, I suggest to the committee that it should not agree to amendment 288.

Donald Gorrie: What the minister has said is helpful. It is hard to imagine what the

circumstances would be, but it might be impossible to discover who owns equipment and therefore to give that equipment back to them. That is quite a sneaky point, which I must accept as a valid argument.

On the general argument that the courts will act in a sensible fashion, I always have slight doubts about such arguments because courts do not act in a sensible fashion any more than politicians always act in a sensible fashion. However, in so far as I understood the minister's well-written reply, I think that it is satisfactory. Therefore, I will not press the amendment.

The Convener: Can a reply be well written and sneaky at the same time?

Amendment 288, by agreement, withdrawn.

Amendment 19 not moved.

Schedule 1 agreed to.

Before section 48

Amendment 256 moved—[Mrs Mary Mulligan]—and agreed to.

Section 48—Interpretation of Part 5

Amendments 257 to 259 moved—[Mrs Mary Mulligan]—and agreed to.

Amendment 20 not moved.

Section 48, as amended, agreed to.

Section 49—Offences under section 33 of Environmental Protection Act 1990: fixed penalty notices

The Convener: Amendment 75 is grouped with amendments 82, 87, 97 and 99.

Mrs Mulligan: There are several references to the Environmental Protection Act 1990 in part 6 of the bill. Amendment 75 will add the words "the '1990 Act'" to the first of those references. That addition will, of course, have no material effect on the bill, but will enable subsequent references to the Environmental Protection Act 1990 to be shortened to the "1990 Act". That change will be reinforced by amendment 97, which will provide an interpretation section for that part of the bill, which will make it clear that references to the 1990 act are references to the Environmental Protection Act 1990. Amendments 82, 87 and 99 will therefore shorten various references in accordance with those provisions.

I move amendment 75.

Amendment 75 agreed to.

The Convener: Amendment 76, in the name of the minister, is grouped with amendments 77 to 81 and 83 to 86.

Mrs Mulligan: I will deal first with amendments 76, 77, 78, 83 and 84, which deal with the time during which a fixed-penalty notice for fly-tipping or littering may be issued. Section 49 of the bill, through amendment of the Environmental Protection Act 1990, will grant powers to police officers, authorised local authority officers and the Scottish Environment Protection Agency to issue fixed-penalty notices as a means of enforcing the law against fly-tipping. The relevant provisions in the Antisocial Behaviour etc (Scotland) Bill were modelled on those that are currently in force for littering—as set out in the 1990 act—which will themselves be amended by section 50 of the bill to extend to police officers the power to issue notices for littering.

The Communities Committee welcomed the creation of such powers. However, following evidence from Highland Council, the committee noted that, as was originally proposed in the bill, notices could be issued only when a fly-tipper was caught redhanded. Highland Council said in evidence that that would be particularly difficult to do in an area such as it covered, and that it wanted less time-specific proposals. Consequently, the committee recommended that the Executive consider further the suggestion that police officers should be able to issue notices when they have reasonable cause to believe that fly-tipping has occurred and not just when they witness an offence taking place.

Representatives from the Convention of Scottish Local Authorities made similar suggestions during the consultation process. We were keen to accept those suggestions, which tie in closely with other action that we have been taking on fly-tipping. For example, in December last year, we gave powers to local authorities to inspect waste-transfer notes, specifically with a view to detecting fly-tipping. It makes sense to give that power the backing of the potential sanction of a fixed-penalty notice.

Amendments 76, 77 and 78 would replace references in the bill to specific occasions when fly-tipping has taken place with references to authorised officers having

"reason to believe that a person has committed a relevant offence".

That will enable officers to issue a fixed-penalty notice regardless of whether the culprit is caught in the act. Members will note that the proposed wording closely reflects the committee's recommendation.

If we are to make those changes to the original proposals on fly-tipping, it is only consistent to make the same changes in respect of the existing regime for littering, which is what amendments 83 and 84 will achieve. We are confident that those amendments do not affect anyone's right—as with

existing fixed-penalty notices for littering—to refuse to pay a fixed-penalty fine. An innocent party may refuse to do so, in which case the usual procedure for dealing with an offence will continue to apply—with all the safeguards of Scots law—namely, that a procurator fiscal would decide whether to prosecute a person in respect of the relevant fly-tipping offences.

On amendment 79, the policy intention behind section 49 is, of course, to implement a fixed-penalty regime for fly-tipping offences. To do that, the bill as drafted would apply such a regime to all offences under section 33 of the Environmental Protection Act 1990. That section penalises fly-tipping, specifically in subsection (1)(a); and it penalises it as a means of causing pollution in subsection (1)(c). Section 33 of the 1990 act also penalises technical infringements of the waste management licensing scheme. For example, the treating or keeping of amounts of waste that are greater than what is specified in the relevant waste management licence could be penalised under subsection (1)(c). SEPA expressed concerns that local authority officers and police officers would have no knowledge of waste management licensing conditions and so could not sensibly make use of the proposed powers in respect of section 33(1)(c) of the 1990 act. We therefore propose, in proposed new subsection (1A) in amendment 79, to exclude section 33(1)(c) from the power to issue fixed-penalty notices. That change will not affect the power to award fixed-penalty notices for fly-tipping offences, which in all circumstances could be caught under the remaining subsections. Technical offences against waste management licensing requirements, on the other hand, would continue to be dealt with by SEPA's standard enforcement procedures.

14:15

Amendments 80 and 85 are purely drafting amendments, and amendments 81 and 86 are the final amendments in the group. As members will know, the proposed fixed-penalty regime for fly-tipping is based on that which is currently in force for littering. Under that regime, established by section 88 of the Environmental Protection Act 1990, Scottish ministers may vary the penalty by order. When considering the proposals on fly-tipping, the Subordinate Legislation Committee noted that the power to vary the fixed penalty for fly-tipping in section 49 of the bill represented a Henry VIII power—there is a phrase for the committee, to go with the other legal terms we have had this afternoon—for ministers to amend primary legislation.

The Subordinate Legislation Committee was particularly concerned that there was no limitation on the exercise of that power. In correspondence with the committee, the Executive has agreed to lodge an amendment that will place an upper limit on the power of Scottish ministers to vary a penalty that is payable in that way. The limit that has been chosen is level 2 on the standard scale—which currently stands at £500—in order to be consistent with the fixed-penalty notices that are proposed for other forms of antisocial behaviour in section 97(2). That agreement was recorded in paragraphs 50 and 51 of the Subordinate Legislation Committee's report to the Communities Committee.

Amendment 81 will fulfil a commitment that we made to the Subordinate Legislation Committee. To promote consistency, amendment 86 will place the same restriction on Scottish ministers' existing powers to vary the fixed penalties for littering. The standard scale itself is, of course, varied from time to time to ensure that it keeps pace with the value of money. The amendments are intended to satisfy the concerns of the Subordinate Legislation Committee, so I hope that members will support them.

I move amendment 76.

Stewart Stevenson: I welcome the Executive's response, which will make the application of notices to people in rural areas in particular much more effective, in a way that the previous provisions would not have done.

Mary Scanlon: I thank the minister for accepting the suggestions from Highland Council. I also seek clarification in relation to amendments 77 and 78. The point that concerns me is that the amendments will insert the phrase,

"has reason to believe that a person has committed a relevant offence".

Could the minister give some examples of what would constitute a basis for believing that someone had committed an offence, just to aid my understanding of what is meant by that phrase?

Donald Gorrie: I also welcome the amendments. There has been an occasion when people who were pursuing the perpetrators of regular fly-tipping found, on examination of the material, that most of it came from the office of an ostensibly reputable architect in Edinburgh, who could be done as a result. The minister is making important points that I support strongly.

I have just one question. Is there a clear distinction between littering and fly-tipping, and does it matter? Are people treated slightly differently in respect of the two? If I was to drop 10 pieces of paper, would that be litter, whereas to drop 11 pieces of paper would be fly-tipping? Is there a distinction? If everyone is to be treated the same way, it will not actually matter, but if I would get a heavier penalty for fly-tipping than for littering, when would that kick in?

Mrs Mulligan: On the difference between littering and fly-tipping, I clarify that there is no division between the two—indeed, they overlap, so the penalty would depend on the substance that was dumped. I suppose that that overlap situation will allow the interpretation to be carried through, which is probably why we need to ensure that the regimes are in sync in the bill.

Mary Scanlon asked about situations in which a fixed-penalty notice might be issued even though no one had seen the rubbish, litter or whatever being dumped. There are ways of identifying the origin of rubbish, for example if it contains envelopes or packaging that have names or addresses on them and obviously come from a particular business. I am sure that people who deal with such matters are regularly frustrated, when they are certain of the origin of the rubbish but are unable to take action to deal with it.

Stewart Stevenson was right to say that in the past it has been difficult to take action in remote and rural areas, where it can be hard to establish when tipping is happening. I hope that the amendments will give succour to people who have sought to resolve such problems.

Amendment 76 agreed to.

Amendments 77 to 80 moved—[Mrs Mary Mulligan]—and agreed to.

Amendments 389 and 390 not moved.

Amendment 81 moved—[Mrs Mary Mulligan]—and agreed to.

Section 49, as amended, agreed to.

Section 50—Litter: power of constables to issue fixed penalty notices

Amendments 82 to 86 moved—[Mrs Mary Mulligan]—and agreed to.

Section 50, as amended, agreed to.

Section 51—Directions in respect of duty under section 89 of Environmental Protection Act 1990

Amendment 87 moved—[Mrs Mary Mulligan]—and agreed to.

The Convener: Amendment 88, in the name of the minister, is grouped with amendment 342.

Mrs Mulligan: Part IV of the Environmental Protection Act 1990 gives bodies such as local authorities, the Crown, educational institutions and statutory undertakers such as road operators or Network Rail statutory duties to clear litter. The current regime applies to "relevant land", which is land that is controlled by the bodies that I have listed and to which the public has access. The duty to clear litter is therefore largely restricted to particular areas of land that are controlled by public bodies. Local authorities are principally affected by the duty and receive funding to discharge their litter-clearance duties.

Section 51 of the bill will give Scottish ministers the power to direct those bodies on how to carry out their statutory duties. The proposed directions may be general or particular to an individual situation. The directions will complement the existing overarching code of practice on litter and refuse and they will enable guidance to be given quickly in specific circumstances. The code of practice may be used as evidence in court proceedings on the performance by bodies of their duty to clear litter.

Amendment 88 will make provision for any directions that are given to be published and for copies to be made available to the public. The Executive agreed to make the change in correspondence with the Subordinate Legislation Committee, which was concerned that instruments that may be relied on in court should be transparent. The change that we suggested met with the Subordinate Legislation Committee's approval, as noted in paragraphs 63 and 64 of that committee's report. I hope that the Communities Committee will accept the amendment.

Amendment 342 would give local authorities the power to direct any owner or occupier—whether a multinational conglomerate or a housebound pensioner—to clear litter from all or part of their land. The local authority may exercise that power whether or not the public has access to the land, which marks a departure from the existing littering regime, and the power would be independent of whether the occupier dropped the litter. An owner or occupier who did not act according to the local authority's direction could be fined up to £2,500.

The Executive considers that those proposed new powers would be disproportionate. They appear to extend the concept of littering beyond areas to which the public has access and, in theory, could be used by a local authority to direct a housebound pensioner to clear from their garden litter that had been dropped by other people, or risk a £2,500 fine. "Reasonable excuse" is given as a defence but it is not defined, in contrast with, for example, the fly-tipping provisions of the Environmental Protection Act 1990, which state specifically as an excuse the fact that the owner or occupier did not deposit the waste.

We appreciate that the desire to extend litter clearance powers to land on which a problem emerges is a legitimate concern. However, a proportionate way of doing so already exists. Under section 90 of the 1990 act, local authorities may designate as a litter control area—to which the duty of clearance in section 89 would apply—any area of land that is, or is likely to be,

detrimental to the amenities of the locality. The code of practice on litter and refuse, and the power of Scottish ministers to issue directions on litter clearance, which we propose in section 51 of the bill, would apply to such areas. The inclusion of the requirement that the land should be at least potentially detrimental to the amenities of the locality ensures that the power cannot be used indiscriminately.

Furthermore, the power is limited, by the requirement in section 86(12) of the 1990 act, to land to which the public has access. As the mechanism exists to deal with problem areas, as it is in keeping with the existing concept of litter as an offence to the public's amenity, and as it is less likely than amendment 342 to lead to serious consequences for innocent parties, I ask the committee to reject amendment 342. I have sympathy with the need to ensure that litter is removed, but the amendment would create too much of a burden and would be disproportionate with what we seek to do.

I move amendment 88.

The Convener: Amendment 342 is in the name of Paul Martin, but he is not yet with us. We will move on to members of the committee who want to comment on amendments 342 or 88.

Donald Gorrie: The minister's comments are helpful. Amendment 342 tries to address an issue, but whatever form the law takes it has to deal with repeated dumping of litter on land by third parties. We all know of places that have become informal rubbish tips because people dump a lot of rubbish there. It may be that landowners should be assisted in erecting fences to keep people out, or there should be some other such response. To put the burden on somebody—perhaps a small farmer—who happens to have a very inviting piece of ground for fly-tipping, and to ask him or her to meet all the expense, is unreasonable.

The minister spoke about public access. This issue may appear to be trivial, but those of us who represent urban areas know that certain houses are at just the right distance between the cairrie-oot and the school so that, when pupils finish their lunch, they chuck the litter into the gardens of those houses. Access is not essential for those pupils; it is throwing power that comes into play. The litter can be really quite significant if you live in the wrong house with the wrong garden. That may appear to be a minor issue but the legislation should take it into account. However, the main point is that amendment 342 is unfair on people who own the wrong bit of ground. We should not support it as it stands.

14:30

Cathie Craigie: I convey Paul Martin's apologies: he is trying to make it to the committee but has unfortunately been held up. He is not here, but it is right that we have been able to debate his amendment 342. I had not decided whether to support Paul's amendment, and I have heard the minister's points. The purpose of the amendment was to ensure that landowners take responsibility. I understand the case that Donald Gorrie talked about—when litter is thrown over or is blown over a hedge into a person's property. There are certainly difficulties there. However, Paul felt that landowners should take responsibility but that there should be a partnership between landowners and the local authority in a bid to tackle serious environmental problems that are caused by fly-tipping. Paul would have been happy to hear the way in which the minister addressed many of his concerns.

Stewart Stevenson: I could not help noting that the minister used the phrase "land to which the public has access." In Scotland, that would include almost all land outside settlements, given the provisions of the Land Reform (Scotland) Act 2003 that we passed in the previous session of Parliament. Of course, that access is conditional on its being exercised responsibly, but the point is that people have that access. Many farmers and rural landowners have significant problems with cars being left in fields; the responsibility to dispose of those cars would fall on the farmers or landowners. If a fridge is thrown into a convenient hole in the ground in somebody's land, Paul Martin's amendment 342 would pin the responsibility on the identified owner of the land.

The minister's phrase immediately raises another question. In a significant number of parts of Scotland, it is not clear who owns the land. In my constituency, there are places where every possible attempt to find an owner has, to date, failed. The system of land registration in Scotland, although well-established, is incomplete.

We have heard that Paul Martin was looking for partnership between local authority and landowner. That is entirely fair, but I am uncertain whether Paul's amendment would lead to a partnership. It would give local authorities the power to

"direct the owner or occupier of land".

I would have grave difficulties in supporting something that could place an unrealistic burden on people in the countryside. Those people are often not the big estate owners, but people with relatively small pieces of land who are making a living at near subsistence level.

Mary Scanlon: I seek clarification on section 89 of the Environmental Protection Act 1990. While we were consulting on the bill, we asked young people in Dumfries what they did and what opportunities and services were available for

them, and they said that they could not use the local parks, mainly because drug users used them and there were needles lying around. Listening to the minister has prompted me to ask what would happen if a local authority failed in its duty to keep its public parks litter free. Are there sanctions that can be used to address the problem in such circumstances?

Ms White: Amendment 88 is eminently sensible and I shall certainly support it. Amendment 342, in the name of Paul Martin, might be slightly heavy-handed, even if it has been introduced in the best interests of his constituents and the land round about. I echo what other members have said about rural areas, but we have a real problem with littering in urban areas, too. However, I thought that, under the Environmental Protection Act 1990, local authorities would have powers to deal with fly-tipping. The minister mentioned that it might be possible to prove, from looking at the litter, that it belonged to someone. That happens in Glasgow at the moment in relation to the tipping of shop rubbish on the streets. Those regimes are already in force.

We have just passed an amendment to insert the phrase,

"has reason to believe that a person has committed a relevant offence,"

and we have mentioned people throwing litter into other people's gardens, which Donald Gorrie talked about. That is a big problem. It would be terrible if we were to penalise people who were just sitting in their own homes but whose gardens, because there happened to be a bus stop outside or a school nearby, might be full of litter. The same would be true for landowners. Amendment 342 is pretty hard-hitting and I will not support it, for the reasons that I have stated. We have laws to deal with the problem, so I do not think that we need the amendment.

Patrick Harvie: Members have mentioned households as well as rural landowners and farmers, but we should also acknowledge the impact that amendment 342 could have on small businesses, including those in urban areas. I echo Mary Scanlon's point about whether local authorities always clear up refuse on their land. I know that they do not—I am sure that many other members know of authorities in other parts of Scotland that do not. It would be quite unfortunate if local authorities were giving instructions to private individuals or businesses to do something to their land that they were not prepared to do in local parks.

Elaine Smith: Convener, I would like to ask you and the clerks a technical question before I comment. Could you confirm that the figure for a level 4 fine is £2,500?

The Convener: Yes.

Elaine Smith: In that case, I would like to ask the minister about the level of fines that will apply to other sections of the bill. I have been having a look through the bill, but have not found the information that I was looking for. It seems to me that level 4 might be rather steep. It brings to mind, for example, the fact that level 4 is the level of fine that I have put in the Breastfeeding etc (Scotland) Bill to give it teeth, and there have been objections in some quarters to that level of fine. However, a level 4 fine seems to be quite excessive for the sort of offence in question, especially if people are fined at that level as a consequence of having litter dropped in their gardens. It is a reasonable level of fine for harassing babies, but maybe not for that kind of littering offence.

The Convener: Perhaps I can add my tuppenceworth on that point. I would be very much disposed to support amendment 342 and I seek reassurance from the minister that she will take on some of the issues that it highlights. First of all, there is the issue of land that is simply neglected, which I am sure happens in other areas and not just in my constituency. People own the land and everybody knows that they own it, but they do not care about it or take responsibility for it. Indeed, they may have a commercial interest in creating pressure for something else to happen to the land that is not currently happening to it, so they hold on to it until, at some point further down the line, it is in such a state and has become such a problem that the planning authority might agree to have something happen to it that people might not want. There is a good example of that happening in my constituency.

I recognise that other people may wilfully tip on their land, but landowners have a responsibility for the land, even if they do not see the tipping happen. A balance must be struck. There is a responsibility that goes with ownership, and although we must ensure that we do not go too far, we must recognise that responsibility. In my experience, people find it difficult to get landowners to admit that they have responsibilities. Sometimes they do not see that they have an obligation to the community in which they own land.

I am interested in what Patrick Harvie had to say about small businesses. In my view, we should put more pressure on small businesses in the community to take responsibility, as litter is a direct consequence of their operation. Some big organisations such as McDonald's make a virtue of the fact that they employ people to clear up the litter that their business generates. The argument is a difficult one to win with small fast-food outlets in my constituency, which should have the same

obligation. I do not think that they should be able to say that litter is not their responsibility because they did not drop it. Given the nature of their business, they should take some responsibility for litter.

I am glad that Paul Martin is now with us, as he may be able to respond to the points that I have made, once he gets his breath back. My main concern about the drive of the amendment concerns situations in which owners or residents are targeted by others who deliberately litter on and make a mess of their property to frighten them. I have come across examples of people who have had graffiti—not racist graffiti, but other types of graffiti—put on their property. Those people are perceived as a problem because they do not continue to clean it off, because they have been ground down and the graffiti has been used deliberately as a weapon to intimidate them. It would seem unfair for such people to be made entirely responsible for what has happened.

I seek strong reassurance from the minister that we will try to deal with people who own land in communities, who have no respect for those communities and who do not take basic steps to keep their property tidy. That issue is separate from situations in which other folk wilfully give people a hard time on their property.

I do not know whether Paul Martin has had time to catch up with what has been said. We have discussed his amendment and Cathie Craigie has outlined the main points that he wanted to make, but I am more than happy to take comments from him now, before we hear from the minister.

Paul Martin (Glasgow Springburn) (Lab): Thank you for giving me the opportunity to comment. I also thank Cathie Craigie for taking up my amendment.

The main purpose of the amendment is to deal with absentee landowners, developers and small landowners who own parcels of land throughout my constituency. I know that this is also an issue in other constituencies. As the convener pointed out, such landowners give no consideration to the problems that communities face, especially fly-tipping.

Amendment 342 provides an opportunity to consider not just fly-tipping but its causes. The experience of many communities is that fly-tipping is encouraged by the fact that certain areas have become zones in which it takes place. Often, it is expected that local authorities are responsible for clearing those areas. I know that a number of local authorities have experienced difficulties and have received little response when contacting landowners, some of which are Jersey-based development companies, to seek assistance in dealing with the problem.

The amendment is intended to deal not just with fly-tipping, which is dealt with in another part of the bill, but with its causes. It also seeks ways in which to prevent it. I know that in the past we have sought permission from landowners to erect barriers to prevent vehicle access to areas where fly-tipping is a problem. On a number of occasions, I have found it difficult to obtain such permission. The aim is to form a partnership between landowners and local authorities. I have lodged this probing amendment to seek assurances from the minister that we take the issue seriously.

14:45

The Convener: It might be worth saying that a number of the concerns have been around the degree of power that would be conferred on a local authority, which might not necessarily be terribly partnership oriented, and the level at which the fine is set.

Paul Martin: As I said, authorities have experienced difficulties with development companies, sometimes even with communicating with them. The experience has been that the companies get in contact only when they become aware that the properties are going to be purchased for development. I want to probe the issue to ensure that we have upward disposal opportunities to advise landowners that, if they do not give consideration to the impact that fly-tipping has on the local community and are not willing to form that partnership, we will consider ways in which we can take action against them. That is why I seek some additions to the existing provisions in the Environmental Protection Act 1990. The legislation should be much more effective than it is at the moment.

Mrs Mulligan: I appreciate the feeling behind Paul Martin's amendment. There is increasing frustration with those who are not considerate about how they get rid of their rubbish. It never ceases to amaze me that people will put a fridge in their car and dump it in a field rather than go to the local municipal dump. From the nodding heads around the table, I can tell that members share my frustration.

I must address the specific points that have been raised. On the fine that would be applicable, it is only fair to say that the figure of £2,500 is the maximum that the fine could be. Generally, the sheriff would take into account people's ability to pay when imposing fines. However, we must consider the implications for the people who might be affected. As I said, it seems a little unfair to penalise in such a way a single person in a dwelling who is inundated by someone else's rubbish.

The convener made a point about areas in which there are piles of rubbish. As Paul Martin said, there are sometimes difficulties in identifying who is responsible for land, who owns it and who should be taking care of it. There are ways in which we can do that. In the Environmental Protection Act 1990, there is a statutory nuisance provision that would allow the matter to be pursued and would ensure that the area was cleared up.

Mary Scanlon made a point about local authorities. Should individuals feel that a local authority is not acting responsibly or fulfilling its duties, they can challenge it, and the local authority can be repeatedly fined by the sheriff until it takes the action that is necessary to clean up its property. Therefore, there is a sanction against local authorities. The situation is not one in which local authorities simply tell other people to take action; they have clear responsibilities as well.

I hear what Paul Martin and Cathie Craigie said about the establishment of a partnership to deal with the problems that all committee members have identified. In fact, a partnership approach is already being taken. Would you believe that there is a Scottish fly-tipping forum? It enables organisations to meet to co-operate on action to deal with fly-tipping and rubbish and thereby to address some of the problems that people identify in their communities. I suggest that that is a way of working in partnership.

Unfortunately, and as Stewart Stevenson pointed out, amendment 342 reads:

"A local authority may direct the owner or occupier of land".

That is difficult to support at this stage, given that there are powers in this area. We would want the mix of available powers—along with partnership working—to allow us to deal with the effects of littering and fly-tipping in our communities.

Although we all share concerns about this issue, it is not just legislation that will resolve it. Continuing education of people is important if we are to ensure that everybody recognises that they have a responsibility to look after their surrounding area and that pressure should be brought in that regard. Public pressure and public opinion can be useful in ensuring that people take on board their responsibilities with regard to waste.

Amendment 88 agreed to.

Section 51, as amended, agreed to.

After section 51

The Convener: Amendment 89, in the name of the minister, is grouped with amendments 89A, 89B, 90 to 96 and 108.

Mrs Mulligan: The Executive amendments in this group relate to graffiti. Graffiti, like rubbish, is a blight on many of our communities and can have serious consequences for the people who have to live with it. It undermines community confidence and creates a climate in which standards drop and in which greater problems can emerge.

We have committed to strengthen local authorities' powers to deal with graffiti. The amendments result from our discussions with local authorities, COSLA and Keep Scotland Beautiful about the further powers that local authorities could usefully be given to tackle graffiti.

Amendment 89 provides local authorities with the power to serve graffiti removal notices on persons responsible for relevant surfaces having been defaced by graffiti that is offensive or otherwise detrimental to the amenity of the surrounding area. Such surfaces might be the surface of a public road, buildings, street furniture, telephone kiosks or litter bins. The surface of land that is owned, managed or controlled "by a relevant body", or the surface of

"any building, structure, apparatus, plant or other object on such land"

would also be included. For the purposes of the amendment, a "relevant body" is a statutory undertaker, as defined in section 98(6) of the Environmental Protection Act 1990 or an "educational institution", as defined in section 98(3) of the 1990 act.

The surface in question must be on public land, visible from public land or otherwise visible to those who use the services and facilities of the relevant body or those of any other relevant body. The provision empowers a local authority to serve a graffiti removal notice where there is graffiti on a school or college building that, while not visible from a street, is visible to those who attend the school or college. The notice requires those responsible for the graffiti to remove it from the property within a specified period of not less than 28 days, beginning with the day on which the notice is served.

Amendment 89A proposes that local authorities must take

"all reasonable action to reduce the likelihood of the relevant surface being defaced by graffiti"

before they may serve a graffiti removal notice. The provision would cover telephone exchange and utility boxes, for example. We believe that it is for those who are responsible for such property to take whatever steps they consider appropriate, for example the use of anti-graffiti paint. We do not consider it appropriate to put the onus on local authorities.

When two or more graffiti removal notices have been issued to the same responsible person within

28 days, amendment 89B would require provision to be made in a local authority's antisocial behaviour strategy when the strategy is reviewed or revised. The amendment would require the updated strategy to name the responsible person and to provide details of advice and assistance that are available to prevent further acts of graffiti.

It is not appropriate to prescribe in that manner what must be included in a local antisocial behaviour strategy. Part 1 of the bill provides that strategies should specify the range and availability of services that are designed to prevent antisocial behaviour, including graffiti. Making specific requirements in different parts of the bill about what should be included in strategies is too prescriptive.

We encourage local authorities and their partners to include the prevention of graffiti in strategies, but I am not convinced that a requirement to name in local strategies people who have been subject to two or more graffiti removal notices within 28 days would be helpful. It is for local authorities, the police and other bodies that are involved in the strategy process to determine priorities for inclusion in the strategy. An antisocial behaviour strategy might well include information about a local authority's policy on the use of graffiti removal notices and about advice and assistance that are available to prevent graffiti, but specific provisions are not required in part 6.

I understand that Mr Stevenson may have lodged amendments 89A and 89B at the behest of the Scottish Retail Consortium, which has raised the issue before. Having had discussions, the consortium may now be more convinced that the amendments are unnecessary.

It may prove necessary in future to amend the definition of a relevant surface in relation to which a local authority may serve a graffiti removal notice. Amendment 90 will provide the Scottish ministers with an order-making power by which to do that. Amendment 108 will make any such order subject to parliamentary approval.

Amendment 91 sets out the information that must be contained in a graffiti removal notice and how the notice should be served. Amendment 92 will empower local authorities to remove graffiti themselves. Amendment 93 will require local authorities to have regard to any guidance that the Scottish ministers issue. Amendment 94 will give a person who has been issued with a graffiti removal notice the right to appeal to a sheriff against the notice within 21 days of its issue.

If a person fails to comply with a notice and is subsequently issued with a notice to recover the costs that a local authority has incurred in removing graffiti, amendment 95 will provide a right to appeal against that notice on the ground that the amount that is sought is excessive.

Amendment 96 provides that local authorities, their staff and their contractors shall have no liability to any responsible person in respect of anything that was done or was omitted to be done in the exercise of graffiti removal powers.

The Executive amendments will allow local authorities to tackle graffiti when those who are responsible for some surfaces and properties cannot be persuaded to remove it voluntarily. I believe that local authorities and communities will welcome the provisions and, therefore, I hope that the committee will support them.

I move amendment 89.

15:00

Stewart Stevenson: As the minister was correct to say, the Scottish Retail Consortium asked for amendments 89A and 89B to be lodged to test the effect of the substantial but broadly welcome amendments that the minister has lodged on graffiti. Obviously, we return to the arguments that we had over amendment 342, in which members highlighted that the activities of vandals or tippers can affect people who have been no party whatsoever to the situation that has been created. This group of amendments seeks to resolve that situation with regard to graffiti.

The consortium represents not only the major supermarkets—which, frankly, can look after themselves—but the corner shop, which might be on the verge of economic viability, particularly in rural communities. It might be wholly unreasonable to require such shops to expend a reasonably substantial amount of money to protect premises that abut the public road from the effects of graffiti. After all, I am sure that the shopkeeper does not enjoy having a graffiti-painted blind or shopfront any more than other members of the public do.

The minister can quite simply dispose of the issue raised in amendments 89A and 89B by making it clear that small shopkeepers whose shops are on the verge of economic viability will not be shut down by the application of the section that amendment 89 will introduce, which, although broadly sensible, could be draconian in certain circumstances.

I move amendment 89A.

Donald Gorrie: The proposed new section has not been scrutinised in the way that the rest of the bill was at stage 1. As a result, although most people will welcome the thrust of the proposals, we must scrutinise them more carefully than the bill's other provisions.

I wonder whether the minister will explain why she is picking on educational institutions and statutory undertakers instead of others. As I understand it, houses, flats and shops do not come under the terms of the amendment because they are not on the road. I hope that she will tell me if I am wrong in saying that amendment 89 does not apply to dwelling-places or shops.

Mrs Mulligan: That is correct.

Donald Gorrie: It seems slightly bizarre to exclude those properties, given that they are the main recipients of graffiti. I entirely agree with Stewart Stevenson that the householder or shopkeeper whose property has been graffitied—if there is such a word—should not have to pay for the removal of that graffiti. That said, a bill that was seriously trying to deal with the problem should contain measures that allowed the council to set up a task force—perhaps made up of people who were under community reparation orders—to remove graffiti from those places.

I understand the Scottish Retail Consortium's concern that, although the provision does not currently apply to its members, it easily could, if we accept amendment 90. After all, amendment 90 gives the minister the

"Power to modify the meaning of 'relevant surface'".

Some future minister who was less intelligent than the present one might decide to bring all houses, flats and shops under the proposed new section, which would mean that the shopkeepers would all have to pay up. We should not allow ministers to modify that phrase in such a way.

Also, it is not clear to me what "graffiti" means. One of the main problems in a city such as Edinburgh, where a lot of interesting, informal entertainment activities take place, is that a great deal of flyposting goes on. Is flyposting graffiti? It is, I would have thought,

"soiling, marking or otherwise defacing",

but it would be helpful to be clear as to whether "graffiti" covers flyposting. I would also like the minister's response to the request that she produce proposals to deal constructively with the graffiti on houses and shops.

The Convener: I, too, would welcome some comments on that. I ask for clarification on what amendment 89 applies to. If it does not apply to houses and shops, what does it apply to and why has it been drafted as it has?

We cannot overstate the problems of graffiti. Once an area becomes graffitied and people have stopped trying to remove the graffiti, it begins to have a serious impact on that community and environment. I am concerned that amendment 89 will be a pressure on people who, over time, have dealt with and managed aggressive graffiti but are ground down by it. If they are given responsibility for removing the graffiti, they might reasonably say that they have not been given appropriate support to stop it happening in their area in the first place. However, I am comforted that the power to disperse groups would at least be used to disperse groups that were gathering to graffiti aggressively in a community space.

Although I agree that, as we have said in earlier debate, people have a responsibility for their property, I am disturbed that we are penalising the victims of crime, because, in some cases, graffiti has become crime as opposed to the more artistic stuff that some describe. If we are not going to do what Stewart Stevenson proposes, then what will we do to address the problem of graffiti that is impacting on communities and the people who are the victims of graffiti rather than, as they would be regarded under amendment 89, those responsible for it? Graffiti certainly troubles people in my area. Their property is consistently damaged and it would enrage them to know that at some point they might be called to account and become the people who are responsible for the damage, even though they have tried to protect their property and been unable to do so.

Perhaps we need to come back to the issue at stage 3, but if the minister will not support amendments 89A and 89B, for the reasons that she had identified, what will she do? What in the bill addresses that concern?

Cathie Craigie: I take the points that Johann Lamont makes and I also have sympathy with Stewart Stevenson's point that the cost of removing graffiti—perhaps a £1,000 bill—could push a small trader who provides a service to a small community over the edge and force them to close. However, I think about the matter in another way: communities need protection as well, and shops in larger communities are often the source of many problems, such as youths hanging about and spraying graffiti in the area. The shops make quite a nice living out of the communities, but the local people have to sit and look at the graffiti.

Local authorities in many areas have set up graffiti hit squads or task forces. North Lanarkshire Council responds to requests to remove graffiti from property, whether it is publicly or privately owned. It has taken that decision because of the complaints that it was getting from its council tax payers. The public purse is therefore paying for clearing graffiti from privately owned properties, but shops that are the source of the problem continue to sell spray paint and the cheap drink that attracts young people to come along and hang about outside their premises. Such shopkeepers must take some responsibility, and the minister should have the powers to introduce

at some point measures that would force them to do that. I hope that she will take that viewpoint on board when she responds.

Ms White: Graffiti is synonymous with antisocial behaviour, especially in certain areas—as Cathie Craigie has said—including town centres. I want the minister to clarify whether we are talking about shopkeepers being responsible for other people's behaviour, because that is what the bill says.

I stay in the middle of Glasgow and we have a graffiti task force that costs a fortune. The building in which I live backs on to a bank. If—as has happened—someone covered the outside of my building, right round to the bank, with graffiti and I had to call out the task force, would I be responsible for paying to have the graffiti removed, because it went halfway round to the bank? That needs to be clarified.

The minister has mentioned the fact that the power to serve a graffiti removal notice might not apply to houses and small shops, but amendment 89 refers to "a public road" or

"any building, structure … on such a road".

There are many houses, shops and buildings that are on public roads. I do not think that small shopkeepers or even supermarkets should be penalised, because the graffiti is not their responsibility—it is caused by the person who puts it there. Dealing with that form of antisocial behaviour is a police matter; individuals and shopkeepers should not be penalised for something that someone else comes along and does.

Although some of the people who perpetrate the graffiti in the centre of Glasgow do not live in Glasgow—they come in from outlying areas—we as council tax payers must pay to have it removed. Why should we be penalised in that way? Why should shopkeepers, who pay high business rates, be penalised again in an effort to stop the people responsible? Anti-graffiti paint has been used outside my building and I know that it does not always stop the graffiti; that depends on what kind of stone a building is made out of. With a light sandstone, the graffiti is simply absorbed, which makes it very difficult to get off.

We are barking up the wrong tree. Graffiti is caused not by the people who run shops but by the vandals and the antisocial elements that put it there. What we should be doing to stop graffiti is a social issue—it is nothing to do with penalising shops and individuals who happen to live in an area where graffiti is prevalent. I cannot support the minister's amendments on the subject.

Patrick Harvie: I would like the minister to compare her position on graffiti—whether we are talking about graffiti on shops, schools, colleges or any other institutions—with the response that she gave on Paul Martin's amendment on litter and fly-tipping, which she described as not being in keeping with a partnership approach. Can she explain where within the proposed new section—I am not wild about nodding through a whole new section at this stage—there is any emphasis on the partnership approach to prevention as well as remedial action?

Mrs Mulligan: First, I will deal with the straightforward issues, which relate to amendments 89A and 89B. In my opening comments, I implied that the Scottish Retail Consortium was now content. That is because it recognises that our proposal does not include shop premises, big or small, and that the burden with which the proposed new section deals will therefore not be placed on those premises. I hope that Stewart Stevenson will not press amendments 89A and 89B.

Whether we are talking about rubbish or graffiti, we start from the premise that we want to make the polluter pay; I think that I wrote to the committee about that recently. However, we acknowledge that that is not always possible. That takes us back to the issue of achieving a balance when dealing with circumstances in our communities that are not acceptable. Let us think about whom the bill is targeted at and consider the home owners issue that Donald Gorrie raised. Generally, most home owners will regard it as being in their interest to remove graffiti. That means that there is no need to introduce legislation to ensure that that happens, as home owners do not want to live with houses that have graffiti on them. However, I take on board the comments that the convener made about how people can be worn down by graffiti. The issue may be one that we need to bear in mind as we take forward the provisions in this proposed new section.

15:15

Other places that we would be looking at under the proposed new section include telephone boxes, electricity sub-stations and benches along the street. Those are places that are not looked after by any one person and graffiti can remain there for some time. There is a need to impress that point on those responsible.

The issue of the inclusion in the proposed new section of "educational institutions" and other such establishments in our communities is to indicate that those are the places where graffiti has been a significant problem.

Patrick Harvie asked about the partnership approach to the issue. Such an approach is taken and many discussions have taken place with the

local authorities, Keep Scotland Beautiful and other stakeholders who will be responsible for the measures. They accept that they have a responsibility to deal with graffiti and that they might not always have carried it out in the past. That is why we have identified those establishments in the proposed new section.

The question was raised of ministers having specific powers to modify the meaning of "relevant surfaces". I reassure members that any regulation to do that would be introduced under the affirmative resolution procedure. I reassure members that the issue would not simply be looked at by me—or whomever the minister happened to be—and that it would be open to the committee to consider whether ministers had correctly used those powers.

There has been consultation on the issue. The Executive amendments are in response to concerns that people in our communities raised. In my earlier contribution, I referred to the fact that although graffiti might seem to be a very small act of antisocial behaviour, it can lead to a spiral of disaffection within a community that can lead to more significant acts of antisocial behaviour. We realised that we needed to deal with graffiti at as early a stage as possible.

In lodging the amendments in this group, our aim was to start to tackle the issue of graffiti. We recognise that some persons who are responsible for relevant surfaces will respond but that others might need to be given the added pressure that the proposed new section will bring. We need to keep the powers under review in order to ensure that graffiti throughout our communities is dealt with effectively.

Donald Gorrie: Is flyposting included?

Mrs Mulligan: I am sorry; I have just noticed my note about that question. Flyposting is not covered by the amendments, but it is covered under other legislation. Later, I will give Donald Gorrie and the committee references to the legislation under which flyposting is covered.

Donald Gorrie: Thank you.

Ms White: I seek a further point of clarification. The minister mentioned that the provisions do not cover businesses or shops. Do they cover banks?

Mrs Mulligan: No, a bank would be included within the designation of retail premises and it would therefore not be included.

Stewart Stevenson: The minister has given it a square go. The points that lie behind amendments 89A and 89B have been addressed. Accordingly, I seek the consent of the committee to withdraw amendment 89A.

The Convener: I am not quite sure whether Stewart Stevenson's definition of a square go is the same as that which is used in the west of Scotland—the minister might not still be breathing if there had been one of those.

Amendment 89A, by agreement, withdrawn.

Amendment 89B not moved.

The Convener: The question is, that amendment 89 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Lamont, Johann (Glasgow Pollok) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

White, Ms Sandra (Glasgow) (SNP)

ABSTENTIONS

Harvie, Patrick (Glasgow) (Green)

The Convener: The result of the division is: For 7, Against 1, Abstentions 1.

Amendment 89 agreed to.

Amendments 90 to 96 moved—[Mrs Mary Mulligan].

The Convener: Does any member object to a single question being put on amendments 90 to 96?

Ms White: I do not object to a single question being put, but I wish to vote against the amendments.

The Convener: The member can vote against the amendments, but it would be helpful if we could record the vote in a oner.

Ms White: I am happy to do that.

The Convener: The question is, that amendments 90 to 96 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Lamont, Johann (Glasgow Pollok) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

White, Ms Sandra (Glasgow) (SNP)

ABSTENTIONS

Harvie, Patrick (Glasgow) (Green)

The Convener: The result of the division is: For 7, Against 1, Abstentions 1.

Amendments 90 to 96 agreed to.

The Convener: I ask Paul Martin whether he wished to move amendment 342.

Paul Martin: I will not move amendment 342 on the condition that further discussions are held on the matter. I hope a partnership amendment can be lodged at stage 3. I was not wholly satisfied with some of the minister's responses and I hope that we can continue dialogue on the issue at stage 3.

Amendment 342 not moved.

Section 52 agreed to.

After section 52

Amendment 97 moved—[Mrs Mary Mulligan]—and agreed to.

The Convener: That completes day 4 of our stage 2 consideration of the Antisocial Behaviour etc (Scotland) Bill.

Meeting closed at 15:21.

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