JUSTICE 1 COMMITTEE

Wednesday 27 April 2005

Session 2

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JUSTICE 1 COMMITTEE
12th Meeting 2005, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

*Marlyn Glen (North East Scotland) (Lab)
*Mr Bruce McFee (West of Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Helen Eadie (Dunfermline East) (Lab)
Miss Annabel Goldie (West of Scotland) (Con)
Mike Pringle (Edinburgh South) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Hugh Henry (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 6

Scottish Parliament

Justice 1 Committee

Wednesday 27 April 2005

[THE CONVENER *opened the meeting at 10:04*]

Protection of Children and Prevention of Sexual Offences (Scotland) Bill: Stage 2

The Convener (Pauline McNeill): Good morning and welcome to the 12th meeting in 2005 of the Justice 1 Committee. We have not received any apologies. I am sure that Margaret Mitchell will join us later.

Item 1 is the second day of stage 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. Once again, I welcome Hugh Henry, the Deputy Minister for Justice, Hugh Dignon, Kirsten Davidson and Paul Johnston.

After section 1

The Convener: Amendment 11, in my name, is in a group on its own.

Having considered at stage 1 the offence created under section 1, the committee felt strongly that in cases in which there was no evidence that an adult had arranged to meet a child, or in cases in which there had been a sexually explicit conversation over the internet—which is already, we believe, charged under breach of the peace—the adult, if convicted, should go on the sex offenders register, provided all that is proved. We heard evidence from witnesses, including some of the police organisations, that they were not confident that adults charged with such offences under breach of the peace would go on the sex offenders register.

There was nothing official on that point from the Executive in its written response at stage 1. I presume, minister, that you will tell the committee this morning that there is already provision for such offences under the Sexual Offences Act 2003. I think that you understand where we are coming from. We just want to nail the issue down absolutely. The committee felt strongly that, although we supported the creation of the new section 1 offence, it was probably more important to ensure that we catch the other types of offence. It is fair to say that the committee was quite shocked during stage 1 at the extent of situations in which adults try to groom children, particularly over the internet, in which quite shocking, hard-core, sexually explicit conversation goes on. While there was no evidence in such cases that those adults were necessarily going to take the grooming any further, we felt that they should be treated as sexual crimes. I have lodged amendment 11 in order at least to have this discussion on the record. If other types of offence already exist, why cannot we just nail them down in the bill as well? I am sure that I will get a response to that.

I move amendment 11.

Stewart Stevenson (Banff and Buchan) (SNP): I support what the convener has said and I look forward to the minister's response. I have read the Sexual Offences Act 2003 and the Protection of Children (Scotland) Act 2003, and I am not clear where—if at all—either of those acts makes the kind of reference that we are looking for. It would be helpful if the minister could tell the committee specifically where those provisions are made. The bill amends other acts, and I recognise that it is sometimes not immediately apparent, when one comes to read the bill, which references are provided. It is clear that, up to a point, there has been a gap in the legislation; we should ensure that we use every opportunity to put people who have a serious sexual aspect to their criminality on the appropriate register.

Mrs Mary Mulligan (Linlithgow) (Lab): I wish to make two points. First, it was implied to us that it was not possible to recognise the sexual content of such actions under breach of the peace and that there was therefore a need to do something further. My second point, to which the convener has already referred, is that a perpetrator may have no intention of taking a conversation any further, yet damage can be done as a result of the explicit nature of the conversation and the gratuitous way in which it takes place. The committee felt that it wanted to ensure that the damage that could be done in that way was recognised. We therefore want to add to our protection of children and young people.

The Deputy Minister for Justice (Hugh Henry): I sympathise with the intentions behind amendment 11, but we do not support it, for two strong reasons. First, the amendment is unnecessary. I will pick up points that members made latterly. Sexually explicit conversations could be prosecuted as lewd and libidinous behaviour or as a breach of the peace. Therefore, provision exists to deal with such behaviour.

Stewart Stevenson asked what provisions or powers cover the situation. Paragraph 60 of schedule 3 to the Sexual Offences Act 2003 makes it clear that if the court, in imposing sentence in relation to any offence other than one that is expressly mentioned elsewhere in the schedule, considers that the offender's behaviour in committing the offence had a significant sexual aspect, that offence can form the basis of a

requirement to register as a sex offender. That means that the court can already require notification in the circumstances that the convener's amendment envisages.

Secondly, perhaps more crucial is the fact that our advice is that if amendment 11 were agreed to, it could have a significant unintended consequence. Paragraph 60 applies only to offences that are not mentioned elsewhere in schedule 3 to the 2003 act, so an express reference to breach of the peace elsewhere in the schedule would mean that paragraph 60 could not apply to that offence.

The convener's amendment would insert in schedule 3 breach of the peace only when the offence was committed against a child. As a result, any breach of the peace offence that did not involve an offence against a child could not lead to a requirement to notify. If an offender harassed an adult with letters or phone calls in which sexual threats were made, the Crown might decide to prosecute such a case as breach of the peace. In some circumstances, the court might consider that the accused was a sex offender who should be subject to the notification requirements. If we agreed to the amendment, the court would have no powers to put that offender on the sex offenders register, so the amendment could reduce the powers that are available to the courts when dealing with breach of the peace offences.

In the circumstances, I hope that Pauline McNeill accepts the assurance that amendment 11 is unnecessary and that she shares our concern that the unintended consequence could leave us worse off.

The Convener: What you have said helps the committee to understand the 2003 act. It would have helped to have that response in writing, so that we could have considered further confirmation that we are avoiding such an unintended consequence.

I will listen to the response to my next point before I say whether I will press my amendment to a vote. I hope that the Executive accepts that the matter is fundamental for the committee. If the 2003 act covers the cases that we have seen, which we believe form the greater number, we need to have confidence that the courts will use that act to put such offenders on the sex offenders register.

Hugh Henry: I cannot assure the committee that any court will use provisions in any legislation—that is a matter for the courts. I hope that the courts will use the legislation that is available, but each determination is a matter for the courts and not for ministerial guidance or diktat to courts.

The Convener: I appreciate that that is a matter for the courts. My only reservation is that we now just have to leave the subject alone and see what happens. Will the Executive consider whether the legislation should be monitored in some way? This is probably our only opportunity in this parliamentary session to consider the protection of children, which is why we are being particularly careful to ensure that we do everything that can be done to put the correct provisions in place so that they can be used. Will you consider monitoring whether the legislation is being used as intended?

10:15

Hugh Henry: We will certainly keep our eye on how the legislation is being used. It is appropriate to consider whether any legislation introduced by the Parliament is having the desired effect or whether there are still gaps and weaknesses. Parliament should come back to any piece of legislation to determine whether it should be strengthened in future.

We are still at a relatively early stage. The Sexual Offences Act 2003 only came into force in May last year, so it will take some time to establish a body of evidence. However, undoubtedly we will keep our eye on how the legislation is being used.

The Convener: Given what you said about an unintended consequence, I feel that I have no option but to withdraw amendment 11, but I might want to revisit the issue. I want to be sure that the Executive accepts what the committee said in its report about our need for adequate provisions to catch offences that are outside the new offence under section 1. We have not had anything in writing from you about that.

Hugh Henry: We believe that the matter is adequately covered but we will reflect on what the committee has said.

Amendment 11, by agreement, withdrawn.

Section 2—Risk of sexual harm orders: applications, grounds and effect

The Convener: Amendment 42, in the name of Marlyn Glen, is grouped with amendment 36.

Marlyn Glen (North East Scotland) (Lab): Amendment 42 seeks to achieve consistency with the changes that we have already made to section 1. If an offender can be under 18, and we have accepted that they can, the risk of sexual harm order should also be available for general use. Given we have accepted that people younger than 18 can exhibit problem behaviour, we must make this change to section 2. I take this opportunity to reiterate that when we take this route, suitable interventions should be available for those young people.

I move amendment 42.

Hugh Henry: Amendment 36, in the name of the Minister for Justice, is a minor amendment that inserts the word "aged" in section 3(b) to ensure that the language used in the bill is consistent and that there is no doubt that we are talking about the age of the child when we refer to that child being "under 16". I hope that amendment 36 is uncontroversial.

We support amendment 42 for the same reasons that I set out when we considered the amendment to section 1 that removed the 18-year age limit for the grooming offence. We have taken note of the evidence and the consultation responses that highlighted the risk that those who are under 18 can present to young children and the damage to those children that results. It is therefore right that risk of sexual harm orders, which we believe will be a useful addition to the protection measures for children who are at risk of sexual harm, should also be available for the courts to use when it is judged that under-18s pose a risk to children. Of course, we expect that such individuals will be the subject of intervention from social work departments and possibly also the children's panel, although those issues are probably more for guidance rather than for the bill.

Mr Bruce McFee (West of Scotland) (SNP): I agree with the minister and Marlyn Glen. There are two sides to the matter. First, we have to recognise—as we did on the first day of stage 2—that such offences and behaviour are not exclusive to those who are over the age 18. Secondly, we have to provide an intervention mechanism. If we as a society are to try to affect someone's behaviour, it is vital that we catch that behaviour as early as possible. Amendment 42 will ensure that the armoury has an additional weapon so that that function can be carried out.

Amendment 42 agreed to.

The Convener: Amendment 34, in the name of Cathy Jamieson, is grouped with amendments 35, 45, 46, 37 to 39, 52 and 55.

Hugh Henry: There has been discussion by the committee and in evidence about the procedure that is to be followed when applications are made for RSHOs—full RSHOs and interim RSHOs. I should make it clear at the outset that the Executive shares the view that the procedure should be completely fair and should allow all parties the opportunity for a fair hearing. Our approach to achieving that fairness in procedure has been to rely on the sheriff court summary application rules, which cater for almost all situations that could be envisaged. In taking that approach, we note the terms of rule 1.4 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) 1999, which states:

> "Unless otherwise provided in this Act of Sederunt or in any other enactment, any application or appeal to the sheriff shall be by way of summary application and the provisions of Chapter 2 of this Act of Sederunt shall apply accordingly."

However, to ensure that there is no room for doubt, we specify in amendment 34 that the summary application procedure is to be used.

Amendment 35, in the name of Cathy Jamieson, specifies a time limit for making an application. Under the rules to which I referred, the default position would be that an application can be made no later than 21 days after the action that leads to the application. In the case of RSHOs, it is our view that if the 21-day limit were applied to the actions that are listed in section 2(3), that would be unduly restrictive, given the complexities of the matters to be considered, such as whether prosecution would be a more appropriate response. Therefore, we propose a time limit of three months after the act in question comes to the attention of the chief constable, because we think that that is a more realistic period. We are conscious that there may be occasions on which, although it is not possible to meet that time limit, there is still a strong case for making an order. We think that it is right that in those circumstances, such action should be permissible, provided that the sheriff is satisfied that it would be equitable to take that action, once he has taken into account all the circumstances.

Amendment 39 seeks to remove the need for consent of the chief constable or the person who is subject to the RSHO to be obtained before the RSHO can be discharged within two years of its having been made. Having reflected on the matter, we think that it is perfectly adequate to ensure that the chief constable always has the right to be heard and that there is no need to give the chief constable a veto. The sheriff court rules will ensure that the chief constable who applies for an order in the first place, and the person who is subject to the order, will both have the opportunity to put their cases when any application for variation or discharge is made.

Amendment 38 is related to amendment 39, in that it seeks to ensure not only that the chief constable who applied for the order, but the chief constable of any area in which the person under an RSHO has gone to live, will be given the chance to be heard.

I will not go into detail on the amendments that Mary Mulligan and Marlyn Glen have lodged. We are sympathetic to their underlying intentions, but it is our general view that procedural aspects are adequately covered by the sheriff court summary application rules that I have mentioned, and that

further specification of the procedure is not necessary. I add that the summary application rules can be amended to set out particular procedures that apply to specific types of application, if it is decided that that is necessary.

I move amendment 34.

Mrs Mulligan: The minister picked up the points that I was trying to make in my amendments. We wanted to ensure through amendment 45 that there would be an opportunity for a person to be heard, as natural justice should allow in any other situation.

On amendment 46, it is important that the accused be given the opportunity to hear the cause, effect and consequences of the RSHO. We are not trying to catch somebody out by placing on them an RSHO; we are trying to prevent them from putting a child at risk or in danger of an act that would harm the child. Therefore, it is important that we ensure that the perpetrator is aware of what is covered in the RSHO.

I appreciate that the minister has tried to pick up the spirit of amendment 46. I hope that he appreciates that my amendments would also provide that when someone is not present in court, we do not want the process to be held up just by people's absenting themselves. I want the minister to consider other ways of ensuring that a person who is not present in court knows exactly what is involved in the RSHO, as they would had they been present. That said, the minister has probably picked up the spirit of the amendments, so I shall not press the matter.

Marlyn Glen: Like Mary Mulligan, I have been persuaded that it is not necessary to spell out in the bill more of the procedures. However, it is important that we balance the rights of the accused with the rights of those who are offended against. It is important that we have this discussion openly and that the courts and everyone else are aware that a balanced view is necessary.

Stewart Stevenson: I want to test my understanding of the effect of amendment 35, which seeks to change the 21-day timescale—to which the act of sederunt refers—to three months when applying for an RSHO. I want to be clear about when the clock will start ticking.

The references are to section 2(3) and the four activities on page 3 of the bill, to which the act of sederunt refers. Will the clock start ticking when a complaint is made to the chief constable, and in what form will the complaint have to be made for the clock to start ticking? At that point, there might be absolutely no prima facie evidence to sustain a malicious and anonymous letter that might have been received by the chief constable, for example. In the whole gamut of sexual offending, we know that this is a very difficult area in which to prove cases and to see through prosecutions in the criminal justice system. It is true that the offence comes under the civil system to an extent, but the question is important.

Mary Mulligan will probably not move her amendments. We will see about that, but notwithstanding that, if amendment 45—which would insert the phrase

"after giving parties an opportunity to be heard",

for RSHOs, but not for interim RSHOs—were to be written into the bill, would the effect be to require the person who might become the subject of the RSHO to be present in court at the hearing, or would it be sufficient that the person was aware of the court hearing and was given the opportunity to appear, but did not have the opportunity to veto by failing to appear? It would be useful to understand the implications of that if it were to be written into the bill. I generally support the minister's amendments, but I want to ensure that we fully understand their implications.

10:30

Margaret Mitchell (Central Scotland) (Con): I have reservations about proposed new subsection (b) that would be inserted by amendment 35. I understand that proposed subsection (a) in the amendment will have the effect of extending the timescale for submitting an application from three weeks to three months, while proposed subsection (b) will, more or less, give a blank cheque. There will be no time limit whatever, apart from in exceptional circumstances. That is already quite a variation.

I also have reservations about amendment 39, which seeks to remove section 4(5), which will give chief constables an absolute veto over discharging RSHOs as a result of the chief constable being the person who was in full possession of the facts when the interim order was made. Are you quite satisfied that section 4(4) covers that? I feel that it is a somewhat of a belt-and-braces measure.

I have reservations about other matters, but I seek clarification on amendments 35 and 39.

Hugh Henry: On the latter of Stewart Stevenson's two points about requiring presence in court, Mary Mulligan's amendment 45 says:

"giving the parties an opportunity to be heard".

It does not require the parties to be present. I hope that that answers the question.

Stewart Stevenson wondered when the clock would start ticking. It will start when it appears to the chief constable that two acts have taken place. We do not specify how that information should be

presented; however, the chief constable has to satisfy himself or herself that there are sufficient grounds for taking a matter forward. In any case, we are quite clear that the clock will start ticking when that information is presented to the chief constable.

Stewart Stevenson: I want to nail the matter down. Does the clock start ticking when the chief constable becomes aware of the second act, regardless of how far in the dim and distant past the first act might be?

Hugh Henry: Yes. Stewart Stevenson is right to point out that the process is triggered not by the first incident, but by a second similar event. As a result, a fair summation is that the time period that he referred to will start from the second event, because the process cannot be started simply by one event.

Stewart Stevenson: Again, just to be absolutely clear, there would be no bar to the first event's being an event over which a person had been successfully prosecuted and sentenced, perhaps even 10 years before. Could the second event be something that happens 10 years later? Would that scenario count under the definition that is set out in the bill? I am not trying to suggest that it should not; I am simply testing the intention behind the proposal.

Hugh Henry: We should remember that this is not a prosecution process.

Stewart Stevenson: I am aware of that.

Hugh Henry: However, I presume that Stewart Stevenson is describing a situation in which two acts have been committed, one of which resulted in an earlier prosecution. In an application that links two events that are separated by a substantial period of time, the courts would have to determine whether such a link should be made.

Stewart Stevenson: So, in the context that we are talking about, there would be no question of the first offence's being regarded as spent because it might be in other circumstances in the judicial process.

Hugh Henry: No—the first offence could have other consequences, which might still apply.

The Convener: Stewart Stevenson has raised an important matter that I had not considered. Could the defence argue under the European convention on human rights that the first offence was too old? There is a tendency to argue that point.

Hugh Henry: We understand that that would not be a valid argument. However, who knows what might be argued in the future under the ECHR? It would be for the courts to determine the matter.

The Convener: If Parliament provides no guidance on the matter, a court might take the view that too much time had elapsed between the two incidents. At stage 2, we should consider making it clear in the bill that we are concerned not about the time between the two acts but about the fact that acts took place that come within the scope of the bill.

Hugh Henry: We have not specified any limit on the time between acts. If we did that, or if we specified that there must be a link between the acts, there would be a danger that cases might be regarded as being outside the scope of the bill. We would rather deploy flexibility, notwithstanding the fact that the courts might take a different view in the future. It is right that the courts should properly consider each case; I would worry about including a specific provision that might militate against a court's taking action against someone whose activities had lain dormant for some time.

Mrs Mulligan: I appreciate that the minister wants to ensure flexibility. It is helpful that he has said on the record that he will not set a limit on the time between incidents, so no one should think that there is any such time limit. However, the convener mentioned the ECHR. If the first incident had led to a sentence, could it be argued that the offence had been dealt with and should not be regarded as the first act? I would appreciate the minister's stating on the record his views on the matter.

Hugh Henry: I do not think that such an argument could be applied. We are not talking about offences; we are talking about behaviour. In the situation that the convener described, the earlier offence would have provided confirmation of the individual's behaviour. However, we are not linking the acts or considering whether they are spent offences. There would be sufficient justification for the court to act if it considered that the individual's behaviour, confirmation of which had been provided in relation to the previous offence, was such that the person presented a risk to children. The person would not be being punished for the previous offence, which would have been dealt with. The question for the court would be whether the previous offence was sufficient to enable the court to identify a pattern of behaviour that posed a risk.

Stewart Stevenson: The minister is probably aware that I received an answer this week to a parliamentary question that I asked about reoffending rates. Strictly speaking, of course, the statistics are on re-conviction rates. It is clear that the re-conviction rates for sex offenders are dramatically lower than the rates for other categories of offender. I think that there is a shared view that that is partly because of the difficulty in detecting the crime, in obtaining the

appropriate evidence and in convicting people who commit sex offences, because such crimes often take place out of the sight of others. I have focused on the issue to ensure that we have the opportunity to catch people who may not be on the sex offenders register because the offence was committed before that was possible and who are now establishing a pattern of behaviour that may lead to an escalation of their activity, which may lead to criminal conviction at some point. By catching them early enough, we can enhance public protection.

I assure the minister that he will have my support in ensuring that we have the finest-mesh net that is consistent with defending the rights of individuals from harassment, persecution and unrealistic prosecution by the state. It is useful to have had this discussion and have it on the record, but in the light of the discussion I invite the minister to consider further whether other things should be said explicitly, perhaps at stage 3, to nail the matter down on the parliamentary record so that judges are clear about the intention of the legislators.

Mr McFee: I think that we are clear about the situation in which there has been a successful prosecution in the past. I will stand the situation on its head. What would be the minister's view of a situation in which there had been a prosecution of an allegation of behaviour of that type two or three years previously, but it had been unsuccessful because there was not enough evidence or corroboration to secure a conviction? Despite the fact that the person had been found not guilty or the case had been not proven, could that still be used to establish an alleged pattern of behaviour?

Hugh Henry: I still have to come back to Margaret Mitchell's comments, which I will deal with once I have dealt with those questions.

If we need to say anything at stage 3 to make the legislation clear, I will certainly do so; I do not want there to be any doubt about Parliament's intention to provide the greatest level of protection for our children.

On Bruce McFee's question, it is not for me to specify an absolute, but it might be that an unsuccessful prosecution at some time in the past could be seen as having helped to establish a pattern of behaviour that causes concern and which may well prompt chief constables to act if they believe that to be necessary. Such action would be taken on the balance of probability, but it would be for the court to determine whether it considers the unsuccessful prosecution to be relevant when it assesses the matter.

The Convener: Do you want to come back on Margaret Mitchell's point?

Hugh Henry: Yes. When Margaret Mitchell talked about subsection (b) in amendment 35, she used the phrase "blank cheque". The provision in that proposed new subsection is similar to what exists elsewhere in statute, for example in the Human Rights Act 1998. There is no significant departure from what is familiar within our legal system.

On chief constables having a veto, I emphasise that chief constables will still have the chance to state their case. That opportunity will not be lost.

Margaret Mitchell: Do you not consider that the bill would be stronger if section 4(5) was left in to underline that fact and to ensure, given that we live in a busy world in which people are under various pressures, that the chief constable was formally approached?

Hugh Henry: A balance needs to be struck on all those matters. The concern is that giving chief constables a veto could be regarded as giving them a disproportionate power rather than giving them the opportunity to state the case and leave it to the court to determine the matter. We believe that chief constables will consider the opportunity to state their case before any action is taken as a significant opportunity, but it is probably right, on balance, that what was described as the veto is not made available.

10:45

The Convener: I would like to clarify another matter. I am trying to understand how the various aspects of the bill link with one another. You have been asked about the scenario in which there has been a conviction, and about whether that could be deemed to be one of the two acts that will be necessary before a chief constable can apply for an RSHO. There is a section that will allow the courts to make sexual offences prevention orders and I had presumed that its purpose was to ensure that, on conviction, such orders were to be used. The system should operate in that way; if the conviction did not merit a sexual offences prevention order, it would be odd for a chief constable then to use the conviction to show the pattern of behaviour when applying for a risk of sexual harm order. It seems to me that that would negate the purpose of the sexual offences prevention order.

Hugh Henry: No, I do not think so. If there had been a previous conviction for a sexual offence, I think that the scenario that you describe in relation to the sexual offences prevention order is right—such an order would probably be more appropriate. We are trying to envisage a scenario in which something may have happened a considerable time ago, and to consider whether that could, at some indeterminate point in the

future, be linked to events at that time in deciding whether an RSHO could appropriately be applied. That is not to negate the use of the sexual offences prevention order. That would still be entirely—

The Convener: That is not what I asked about—I am talking about the idea behind the bill and what will be done when it comes into force. In the scenario that Bruce McFee described, in which there has been a conviction for a sexual offence, the point of having prevention of sexual offences orders is that they should be used if the conviction merits such an order. We do not want to exclude that scenario, but that is the idea behind it. If the court did not apply a sexual offences prevention order, it seems odd to me that the same act would be used in establishing a pattern of behaviour to apply for a risk of sexual harm order, when the court could in the first place have applied a sexual offences prevention order in respect of that conviction.

Hugh Henry: We are looking at two different things. The court cannot make a sexual offences prevention order unless there is a conviction—if there is a conviction, it can make such an order. We started off with a scenario in which someone might have been charged with a particular offence but the prosecution had been unsuccessful, and we asked whether that could be linked to future behaviour. We are saying that, potentially, it could, if the court thought it relevant. The chief constable would make the link first, and it would then be a matter for the courts. That is not to say that what we are now talking about is somehow diluting or removing provisions that would be more appropriate, the sexual offences prevention order having been placed as a result of conviction. We started off discussing a slightly different scenario about unsuccessful convictions, but the question is whether a conviction with a sexual offences prevention order from some point in the dim and distant past could in theory be sufficient for a RSHO to be considered because of another event. In theory, it could—if it was felt that an RSHO was relevant. However, other safeguards in respect of the individual might still apply. Arguably, they could be just as effective, or even more so.

The Convener: I am not disagreeing with that interpretation; I was just making an observation about relying on a past act in an application for a risk of sexual harm order. The point of having such an order is that the court can consider that act. However, the defence might argue that, if the act was not used in any previous application for a sexual offences prevention order, it should not be used as evidence in an application for a risk of sexual harm order. Why should the courts get another go, using the same act? The whole point of having sexual offences prevention orders on conviction is that the act really merited such an order.

Hugh Henry: There are a number of different scenarios. The first scenario is that of an unsuccessful prosecution. The question is whether that trial could be sufficient to trigger a second order. The answer to that, I believe, could be yes.

The second scenario is that of a successful prosecution after which a sexual offences prevention order is established. Whether there would be a need for a risk of sexual harm order at some point in the future would be arguable, but such an order could not be ruled out.

The third scenario—and the one that I think you are referring to—is that of a successful prosecution at which the court determines that no sexual offences prevention order is required. Should it be possible to obtain an RSHO in future? The answer to that could be yes. If we can link such an order to an unsuccessful prosecution, it would be right to be able to link it to a successful prosecution at which the court determined that no sexual offences prevention order was required.

With RSHOs, we are not trying to convict people but to take action because of concern about behaviour that could be a current or future risk to children.

The Convener: It is helpful to clarify the purposes of the two kinds of order.

Margaret Mitchell: I am curious to know how this would work in practice. The minister has said that, in theory, if someone has been prosecuted, albeit unsuccessfully, something relating to that trial could be the first incident that then—in conjunction with a second incident—triggers the interim RSHO. If there was a not guilty or a not proven verdict, how does one go back to the first prosecution and tease out the elements that could be acted on?

Hugh Henry: An incident is brought to the attention of the chief constable. If the chief constable believes that the incident is not isolated but can be related to something that took place before—at whatever point and of whatever nature—and believes that the balance of probability is sufficient to suggest a risk to children, the chief constable can go to the next stage and apply for a risk of sexual harm order.

Mr McFee: The information has been useful. Could an unsuccessful trial provide both the first and the second incidents that the chief constable would require before seeking a risk of sexual harm order?

Hugh Henry: Only if the court considered more than one incident. If there was only one incident, it is hard to conceive of there being sufficient justification to say that there were the two

separate events that would be required for a risk of sexual harm order.

Mr McFee: But two events could occur and be used in evidence in criminal proceedings. In such situations, I think that you are saying that one unsuccessful court case could possibly produce both the incidents that would be required to apply for an RSHO.

Hugh Henry: If a prosecution that related to more than one event was unsuccessful and the chief constable believed that there were two events and he had concerns, I presume that the chief constable could decide whether to apply for an RSHO. It would then be for the court to determine whether the requirements had been met, whether there had been two events and whether the individual's behaviour posed a sufficient risk. It should be remembered that we are talking not about a conviction, but about something being done with a different level of proof and about building in protection and safeguards. As long as there were two events, it is conceivable that a chief constable could consider it appropriate to take such action.

Mr McFee: I understand the different levels of proof, which is why I asked the question. If a person has been convicted but no sexual offences prevention order was issued by the court at that time, would it be possible for the chief constable then to apply for a risk of sexual harm order if the court case had covered two separate incidents?

Hugh Henry: Potentially, yes.

Mr McFee: So further evidence would not be needed.

Hugh Henry: Potentially, they could apply, but I would have thought that it would be more appropriate to apply for a sexual offences prevention order rather than a risk of sexual harm order. However, what Bruce McFee has described is potentially and theoretically possible.

The Convener: We seem to have exhausted all the scenarios and no other member seems to want to speak. Minister, do you want to say anything to wind up?

Hugh Henry: No. The matter has been adequately covered.

Amendment 34 agreed to.

Margaret Mitchell: May I record my abstention? Quite a bit has come out—

The Convener: No, you cannot. You must say that you do not agree to an amendment and then there will be a vote. The problem is that the amendment has been agreed to and there cannot now be a vote.

Margaret Mitchell: I want to abstain, so the amendment is not agreed to.

The Convener: I am sorry, but it has been agreed to. Anyway, you have said what you have said and that will be recorded in the *Official Report*. For clarity, if members do not agree to an amendment, they must say that they do not, so that there can be a division. That is how abstentions are recorded.

Amendment 35 moved—[Hugh Henry].

The Convener: The question is, that amendment 35 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 35 agreed to.

11:00

The Convener: Amendment 43, in the name of Stewart Stevenson, is grouped with amendments 44 and 48.

Stewart Stevenson: As members will recognise from our discussions at stage 1, and as the minister will recall, amendment 43 is, in essence, lifted from section 14 of the Sexual Offences Act 2003, which applies south of the border. Its purpose is to address the concerns of a number of special interest groups, all of which have contacted me in recent days. The groups that feel that their position is not adequately protected include teachers who provide sex education and advice, such as guidance teachers, who may be providing advice to pupils who are "a child" under the terms of the bill. They also include doctors, and the British Medical Association has concerns that doctors, who may be providing sexual health advice to youngsters, are not adequately protected by the bill. Finally, they include magazine and newspaper publishers that run agony aunt columns and the like, which respond to queries from their readership. In giving a response on a matter that may be sexual in character, but is a responsible response aimed at enhancing the protection of the child, they feel that—as the bill is

currently framed—they may be crossing the boundary into prosecutable activity.

I do not defend some of the things that are printed in some publications, which do not deserve protection. That is why amendment 48, which contains the substance of the three linked amendments, makes the same specific provisions as does section 14 in the 2003 act, in referring to

"(i) protecting the child from sexually transmitted infection;

(ii) protecting the physical, psychological or emotional safety of the child, including preventing the child from becoming pregnant; or

(iii) promoting the child's physical, psychological or emotional well-being by the giving of advice".

If the minister is able to point to statute law elsewhere that provides the necessary protection for teachers, doctors, publishers and, indeed, others who have not yet made their concerns known to me or other committee members, those groups would of course be entirely happy and I would not seek to press the amendments. However, as the bill is presently constructed, people who are on the side of children, and on our side in trying to protect children, have some real concerns. My amendments are geared to aid them, in aiding children and in aiding us.

I move amendment 43.

Marlyn Glen: I am glad that we are having this discussion on the record. It is important that we clarify what the bill is about and what the bill is not about. Some of the confusion may have arisen because of a muddle in terminology at the previous committee meeting, when we were talking about the difference between sexual services and sexual health services. We should put on record the importance of sexual health advice and services.

The special interest groups that Stewart Stevenson talked about have expressed concerns about the bill. That is a great pity, because they should not have such concerns. We are talking about special interest groups—about anybody who gives sexual health advice. I do not want to list them all, but they range from parents to professionals, as well as publishers. There is a huge group of people who give sexual health advice informally as well as formally. We should give them—and be clear that we are giving them—our support. We should be clear that the bill is not about them at all.

We have decided that we will not ask for exemptions for certain categories of people; if someone breaks the law, they should be answerable. However, it is a good idea for us to have an open discussion about the issue, so that all the people who have expressed concerns can be reassured.

The Convener: I, too, am grateful to Stewart Stevenson for lodging this group of amendments, because it is important to debate the issue, as we did at stage 1. The problem is that there is nothing in section 2(1), under which the chief constable may apply for a risk of sexual harm order, to say that such an application should be for the purpose of protecting a child. That is not mentioned until we get to the provisions in section 2(4) on such an order being made only if a sheriff is satisfied that

"it is necessary … for the purpose of protecting children".

Section 2(3) states that acts that can lead to an application for a risk of sexual harm order include

"(c) giving a child anything that relates to sexual activity or contains a reference to such activity"

and

"(d) communicating with a child, where any part of the communication is sexual."

That is what has given rise to the concern of the organisations that have written to us all. They are not asking for something to be included in the bill, but they want reassurances that the work that they do will not be hampered in any way by the passing of the bill.

I have reservations about adopting the English provisions and feel that a relationship with a child that might involve discussing sexual health or having explicitly sexual conversations should not place any person in a position to abuse the child's trust. Therefore, it is important to hear what assurances the minister can give to nail down the meaning of section 2.

Mr McFee: I have a great deal of sympathy with amendments 43, 44 and 48 for the reasons that Stewart Stevenson outlined and I am keen to hear the minister's answer. It is possible to read section 2 in two different ways. The acts that are described in sections 2(3)(b) to 2(3)(d) seem to cover the ordinary activities of professionals such as doctors and teachers.

I wonder whether the minister is relying exclusively on paragraphs (a) and (b) of section 2(1), which stipulate not only that for there to be an application for a risk of sexual harm order the acts must have taken place on at least two occasions but that they must give the chief constable

"reasonable cause to believe that it is necessary for such an order to be made."

Is that sufficient to protect the professions that Stewart Stevenson has mentioned? I want to hear the answer to that before we reach a final determination.

Hugh Henry: Reference has been made to the content of various teenage magazines, but I will leave aside my personal prejudices and thoughts

about the content of some of those magazines and try to deal with the amendments that are before us.

Unusually, Stewart Stevenson confuses two different issues. He talks about prosecutable activity and cites section 14 of the 2003 act, which deals with offences. However, we are talking not about offences but about a completely different issue. Section 14 of the 2003 act does not apply to RSHOs, so there are no exemptions from RSHOs for doctors or teachers in England and Wales similar to those that Stewart Stevenson proposes.

It is important to remember the context in which it is possible for an RSHO to be made, which brings us back to Bruce McFee's point about section 2(1). We need to remember that for anyone—including teachers, youth workers, medical workers and health advisers—who is dealing with children to have a risk of sexual harm order made against them, two conditions would need to be satisfied. First, there would have to be two activities that were of concern, so we are not talking about prosecuting people or taking out risk of sexual harm orders against them if they are just giving advice or doing their job. There would have to be two specific acts that the chief constable was concerned about. If, after hearing reports, the chief constable was concerned about a teacher, the chief constable would have to determine whether further action was required.

The chief constable could be concerned about the activities of a teacher, a youth worker, a church leader, a health worker or a medical professional, and it might be entirely appropriate to take further action. We are certainly not saying that people in certain categories of society will never be prosecuted or never be considered for an RSHO. Tragically, we know all too well from cases over many years that people from all different backgrounds can be a risk to children. However, someone who is simply doing their job in all good faith could not, I believe, be caught up in these orders. The person would have to have done something that was reported to the chief constable; and the chief constable would have to have concerns about the person because of the actions of the person and things that had happened on more than one occasion.

There would then be further safeguards before any person could be caught up in such an order. The chief constable would have to apply to the courts for an order. The court would then determine whether or not the actions were such that an RSHO should be considered—but only after a hearing at which the person would be able to present their case.

For example, why would a chief constable think that a teacher who was following the curriculum should have an RSHO taken out against them? Even if that chief constable perversely thought that following the curriculum was sufficient to establish the need for such an order, it would be for the court to decide whether the teacher following the curriculum was a risk to pupils.

A similar example would be that of a health worker giving health advice. The chief constable would have to determine that there had been harm, and the person would be able to argue their case in front of a court. The court would decide whether or not an RSHO was required.

We are talking not about prosecutions, but about actions by individuals—irrespective of who they are—that could be construed as being harmful to children. A risk of sexual harm order could come about only after a number of safeguards had been triggered. Anyone doing their job properly and in good faith could not possibly be caught up in what would be casual use of such an order.

Marlyn Glen: I would like you to reiterate some of that, because people are concerned about the possible triggers for the orders. A teacher who is simply following a formal curriculum could not possibly be considered to be breaking the law. However, lots of people—including teachers—will give advice outside the curriculum. For example, they might answer a question that was put to them directly.

Another concern is that, whereas teachers in schools have formal curriculums, other workers do not have that kind of formal structure. We need reassurances on that point.

11:15

Hugh Henry: If those workers are doing the job that they are employed to do and are acting appropriately, I do not think that there is any potential for the orders to be used. If, within the curriculum or in response to a question, a teacher behaves appropriately, I do not think that the chief constable would be able to establish anything that would be sufficient to apply for a risk of sexual harm order.

Equally, anybody who made inappropriate comments, be they a teacher or other worker in the school, would have to consider the consequences of their actions. We are not saying that some people have absolute protection, because we know that there have been teachers who have acted inappropriately over the years. There is a clear duty on us all to think carefully about what we say and to consider the harm that might be done.

If a chief constable were concerned that things were being said in the curriculum that were sufficient for the chief constable to think about taking out an RSHO, that chief constable should

discuss that with the director of education. If the chief constable felt that advice was being given by any member of staff as part of their routine job, the chief constable should be discussing with the chief executive of that local authority or health board the result of the activities that caused the chief constable concern. If there were wider concerns, they would not apply to one individual and the matter would need to be resolved.

However, we must remember that if anything of concern is said, it has to happen on more than one occasion. The chief constable would have to be satisfied that the matter was sufficient to take the process forward and the court would then make the final decision following a hearing at which the individual would have the opportunity to put their case.

The Convener: I am entirely comfortable with the Executive's broad position on the matter, but as you and other witnesses have said, the chief constable should consult other agencies before embarking on a final decision. What legislative obligation is there on the chief constable, or is the decision solely one for the chief constable?

Hugh Henry: Yes, but for the purposes of clarity, I will repeat what I said before. I do not think that I said that the chief constable would be required to consult the director of education.

The Convener: That is what I am asking you about. So the chief constable is not required to consult.

Hugh Henry: No, I said that if a chief constable were becoming concerned that the curriculum was leading to concerns, then I believe that the chief constable should discuss the curriculum with the director of education. If there were general concerns about workers getting themselves into a situation in which they were at risk in the course of their work, it would be incumbent on the chief constable to discuss that with the chief executive.

The Convener: That is my point. I understand that it would be incumbent on the chief constable, but the legislation does not make it incumbent. The legislation says that it is a matter for the chief constable.

Hugh Henry: That is correct, but I am talking about two different things. As far as the legislation is concerned, any concern is a matter for the chief constable to take forward. There is no requirement on the chief constable to discuss it. I am trying to describe a situation in which someone who was doing their job reasonably was left open to the chief constable's concern. Those issues should be discussed by the chief constable with the appropriate agency, but as far as the legislation is concerned, it is a matter for the chief constable.

The Convener: I understand what you are saying, but witnesses have said to the committee that they think it is important to be clear. In fact, some would argue that the legislation should include the fact that it is incumbent on the chief constable to consult others, although no committee member has stressed that point at stage 2 so far.

Where it says in section 2 that the chief constable can make an application to the sheriff for an RSHO when the chief constable has

"reasonable cause to believe that it is necessary for such an order to be made",

I would have been happier had the wording included "for the protection of a child" at that point. I say that because, although I accept everything that you say about the intention behind the provision and the practical realities of what would be expected, the committee has expressed concerns about the extent of the provision.

I would like the test to happen at the beginning and the situation to be nailed down before it gets to court, because once that happens, whether the sheriff accepts or dismisses the case, one is already in the process. As we have discussed in the past, the process is based on the balance of probability. I would like to be sure that when the chief constable is making the decision about whether to proceed, there are enough safeguards in place.

I am not suggesting any changes or opposing the Executive's view. Stewart Stevenson's amendment has been useful, as it has resulted in this discussion, but I will not support it. However, I reiterate that further discussion on the test may be needed at stage 3. I trust the chief constables whole-heartedly—I would not say anything other than that on or off the record—but they are not infallible. The legislation must be clear cut and we as legislators must be satisfied that everything that needs to be done to achieve what has been said is covered by section 2 of the bill.

Hugh Henry: I am happy to consider whether further strengthening of section 2 is needed to achieve what has been suggested. If that is possible and will assist, we will come back with proposals at stage 3.

The Convener: The final word will go to Stewart Stevenson.

Stewart Stevenson: I say straight away that I do not think that there is a fundamental disagreement about what we are trying to achieve and say to people who have expressed concerns and others that I am reasonably satisfied that it would be likely that a perfectly proper case could be made in court under section 2(4)(b), which

states that the sheriff may make a risk of sexual harm order if he is satisfied that

"it is necessary to make such an order for the purpose of protecting children generally".

A case could properly be made that people who provide sex education, advice or whatever protect rather than harm children, although they undertake acts in section 2(3), which refers to

"giving a child anything that relates to sexual activity"

and

"communicating with a child, where any part of the communication is sexual."

However, section 3, on the interpretation of section 2, makes it clear that people who provide sex education and advice would undertake activities that relate to sexual activity—I refer to section 3(e)(i)—and that there could be sexual communication. I am reasonably happy that people would be able to argue successfully in court if they have behaved properly, although I accept that such people are capable of behaving entirely improperly.

Our key concern is probably about section 2(1), where the process initiates, and the considerations that the chief constable can and must take into account in deciding to start an action. I will certainly take into account the minister's helpful suggestion about considering the matter at stage 3, but I say to him that it is important not to make people in education, the medical professions or, indeed, publishing feel inhibited about doing constructive things. Part of the debate is about ensuring that anything that we say in parliamentary debates or that we put in the bill does not damage their confidence about doing the constructive things that they do.

I am interested in the option of published ministerial advice or guidance to chief constables that qualifies for people the considerations that chief constables might make so that there is not a licence for people to misbehave, as well as in other options. On that basis, I am content to seek the committee's permission to withdraw amendment 43.

Amendment 43, by agreement, withdrawn.

Amendments 44 to 46 not moved.

The Convener: Amendment 47, in the name of Mary Mulligan, is grouped with amendment 51.

Mrs Mulligan: The intention of amendment 47 is simple. I want to be reassured that the effect of an RSHO would not be negated if someone moved outside the sheriffdom where it was granted.

Amendment 51 is similar and I am glad that Marlyn Glen picked up the example that I missed.

I move amendment 47.

Marlyn Glen: As Mary Mulligan suggests, amendment 51 follows on from amendment 47. It seeks clarity about the extent of interim orders.

Hugh Henry: We do not think that either amendment 47 or amendment 51 is necessary. Unless otherwise stated in the orders, full and interim orders will have effect throughout Scotland. All civil orders are valid throughout Scotland and RSHOs, whether full or interim, will be no different.

For example, if a sheriff makes an order requiring one person to pay £50,000 to another person, the first person cannot escape liability simply by moving to another sheriffdom. The order automatically has effect throughout Scotland. Likewise, if someone is put on an RSHO, whether full or interim, the order will have effect throughout Scotland. The wording of the bill makes that clear. Section 2(4)(b) refers to "protecting children generally" from the subject of an order—in other words, protecting children not only in one sheriffdom but throughout Scotland.

My officials are in discussion with the Scotland Office about using an order under section 104 of the Scotland Act 1998 to make it clear that breach of a Scottish RSHO in England, Wales or Northern Ireland would also be an offence. That would mean that Scottish RSHOs would have effect in other jurisdictions of the United Kingdom and not only in Scotland. Not only would an amendment to specify that orders would have effect throughout Scotland be unnecessary; it might in fact constrain us in what we are trying to do.

Mrs Mulligan: I am reassured by the minister that not including the wording of amendment 47 will not cause any problems, and I am pleased that the amendment has given him the opportunity to inform us about the application of a section 104 order. I think that what he said has further reassured the committee.

Amendment 47, by agreement, withdrawn.

The Convener: Amendment 50, in the name of Stewart Stevenson, is in a group of its own.

Stewart Stevenson: Amendment 50 is a probing amendment. In an open-minded way, I certainly want to hear what the minister has to say.

Amendment 50 goes with another amendment to the bill that would amend the Protection of Children (Scotland) Act 2003. The clerks have that other amendment, but it has not yet appeared on the marshalled list. The amendments would provide that when an RSHO is taken out against an individual, that individual will—if it is appropriate—end up on the disqualified from working with children list. From reading the 2003 act, it appears to me that that would not be possible at present. If my interpretation is wrong, and if the interpretation of the organisations that

have expressed concerns is wrong, I would be delighted to hear that from the minister.

After talking about organisations' duty of care not to put people who are on that list into positions of child care, section 11(5) of the 2003 act says:

"It is a defence for an organisation charged with an offence under subsection (3) above to prove that the organisation did not know, and could not reasonably be expected to have known, that the individual was, at the time of the offence, disqualified from working with children."

11:30

Now, an RSHO on an individual could touch clearly on a risk to children, and that should mean that the individual should not work with children. Indeed, the RSHO could place a restriction on the individual's activity so that they are not able to work with children. However, if organisations seek—from Disclosure Scotland or elsewhere—information about an individual who has applied to work with children, it seems that those organisations would not be told about the RSHO. There is no mechanism for organisations to find that out. Therefore, although the individual who is subject to the order is committing a breach of that order by applying, the organisations are not able to play their part in protecting children. They cannot become aware of the RSHO through the disclosure process.

Amendment 50 seeks simply to address that issue. I will be delighted if the minister has another way of addressing it, if he can tell us that our concerns are misplaced, or if he can tell us that he will consider the matter further at stage 3.

The second amendment that I have lodged is, in essence, a copy of section 10 of the 2003 act, but adapted to allow an RSHO case to be referred to ministers. It is not a straightforward amendment; I certainly did not find it straightforward to work up a first draft. The minister and his advisers may make us aware of possible complications. However, the litmus test is this: if somebody is subject to an RSHO that prevents them from working with children, organisations must be able to find that out so that they can play their part in ensuring that children are protected from people who, after going through the court system, have been deemed a risk to children. That is the bottom line.

I move amendment 50.

Hugh Henry: YouthLink Scotland has produced a very good briefing that has informed the discussion this morning. I appreciate and agree with YouthLink Scotland's concerns that all relevant information on a person's suitability to work with children should be made available to employers whether the person is currently in employment or whether the person is applying for a new position. It is important that information about the existence of an RSHO can be passed to the relevant people.

One option would be that of amendment 50, which is to refer people who are subject to RSHOs to Scottish ministers for possible inclusion on the disqualified from working with children list. I appreciate that it is a probing amendment but, as it stands, there are technical problems with the drafting. For example, it is not clear what the court should do once it has considered the issues; nor is any detail given on the test that the court should apply when considering whether a person who is subject to an RSHO should be referred to Scottish ministers. We therefore cannot support the amendment as drafted.

At present, information about the existence of an RSHO can be passed to employers in a number of ways. However, rather than go into those this morning, I would simply agree with Stewart Stevenson that the current arrangements could be usefully strengthened to provide a more systematic procedure. That would ensure that anyone who is the subject of an RSHO is also considered for inclusion on the disqualified from working with children list, and that employers are made aware of the existence of an RSHO where relevant.

We are already working on implementing the Bichard recommendations to ensure better information sharing and to increase safeguards. As part of that work, we will consider how we can improve information sharing about RSHOs so that all relevant information about the order is made available to the person's employer or potential employer.

Having made those general comments, I will make a commitment to come back at stage 3—either with further amendments that help to clarify or confirm the situation, or with a more detailed explanation of the procedures that will have to be put in place to ensure that information is shared effectively.

Stewart Stevenson: The response from the minister is helpful, and recognises the validity of the concerns that were expressed by YouthLink Scotland and the organisations that it represents.

Amendment 50, by agreement, withdrawn.

Section 2, as amended, agreed to.

Section 3—Interpretation of section 2

Amendment 48 not moved.

Amendment 36 moved—[Hugh Henry]—and agreed to

Section 3, as amended, agreed to.

Section 4—RSHOs: variations, renewals and discharges

Amendments 37 and 38 moved—[Hugh Henry]—and agreed to.

Amendment 39 moved—[Hugh Henry].

The Convener: The question is, that amendment 39 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)

ABSTENTIONS

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 39 agreed to.

Section 4, as amended, agreed to.

Section 5—Interim RSHOs

The Convener: Amendment 49, in the name of Marlyn Glen, is grouped with amendments 40 and 41. If amendment 49 is agreed to, it will pre-empt amendment 40.

Marlyn Glen: Amendment 49 is on rights of representation and the different standard of proof that is required to grant interim RSHOs. It attempts to change the test that will be applied by a sheriff in determining whether to make an interim RSHO. The test in section 5 is whether it is "just" to make an RSHO, which seems to be a lesser standard than the test under section 2, which is that it is "necessary" to do so. Amendment 49 seeks to sort that out. It also attempts to ensure that the sheriff has all the relevant information before making an interim RSHO, by providing for the parties to address the court.

I move amendment 49.

Hugh Henry: I acknowledge and support what Marlyn Glen is seeking to achieve.

Amendments 40 and 41, in the name of Cathy Jamieson, expand on the provision in the bill, which says that the sheriff should make an interim order if he or she considers it just to do so. The amendments add two further requirements. First, the sheriff must be satisfied that the interim order has been intimated to the person against whom the order is sought. Where the application for an interim order is part of the main application for the order, it is quite clear that it will in all circumstances have been intimated as part of the normal procedure under the sheriff court rules. However, where the application for an interim order is separate from the main application, it will be incumbent on the sheriff to satisfy himself or herself that that has been intimated as well as the main application.

The second additional requirement is that the sheriff must satisfy himself or herself that prima facie it appears that the person against whom the order is sought has on at least two occasions done something that falls within the acts that are set out in section 2(3). Clearly, the question whether the person has in fact done those acts is likely to be the subject of further debate at the hearing of the main application but, if there is a prima facie case, that part of the requirement is met.

Finally, in keeping with what is in the bill at present, the sheriff must also be satisfied that it is just to make the interim order.

We sympathise with what Marlyn Glen seeks to achieve, but our view is that requiring the sheriff to ensure that all parties have the opportunity to be heard is unnecessary. An integral part of sheriff court summary application procedure is that anyone who has received intimation of an application automatically has the right to be heard. Therefore, I hope that Marlyn Glen agrees that pressing her amendment is unnecessary.

The Convener: I want to clarify the effect of Executive amendments 40 and 41. Will the provisions in section 5 be strengthened in any way, or will there simply be clarification?

Hugh Henry: The amendments will expand and, I hope, clarify. Amendment 40 will leave out

"considering it just to do so"

and amendment 41 will insert proposed subsection (3A) in section 5. We hope that the amendments will help to clarify matters.

The Convener: The words

"considering it just to do so"

will be removed, but they will in effect be put back in. I ask about the matter because the committee was concerned about the only test being whether the sheriff considered it just to make an interim order. Will the Executive amendments strengthen the requirements by bringing everything together? Will the requirement that there is a prima facie case that an individual has done an act within section 2(3) strengthen the provisions?

Hugh Henry: Yes. The sheriff must be satisfied that there is a prima facie case and that

"it is just to make the order."

We think that that approach will strengthen the bill.

The Convener: I understand. The phrase

"that it is just to make the order"

does not sit alone. There must also be the other test.

Hugh Henry: That is correct.

Marlyn Glen: I accept the minister's reassurances and do not intend to press the amendment.

Amendment 49, by agreement, withdrawn.

Amendments 40 and 41 moved—[Hugh Henry]—and agreed to.

Amendments 51 and 52 not moved.

The Convener: Amendment 53, in the name of Marlyn Glen, is in a group on its own.

Marlyn Glen: I will be brief. Amendment 53 reconsiders the rights of the accused person and I ask the minister to consider it. The amendment states what will happen to an interim order if a risk of sexual harm order is not made.

I move amendment 53.

Hugh Henry: I understand what Marlyn Glen is trying to achieve in amendment 53 and on first sight it appears sensible that if a sheriff decides that an RSHO is not required after all, the interim RSHO should be nullified and no record should be kept. However, I hope that the committee, on reflection, will agree that there are important arguments against that approach. An RSHO might not be granted, but the behaviour that gave rise to the concerns could be sufficiently serious to justify the police's retention of the information. If the record was simply deleted every time that an RSHO application was denied, the possibility of building up a pattern of behaviour would be lost. To do their job effectively, the police must sometimes hold sensitive soft information about individuals.

11:45

For example, if a person frequently comes to the police's attention because of suspicious inappropriate behaviour towards children, they might not commit an offence, but their behaviour could be enough to raise police suspicions. The chief constable applies to the court for an RSHO and an interim order is made. However, if on further consideration the court is not convinced on the balance of probabilities that an RSHO is necessary to protect a child or children from harm by that person, what do we do?

In the worst-case scenario, that person could obtain a job working with children and might not have to reveal that an interim order had been imposed. That person could then use that job to sexually abuse children. Would it not be better for the police to retain the information about the interim RSHO, so that when an employer makes an enhanced disclosure request, the information about the interim order can be revealed? That is exactly the kind of information that the police should retain and reveal in appropriate circumstances if we are to protect children.

Of course, safeguards exist on the holding of such information, and the police would certainly not reveal the information to just anyone. Before a decision was made on whether to release such information to a third party, proper account would always be taken of the balance that needs to be struck between the rights of the person concerned and the duty of the police to protect children. Furthermore, procedures are in place for the police to review regularly all the information that they hold, to determine whether any of it should be deleted.

I have some sympathy with amendment 53, but I hope that the concerns that I have expressed about the potential consequences of not holding the information are sufficient to persuade Marlyn Glen to withdraw the amendment.

Stewart Stevenson: Could we explore one or two possible scenarios? An interim order is granted and a hearing for a full order takes place. We require the commission of two acts for an order to be made. I foresee circumstances in which the court is not satisfied about one act but is satisfied about another. That will not be sufficient for an RSHO to be granted. In those circumstances, do you suggest that it would be reasonable to retain the information that related to the act that the court was satisfied about but which was insufficient for the granting of an order?

Hugh Henry: The court could reasonably decide on the balance of probabilities that the evidence or information was insufficient for the granting of an order. However, the evidence could be sufficient for the police to have suspicions and to act. What is legitimate for the police to act on must be separated from what the court requires to satisfy itself that something further needs to be done.

Stewart Stevenson: I move on to when an interim RSHO can be granted. The bill requires an application for an order to be intimated to the person who may be subject to the order, but that does not necessarily mean that that person should have received the intimation. It would be useful to have that clarified. The intimation must be sent in a way that allows a reasonable expectation of delivery.

In any event, the person need not be present at the hearing. Subsequently, at the hearing for the full RSHO, the interim RSHO that was granted on the balance of what was before the court at the

time might be dismissed on the basis that the whole thing was based on malicious reference to the police or whatever. Under those circumstances—if the basis on which the court had granted an interim RSHO has been dismissed—would it be reasonable for the information to be retained?

Hugh Henry: It would be difficult to start specifying some situations in which information on unsuccessful RSHO applications was retained and others in which it was not. That would lead to further complexities.

You mentioned notification. The sheriff court rules clearly set out the processes under which notification should be made, not just in relation to this matter but in other situations. Those rules are robust and I have no reason to think that notification in relation to RSHOs will be different from other circumstances in which the sheriff court rules apply.

Stewart Stevenson: I think that I am with you, but would it be useful to consider by what mechanism transparency will be achieved in relation to what information may be retained? That might be open to legal challenge by someone who has been the subject of an interim RSHO, or indeed of an RSHO. The retention of information could have a significant effect on that person's future employability or other things in their life.

Hugh Henry: I sympathise with what Stewart Stevenson is trying to achieve, but I have a mind that is nowhere near as analytical as his and I struggle to think how we could build in all the complexities that would be required to achieve exactly what he seeks. I struggle to conceive of something that would satisfy him on the matter. We will reflect on it, but I doubt whether we could easily and coherently build in something that would be sufficient to achieve the transparency that he seeks.

The Convener: I see your point, but for the purposes of the debate it is worth while to explore further the point that Stewart Stevenson raises about cases in which there has been malicious reporting. What protection does an innocent person have in a system that requires the chief constable to make an application only on the balance of probabilities? If an application fails, the information may be kept, but nobody knows on what basis. I understand your argument, but I want us to explore the other side of the argument, too. Once we go down the road of thinking about an application, the process is unstoppable. Whether or not the order is granted, the subject has already provided information that could be used.

Hugh Henry: That situation pertains in many circumstances. The police may receive information from a variety of sources and they have to determine what is credible, what is malicious and what is vexatious. They do that in relation to sexual harm to children, allegations about drug dealing and violent crime. There are a number of situations in which the police have to determine whether information is sufficiently credible for them to proceed. If there is more than one act and the chief constable thinks, on the balance of probabilities, that there is sufficient information, it is right for the police to act appropriately. As in other circumstances, the police would have to determine whether something had been done maliciously or with no reference to the facts.

The Convener: I would like you to clarify something that you said earlier. You were asked about cases in which an interim order was granted but a full order was not. Would the situation be identical if no application for an interim order were made and the application for a full order failed? Would the fact that an order had been applied for still be the subject of disclosure, if someone were seeking to work with children?

Hugh Henry: It could be, rather than would be, the subject of disclosure. There is a distinction to be made.

Mr McFee: Let us clear up the issue. Amendment 53 relates particularly to situations in which an interim order has been granted, but the full order has not. Stewart Stevenson asked what would happen if, between the granting of the interim order and the non-granting of the full order, it transpired that the allegations against the individual against whom the interim order had been granted were malicious. In other words, what would happen if, during that time, it emerged that the person had been falsely and maliciously accused? In straightforward layman's terms, how would the individual clear his or her name? If amendment 53 is not agreed to, what would be the mechanism for removing from the person's record the interim order that was granted on the basis of malicious and false allegations, especially if they applied for a job that required either a disclosure or an enhanced disclosure to be made?

Hugh Henry: The person would not have a record as such, because this is not a criminal conviction. If it were established clearly at the hearing that an allegation was malicious and vexatious and that there were no grounds for it, there would be no reason for the chief constable to have concerns about the information and to use it in disclosure procedures. However, we are discussing situations in which the court may decide that a full order is not appropriate, but in which there is no reason for determining that the allegation was malicious or vexatious. In such cases, it will be for the chief constable to determine whether holding the information for disclosure purposes may be appropriate.

Margaret Mitchell: I share other members' reservations about this provision. Interim orders are granted on the balance of probabilities. They may be granted in response to a malicious attempt to say something that is quite untrue and there may have been no opportunity to prove substantially that the allegation was not malicious. I gather from what you are saying that the information could remain on someone's record, quite unjustly, for some time. I have a problem with that.

Given what is involved in breaching an interim RSHO, I wonder whether a different way of serving notice of an order could not be considered, in order to give the accused every possible chance to defend themselves. We are talking about a quite different animal from an interim antisocial behaviour order, because the offence concerned is of a sexual nature. For that reason, could serving the order in person be considered?

12:00

Hugh Henry: If we were concerned about how the order is to be served, we should be concerned about how other notices are to be served. If we were concerned about the orders being served effectively, we would have to examine the sheriff court procedures. If those procedures did not work in this case, I would worry that they would not work in other circumstances, which is a much bigger issue.

Margaret Mitchell's first point was about the retention of information. If information is malicious or vexatious and has no basis in fact, there are no grounds for the chief constable to hold that information so that he can examine patterns of behaviour or decide whether there are any disclosure issues. Any information that the chief constable decides to retain can be retained only in accordance with the principles of the Data Protection Act 1998; safeguards that are already built in allow the retention only of information that the chief constable considers to be relevant, necessary and up to date. If something is clearly malicious and false, how can it be relevant, necessary and up to date?

Margaret Mitchell: I suppose that I am thinking of the situation of a teacher who has been accused maliciously by a child; the accusation has not really gone anywhere and nothing further has happened. There is no proof that the accusation is malicious, but equally there is nothing to move the situation on. Does that become routine?

Hugh Henry: I am not sure how that would apply. If no one considers the accusation to have any relevance, how could it lead to the consideration of an RSHO?

Margaret Mitchell: In the first instance, under sexual education. We talked about that in the previous discussion. There could be enough in a child's perception or interpretation of a situation for someone to think that an interim RSHO is needed, but then it is not taken any further. There are grey areas that cause me concern; that is just one possible scenario.

Hugh Henry: I cannot accept that. Margaret Mitchell is describing a malicious complaint from a child that is not significant enough to be pursued, although it might remain as a stain on the teacher's reputation. If the complaint is not significant and no one believes it, why would a chief constable see that as a reason for proceeding with an RSHO? We are not talking about someone making a complaint about a teacher that goes nowhere and in which no one else is interested, but in relation to which the information is held because it might build up into a pattern of activity. If, on the other hand, the chief constable thought that there was sufficient substance to the accusation, that would be entirely different.

However, we are discussing not that situation but one in which a full order has not been granted but, at the time, the chief constable thought that there were sufficient grounds for an interim order. The debate is about whether any of that information should be retained. Remember my earlier point about the Data Protection Act 1998. Even if the chief constable thought that it was appropriate to retain the information, they could do so only if the information was relevant, necessary and up to date. If it was established that the accusation was malicious, there is no way that the chief constable could retain the information in the way that Margaret Mitchell described.

Mr McFee: I want to nail this matter. If an interim order had been granted, but during consideration of the application for a full order it was discovered that the evidence was false or had been maliciously fabricated, are you saying that there would be no circumstances in which the chief constable would reveal the existence of the interim order under the disclosure or enhanced disclosure requirements?

Hugh Henry: That would clearly be the case if the interim order had been granted as a result of evidence that was without foundation or based on malicious or vexatious allegations.

The Convener: However, a problem would arise if there was no discussion or understanding of the sheriff's reasons for not granting the full order. If the sheriff did not say that the application for the full order had failed because the allegations were false or malicious, it would be left wide open for the chief constable to use the information.

Hugh Henry: That would be the case if the sheriff was the only person who knew that the allegations were false and malicious. However, I assume that the sheriff would reach their conclusion as a result of evidence of false allegations being led in the discussion, to which the chief constable would be party.

The Convener: However, we are being asked to accept that the chief constable could retain information that formed the basis of an application and use it for disclosure purposes, even if the 50:50 test could not be passed and the application for a full order failed.

I am happy about what Marlyn Glen said and she must decide whether to press or withdraw amendment 53, but the discussion has raised wider issues, which we should address at stage 3. Given the minister's comments, I now think that the bill should contain more safeguards in relation to the decisions that the chief constable might make. The minister said that even if an interim order was not granted and the application for a full order failed, the information could still be subject to disclosure. I am not convinced that information about a person who was simply unable to prove that the allegation against them was false should be used to prevent the person from working with children. I am uncomfortable about leaving such uncertainty in the bill and I would be happier if we considered amending the bill at stage 3 to include further safeguards, to make clear the basis on which the chief constable could disclose to another party information that related to a failed application for an order.

Hugh Henry: We are not just talking about the failure of an application; we are talking about cases in which an interim order was granted and there was an application for a full order. The sheriff might decide that the case was made and the events took place, but that it was not appropriate to grant a full order. There might be circumstances in which the information was sufficient to cause concern, but insufficient—for whatever reason—to enable the sheriff to grant a full order.

I will reflect on whether information could be disclosed if it had been established beyond doubt that allegations had been made maliciously or vexatiously and I hope to give the committee further assurances on the matter. However, I strongly believe that there will be circumstances in which, although a full order is not granted, it will be reasonable for the chief constable to retain information, in order to protect children.

The Convener: I think that the committee agrees with you on that point, but there is another scenario, about which we need to be sure. I realise that I am broadening out the discussion and I probably would not support amendment 53 or call for further thoughts on it.

However, for me, the debate has raised wider issues. You have now said that, even if there is no interim order and the main application fails, the matter would still be up to the chief constable to decide. I am uncomfortable with simply leaving the situation like that. From the beginning, I was not comfortable with the test of the balance of probability. I have accepted the Executive's argument and I think that you have made a good case for why we should accept a balance of probability test. However, I am at the limit of where I am comfortable. Now that we have had the discussion about disclosure, I certainly do not want to give the impression that, in not supporting amendment 53, I am saying that I am entirely happy with the disclosure debate.

I am happy with what you said about having a discussion about the matter at stage 3 and accept that we may come to share your view. However, I feel that that is an important debate to have.

Hugh Henry: It is important to put on the record that, although we have talked about an application failing, it could be that it is not that the application has failed but that the decision of the court is not to grant the order for whatever reason. That is not necessarily the same as an application failing.

The Convener: I accept that.

Marlyn Glen: The discussion has been useful. It echoed the debate that we had earlier, in that it was to do with balancing people's rights. I appreciate the fact that committee members have been able to express their concerns.

I understand the need for retention of information in various circumstances and recognise the important point of establishing patterns of behaviour. As I said, there is a need to consider the issue of the balance of rights, but, at the moment, the paramount issue is the protection of children.

From a different perspective—if I may bring in a new element—I wondered whether, in a situation in which malicious complaints are being made, it might be useful for the adult if that information were retained. If there were a pattern of malicious complaints against the same adult, which can happen, it would be useful if the police had kept that information.

However, the committee has been asked to accept the minister's assurances that the police review such information carefully and follow robust procedures. For the moment, I accept that position, bearing in mind the minister's agreement to reflect further on the points. With the committee's agreement, I will not press amendment 53.

Amendment 53, by agreement, withdrawn.

Section 5, as amended, agreed to.

After section 5

Amendment 55 not moved.

Section 6 agreed to.

Section 7—Offence: breach of RSHO or interim RSHO

The Convener: Amendment 54, in the name of Marlyn Glen, is in a group on its own.

Marlyn Glen: Amendment 54, which concerns the use of probation as a disposal, would remove section 7(4) from the bill. Section 7(4) says that probation shall not be a disposal that is open to the court if a person is convicted of an offence under section 7. I do not know why the bill limits the options that are available to the court in such cases. I suggest that there will be cases in which a probation order would be appropriate and could assist in addressing offending behaviour.

I move amendment 54.

Mr McFee: I have some sympathy with amendment 54 and would like to hear the minister's response. Given that section 7(3) says that a person who is guilty of an offence under section 7 is liable—both on summary conviction and on conviction on indictment—to imprisonment or a fine or both, I wonder why that other road will not be available. Is there a specific logic behind the decision to exclude probation as a method of disposal or is section 7(4) an unfortunate inclusion?

12:15

Hugh Henry: Our original rationale for not allowing a probation order to be used as the disposal for breach of an RSHO was that the offender had already demonstrated that he or she could not meet the requirements of an order that required him or her to behave in a particular way. Our thinking was that it would therefore be inappropriate to impose another order that would require the offender to behave in a certain way.

However, I am persuaded that, in certain circumstances, a probation order might be a useful disposal for breach of an RSHO and that it would be wrong to prevent the courts from using an order if they considered it to be appropriate in the circumstances of a case. I am therefore happy to support the amendment.

Amendment 54 agreed to.

Section 7, as amended, agreed to.

Section 8 agreed to.

The Convener: That brings us to the end of agenda item 1. I thank the minister and his team for attending.

Members are reminded that, as Monday 2 May is a holiday, the deadline for lodging amendments for our next meeting is Thursday 28 April at noon.

12:16

Meeting suspended.

12:28

On resuming—

Subordinate Legislation

Act of Sederunt (Fees of Solicitors and Witnesses in the Sheriff Court) (Amendment) 2005 (SSI 2005/149)

Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2005 (SSI 2005/150)

The Convener: Item 2 is consideration of subordinate legislation. I refer committee members to the correspondence from the Lord President's office, which has been circulated as a late paper—everyone should have it—and relates to the Act of Sederunt (Fees of Solicitors and Witnesses in the Sheriff Court) (Amendment) 2005 (SSI 2005/149) and the Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2005 (SSI 2005/150). Committee members will recall the debate that we had on these acts of sederunt at last week's meeting, when we asked for more information, which we now have. I invite members to comment on the letter that we have received from the Lord President's office.

12:30

Stewart Stevenson: I read what the Lord President said, but I am not terribly sure that it lightens my darkness. Perhaps I should get new batteries for my torch. However, my comments and concerns about the subject are general and not particular to this instance.

In view of the other business that the committee has to deal with today and at other times, I am not minded to make anything more of the matter at this stage, but I plan to find time to examine the subject more generally because there is widespread concern among many people in Scotland about the cost of going to law. We have to make the law more accessible to people than it is. My attempts to hold down the costs for people who have to go to law via such mechanisms—it is a very small contribution to helping people—are part of an on-going subject in which I will retain an interest. On the basis of last week's discussion, I believe that other members have similar, if not identical, concerns.

Mr McFee: I am not sure what more can be gained from chasing this example because it has more to do with fees that can be recovered from an unsuccessful party. However, one point in the Lord President's letter is worth highlighting. Reference is made to the fact that the instruments have no implications for the public purse other than if the pursuer is a Government department. We should bear it in mind for future reference that we as MSPs are clearly required to look after the public purse. We should be vigilant to challenge the attitude that an increase that affects the public is any more acceptable than one that does not. Very often, it is the individual member of the public rather than the local government body who is most affected by such increases in fees; indeed, Government simply passes on such increases to the general taxpayer.

Margaret Mitchell: I welcome the correspondence from the Lord President, which has shed more light on how the increase was calculated. I am reassured that it was based on a range of practices, from big and small firms, and on the cost of actuaries. There seems to be rhyme and reason to the increase and—like Bruce McFee—I am reassured that any impact on the public purse will be negligible. It was worth asking for further clarification and I am satisfied with the letter.

The Convener: I, too, welcome the response from the Lord President as well as the fact that it was turned around quickly because the information was required for today's purposes.

I understand Stewart Stevenson's concern about the public purse and the debate about spending, but I welcome in particular the increase in fees for witnesses. That is an essential part of the criminal and civil justice systems and there has been a substantial increase in the upper limit, although probably not enough. Many witnesses do not get their full expenses covered and do not get full payment from their employer while they attend court. I am happy for further work to be done on that and I welcome the substantial increase in the upper limit.

Are members satisfied that they have a bit more information and are they content to note the two instruments?

Members *indicated agreement*.

Sexual Offences Act 2003 (Prescribed Police Stations) (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/156)

The Convener: I invite members to consider the note that has been prepared by the clerk and which provides background information on the regulations. SSI 2005/156 is subject to the negative procedure. The instrument is a long-titled piece of subordinate legislation with which we have dealt before. We will probably see many more such instruments because they are required in relation to the Sexual Offences Act 2003 if even

minor changes are made to police stations. Are members content to note the regulations?

Members *indicated agreement*.

Petitions

Miscarriages of Justice (Aftercare) (PE477)

12:35

The Convener: Item 4 is consideration of petitions. I refer members to the note that has been prepared by the clerk and which sets out the background to recent developments in relation to petition PE477 by the Miscarriages of Justice Organisation, or MOJO. I refer members to the correspondence that has been circulated as a late paper. There is also a covering letter and research by MOJO that might be of interest. Do members have any comments?

MOJO has secured additional funding for a specific purpose. We have already dealt with the petition, although further issues might arise from dealing with miscarriages of justice. If the committee is happy to do so, I suggest that we close our consideration of the petition.

Members *indicated agreement*.

Family Law (PE770)

The Convener: I refer members to the note that sets out the background to petition PE770 by Patricia Orazio. We have seen the petition before and we agreed that it would be best to consider it alongside the Family Law (Scotland) Bill. In view of that, the recommendation is that we keep the petition open and consider it at stage 1 of the bill. I invite members to comment.

Mrs Mulligan: We should wait for the bill.

Stewart Stevenson: Agreed.

The Convener: There are some recommendations in the petition that match some of the issues that members have raised about the use of mediation and family law centres, and about access to children and how that is dealt with. It is a pertinent petition and it is also welcome. One suggestion is that we should pass the petition to the Executive for comment. Although we can put questions to the minister anyway, we have the option of seeking a direct response. Alternatively, we could refer to the petition as the stage 1 process gets under way.

Mrs Mulligan: I agree that the petition is pertinent to work that we will be doing. Given that we will call witnesses to speak on the issues that are raised, it is important that we run the petition alongside our consideration of the bill. It might be useful for us to pass the petition to the Executive so that the minister, when he appears before the committee, will have the opportunity to respond to it, along with all the other evidence that will have

been collected, which—judging by the two files that we saw last week—will be rather a lot.

Mr McFee: It is worth noting that much of the subject will be considered at stage 1. I agree with Mary Mulligan that there is a case for passing the petition to ministers so that they can address the questions that will come up during our evidence taking, especially in the light of the information that we were provided with the other day, although I do not claim to have read it all yet. There is a case for going that extra step and asking the ministers to respond directly to the points that have been made.

The Convener: There is no disagreement to that sensible suggestion. We will send the petition to the Executive and inform it that we will raise some of the issues in the petition during stage 1 consideration of the Family Law (Scotland) Bill, so that ministers can think about their responses.

Closed Petitions

12:41

The Convener: Item 5 is consideration of closed petitions. I refer members to the note that has been prepared by the clerks that sets out what we have done with each of the petitions and any outstanding business.

The closed petitions are: PE14, on security of tenure and rights of access; PE29, PE55, PE299 and PE331, on dangerous driving and the law; and PE111, on emergency vehicles and dangerous driving. Although the petitions have been closed, work on their subject matter has obviously not been finalised. We have also received letters in relation to the petitions. The fact that the petitions have been closed does not prevent the committee from picking up the subjects that they address.

Carbeth Hutters (PE14)

The Convener: We will deal first with closed petition PE14, on security of tenure and rights of access.

Margaret Mitchell: I agree with the recommendation in the clerk's note. We went as far as we could go in our consideration of PE14. Our additional consideration of the matter led to a possible course of action being suggested and it is for the Carbeth hutters to decide whether to pursue that course of action through the courts.

Stewart Stevenson: I will make a general point, which I think was made when we considered the petition previously. We must be wary of putting ourselves in a position in which we become a source of legal advice—we are not equipped to be such a source. The committee does not have the resources to commission legal opinion except in exceptional circumstances that relate to our work. I cannot identify any action that we could usefully take on the matter. If something is brought to our attention in the future, I am sure that we will find time to discuss the matter further, notwithstanding the closure of PE14. However, I do not anticipate that that will happen soon.

The Convener: I remember dealing with the petition, which was lodged in 1999. The Carbeth hutters have received genuine sympathy and support, as have other people who subsequently supported the principles of the petition and its call for protection for hutters. Members have seen the correspondence that we received from hutters, who express dissatisfaction and concern because their situation has not moved forward since 1999. It is worth saying on the record that the failure to make progress is the result not of a lack of support or action on the part of the committee—or the Justice and Home Affairs Committee in the

previous session of Parliament—but of the lack of a solution that can be tried and tested.

Members know that we appointed an adviser on the matter, who identified all the potential legal solutions with us in a private meeting. After considering different aspects of the law, we took the view that it would be impossible to secure legal protection for the hutters without upsetting the balance in relation to other aspects of the law. I think that we settled on an approach that would consider the application of what I read as a type of right-to-buy provision in the Land Registration (Scotland) Act 1979. The Executive responded that it could not comment on the application of the 1979 act, which took us no further forward. As the clerk's note says, Alasdair Morgan intimated to the committee that the Rascarrel bay hutters were aware of a case in which the 1979 act was being used, but we do not know the outcome of that case.

I am reluctant to leave the matter in the air and I do not think that the committee should make the decision that nothing can be done; I am not convinced that we have exhausted the potential for revision of the 1979 act. Do members think that we should ask the Executive to reach a conclusion on the matter? I accept that the Executive cannot comment on the application of the 1979 act, which is a matter for the courts. However, is there scope for amending the 1979 act to strengthen the right-to-buy provisions that appear to apply to people who already have a lease?

If the Executive were to say, "We have looked at amending the act and there is no way of doing so that would give comfort to hutters", I would accept that that is the case. However, so far the Executive has said only that it will not comment on application of the act.

12:45

Mr McFee: I tend to agree with the convener's last comments. Notwithstanding the action that is still under way, it is starting to appear as if the only solution to the problem is a political solution; one that would involve changes to legislation. If that is the case, clearly the best place for that to be examined and, potentially, determined is the Executive itself. I would be sympathetic to a recommendation that asked the Executive to comment specifically on that. I do not propose to ask the Executive to comment on how it thinks the law should be applied, but on whether there is scope to change the legislation.

The Convener: That is the only unanswered question. Hugh Henry said:

"As neither Ministers nor officials can provide legal advice, I am unable to comment on Professor Rennie's view that the hutters could claim to be tenants-at-will. This is a matter for the courts to determine. Section 21(1) of the Land Registration (Scotland) Act 1979 provides that the hutters can ask the Lands Tribunal for such a determination if they wish to test the matter in court."

Although I accept the answer, the only unanswered question is whether the act could be strengthened in some way that would give hutters and other similar leaseholders some protection under the law.

The clerk has reminded me of our previous correspondence with the Executive, in which the Executive said that there was no prospect of a legislative solution. The clerk will advise whether we received that letter before Professor Rennie's report was published. Even if that was the case, I would still wish to write to the Executive on the basis of that report.

Road Traffic Deaths (PE29)

Dangerous Driving Deaths (PE55, PE299, PE331)

The Convener: The next petitions for our consideration are on dangerous driving and the law.

Stewart Stevenson: The immediate action that the clerks have suggested, to which I am particularly sympathetic, is that we write to the Home Office as part of its consultation paper "Review of Road Traffic Offences Involving Bad Driving". I note that the consultation closes next Friday. I am also sympathetic to the reasoned and reasonable statement of the situation that Scotland's Campaign against Irresponsible Drivers—SCID—makes in its submission to the Westminster consultation.

I want to highlight three points that SCID raised, the first of which is at section 2.3, which states:

"The present lack of recognition by the state of innocent victims killed (or seriously injured) by careless drivers causes an aggregated grief for victim families".

SCID proposes the introduction of

"A new offence of causing death or serious injury by careless driving",

which I support. SCID also makes a fair proposal for a new definition of the offence of careless driving, which is:

"a standard of driving which would fail the test of competence, i.e. the driving test".

As members know, I have the hobby of being a private pilot, as part of which I have to resit my exam every 24 months with an examiner. Of course, if I do not pass, I cannot continue to exercise my rights to that hobby. It seems to be bizarre that, even after conviction on a road traffic offence, people do not have to resit the driving test

to see whether they are fit to resume driving. SCID's proposal should be taken further.

The final point in SCID's submission that I want to highlight and which I thought was interesting, is its support for the suggestion that there be an offence of illegal driving. In other words, there should be special provision to deal with, and a serious crackdown on, people who drive while they are disqualified or unlicensed. I am happy to proceed with the clerk's suggestion that we support what SCID has proposed, as long as other members are similarly minded—although I might still support the proposals even if the committee does not.

Mr McFee: Dangerous driving has been an issue for many years; I remember it being an issue before I became an MSP. In all that time I have not detected much of a change in the attitudes of drivers who take to the roads drunk, without insurance, while they are not licensed or in cars that would not pass an MOT. We need a change in attitudes; driving should be seen not as a right but as a privilege. If a person abuses the terms of that privilege, he or she should lose the right to drive. If, in abusing that privilege, a driver kills someone, they should in certain circumstances lose their liberty as well. This is about changing the attitude of drivers.

The review is a move in the right direction. I believe that a maximum sentence of five years in prison in cases in which an innocent person is killed is way too low, and that far stiffer sentences should be available to our courts. However, I am mindful of the fact that that is an issue that we do not control.

We should make some form of representation to the Home Office and place on record our feeling that the present system is wholly inadequate to deal with such crimes—let us call them that. As a society, we have tended to ignore what has happened over many years, but it is possible to change drivers' attitudes. Over the past 20 years, we have seen a change in attitudes to drink-driving. It used to be acceptable, but it is now universally abhorred. Nevertheless, there is still a minority who engage in it, so it has to be made absolutely clear to them that if they are involved in an accident as a result of their behaviour, they can expect the full force of the law to come down on top of them.

Mrs Mulligan: I agree with Stewart Stevenson. It would be helpful for us to submit information to the Home Office, as the note by the clerk suggests. It is important that the Home Office acknowledge the strength of feeling on the issue in the committee and, I have no doubt, in Parliament. We should add our voice to the Home Office's deliberations as a response to people's concerns about this serious issue. Action has been slow, but if we can do anything to support it, we should.

Margaret Mitchell: Obviously SCID's work speaks for itself, as it draws attention to the seriousness and complexity of the issue. I am happy to support the recommendation in paragraph 9 and the recommendation in paragraph 10 that we refer the matter to the Lord Advocate for his consideration.

Mrs Mulligan: Does not paragraph 10 refer to the Lord Advocate's response to SCID?

Margaret Mitchell: I beg your pardon. However, I am still happy to support the recommendation in paragraph 10.

The Convener: I do not disagree with anything that has been said. We have to bear it in mind that the petitions are now closed and that the committee has not formed a view on the issue. We need to be careful about that. We would, if we are to say that we have taken a view, have to have a discussion specifically on that. It is important for us to know where the Home Office is with the consultation—which, as Stewart Stevenson says, closed on Friday—and what is going to happen next. The suggestion is that we forward the SCID submission and explain that it is the subject of a petition that the committee has been dealing with, and that we would like the Home Office to consider its contents.

Members *indicated agreement*.

The Convener: Margaret Mitchell suggests that we also act on recommendation 10. What information do we have that SCID does not already have?

Callum Thomson (Clerk): SCID may not have the Lord Advocate's letter.

The Convener: Okay. We will forward the Lord Advocate's letter to SCID.

Road Accidents (Police 999 Calls) (PE111)

The Convener: The final petition is PE111 on emergency vehicles and dangerous driving. It is a closed petition, but we have been waiting for some outstanding correspondence, which we now have. Do members have comments?

Stewart Stevenson: One of my key general concerns is that we should ensure that people who drive emergency and police vehicles remain competent. It is all very well for people to go on a course and to achieve a standard but, in the absence of direct practical supervision and re-testing it is entirely possible—indeed, it is likely—that their standard of driving will deteriorate. All emergency drivers should have their performance reviewed and their ability to drive such vehicles should be re-tested periodically. I am uncertain

how the committee might respond to that suggestion, but it might be useful to put that observation on the record.

Margaret Mitchell: On reading the paper, I have the same concern as I have voiced before. It seems to concentrate rather heavily on other road users, as opposed to the drivers of the emergency vehicles. I doubt PE111. However, I accept that, given the pressure of work, it is unlikely that the committee can do much more on the issue.

The Convener: The emphasis in our discussion of the petition changed when the committee discussed whether drivers know how to deal with emergency situations. We have all probably been in situations in which everybody has moved in the wrong direction and hindered an emergency vehicle. We extended the subject from irresponsible driving of emergency vehicles to include the responsibilities of other road users. That was not to depart from the main subject of the petition, which was about some news articles that the petitioner had read about emergency vehicles being driven irresponsibly.

13:00

Mr McFee: I do not have any statistical data for this, but I think that the majority of emergency vehicle drivers are responsible drivers. For example, when they first take up a position, they are put through a fairly intensive driving course, although the course varies between the different services. However, when the petition was current, I did not manage to tease out the condition of on-going training.

As I said the last time we discussed PE111, I am very much in favour of greater emphasis being placed on other drivers' reactions to emergency vehicles. Only last week, I witnessed another shambles. A fire engine was trying to get along a very crowded road while two cars sat at a set of traffic lights, holding everything up. I do not necessarily blame the drivers involved, because the highway code does not make it clear how one should respond to an emergency vehicle. It is clear that you should drive off the road, but what do you do if you are sitting at a red light?

Some interesting points have been made. The Association of Chief Police Officers in Scotland says that it does not support a change to the national driving test to take account of how drivers should react, because it would have to consider how that would be done.

That said, ACPOS has sensibly recommended that public awareness of how road users should respond to approaching emergency vehicles should be covered by the Scottish Road Safety Campaign. The Scottish Parliament could promote such awareness in a road safety campaign. Although highly trained emergency vehicle drivers know how to respond in such situations, they do not know what other people have been told to do and cannot read how they will respond. I am not saying that everyone who is involved in a crash with an emergency vehicle is to blame; however, greater understanding not only of what an emergency vehicle driver will do but of how the driving public will respond would help to reduce the number of incidents. Unfortunately, we will never get rid of such incidents, but we should be able to reduce their frequency and severity. I would be interested to hear how we could constructively develop such a sensible suggestion.

The Convener: Members will note that the correspondence from Fife fire and rescue service supports the committee's view, which was expressed at the early stages of our consideration of PE111, that the highway code should offer more definitive guidance on responding to emergency vehicles.

If we do not close things down and finalise our position, the petition could run forever. We can raise some interesting points with the Executive; although some of them will touch on reserved matters, others—such as the suggestion about raising public awareness—will not. We could collate the information in our papers, pass it to the Executive and say that although we have finalised our findings on the petition we thought that it would like to see the suggestions that have been made, such as the establishment of a national standard for drivers. Perhaps it could take up with the Department for Transport the point that the highway code should contain guidance on how drivers are expected to respond to emergency vehicles. I think that that would conclude all our possible work on the petition.

Mr McFee: I am not against what you suggest and I acknowledge the limitations that we face with regard to changing the highway code, although I support the committee's earlier view that the code merits some attention in that respect. In fact, given that it has been quite a while since it was fully reviewed, the code merits attention in many respects.

That said, I suggest that when we hand over the information, we draw attention to two areas that we have control or influence over. First, we must ensure that on-going training of emergency service drivers is a priority for police and fire boards and the ambulance service. Secondly, we can make a very direct and positive input into the Scottish Road Safety Campaign. Despite Parliament's other limitations, such a move should have a beneficial effect.

The Convener: That seems sensible to me. Do members agree?

Members *indicated agreement*.

The Convener: That concludes our business. At our next meeting, on Wednesday 4 May, we will have day 3 of our stage 2 consideration of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. I now close the meeting, but I ask members to hang on for 10 seconds to allow me to run through some practical arrangements.

Meeting closed at 13:05.

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