JUSTICE 1 COMMITTEE

Wednesday 15 November 2006

Session 2

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JUSTICE 1 COMMITTEE
† 43rd Meeting 2006, 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)
*Mike Pringle (Edinburgh South) (LD)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Bill Aitken (Glasgow) (Con)
Karen Gillon (Clydesdale) (Lab)
Mr Jim Wallace (Orkney) (LD)

*attended

THE FOLLOWING ALSO ATTENDED

Hugh Henry (Deputy Minister for Justice)
Gillian Mawdsley (Scottish Executive Justice Department)
Nora Radcliffe (Gordon) (LD)
Ian Vickerstaff (Scottish Executive Legal and Parliamentary Services)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERKS

Euan Donald
Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 2

† 41st Meeting 2006, Session 2—held in private.

42nd Meeting 2006, Session 2—joint meeting with Justice 2 Committee.

Scottish Parliament

Justice 1 Committee

Wednesday 15 November 2006

[THE CONVENER *opened the meeting at 09:52*]

Criminal Proceedings etc (Reform) (Scotland) Bill: Stage 2

The Convener (Pauline McNeill): Good morning. We all seem to be in a good mood this morning, but that might change. Welcome to the 43rd meeting in 2006 of the Justice 1 Committee. I ask everyone to switch off their mobile phones.

Item 1 is stage 2 consideration of the Criminal Proceedings etc (Reform) (Scotland) Bill. I welcome once again Hugh Henry, the Deputy Minister for Justice, and his team—Max McGill, Paul Johnston, Noel Rehfisch and Tom Fyffe. Thank you for joining us this morning.

We will pick up where we left off.

Section 33 agreed to.

Section 34—Sheriff summary: particular statutory offences

The Convener: I welcome Nora Radcliffe. Amendment 165, in her name, is in a group on its own.

Nora Radcliffe (Gordon) (LD): I apologise to the committee and the minister, but I will leave immediately after the debate on this group because I am dealing with other legislation in another committee.

A key measure in the bill is an increase in sheriffs' sentencing powers in non-jury trials. Sheriffs will be able to impose sentences of up to 12 months' imprisonment and fines of £10,000 so that the courts can deal effectively with a wider range of cases. The policy is implemented by sections 33 to 35; section 33 makes the change for common-law offences, while sections 34 and 35 apply the policy to statutory offences. However, not all statutory offences are covered. Section 35 applies only to statutory offences that are

"triable either on indictment or summary complaint",

and section 34 adds a number of other statutory offences. I believe that the policy change should apply to wildlife offences under part I of the Wildlife and Countryside Act 1981, and my amendment 165 would make such a change.

When an offender is convicted of wildlife crime, their sentence, in general, will be a fine of up to £5,000, a custodial sentence of up to six months, or both. However, such offences are triable only by summary complaint. They are not covered by section 35 of the bill and they are not listed in section 34. For a small number of offences that are triable both by summary complaint and on indictment, the provisions in section 35 will apply.

Amendment 165 would increase the maximum penalties for wildlife crime in line with those for similar offences. Although actual sentences would, of course, remain a matter for the courts to decide in individual cases, an increase in the maximum penalties is consistent with the Executive's policy intentions for the bill. It would also signal to the police, the Procurator Fiscal Service and the courts that the Parliament takes wildlife crime seriously, that the area deserves sufficient resources to allow the proper investigation and prosecution of cases, and, where convictions follow, that sentences should be sufficient to act as a genuine deterrent.

I move amendment 165.

Stewart Stevenson (Banff and Buchan) (SNP): I support the intention behind the amendment. Like Nora Radcliffe, I believe that it is important that we send the right signals and that the courts have the right powers. However, I ask her to explain why we should disconnect sentences from the standard scale, as proposed in the second paragraph of her amendment. What would be the effect of changing from the standard scale to "a prescribed sum"? The standard scale has a useful general flexibility, although I recognise that there are other cases in which we choose not to use it. I broadly support the proposal, but we need to understand the effect of the change.

Mike Pringle (Edinburgh South) (LD): I support the amendment, which would send a message to people who get involved in things such as badger baiting. In a recent case, large numbers of eggs were discovered south of the border. The amendment would not have covered that case, but wildlife crime is on the increase and we have not addressed it effectively enough.

Mrs Mary Mulligan (Linlithgow) (Lab): Like my colleagues, I support the intention behind the amendment. A lot of damage is done through wildlife crime and some of it can never be rectified, so we need to send a message about how seriously we take it. However, I am a little concerned that we have not been able to have this discussion before now. I will listen carefully to the minister's comments—and the closing comments from Nora Radcliffe—on how we should proceed.

The Deputy Minister for Justice (Hugh Henry): I fully understand the intention behind Nora Radcliffe's amendment. We are all appalled by wildlife crime; the Parliament has made it clear

that we oppose it and that it must be dealt with. However, I do not believe that the proposed change should be made at this time and in this bill.

The Executive takes wildlife crime seriously. Last month, we co-hosted the launch of the national wildlife crime unit in North Berwick, and the Nature Conservation (Scotland) Act 2004 modernised and upgraded the safeguards for Scotland's wildlife. Last week saw the first successful prosecution under the 2004 act for the new offence of reckless disturbance. That was widely hailed as a significant landmark—indeed, the Royal Society for the Protection of Birds publicly congratulated the Executive and the Parliament on the result.

We have addressed wildlife crime in various pieces of legislation during the life of the Parliament. I was involved in implementing the important provisions on wildlife crime in the Criminal Justice (Scotland) Act 2003, which was one of the first pieces of justice legislation that I dealt with when I came into the justice portfolio. The 2003 act introduced a package of measures including a specific power of arrest, wider availability of search warrants and reform of the existing time bar on bringing prosecutions more than six months after the commission of an offence. More important, the 2003 act increased the maximum penalty to a sentence of six months and/or a fine of £5,000 for most of the offences for which amendment 165 would increase the penalty again.

10:00

We must bear it in mind that the powers that are available have not been fully used. The maximum fine that has been imposed for such offences in the past five years was £2,500 for a single offence, although higher total fines have been imposed for multiple offences. As far as I am aware, the custodial penalty has been used only once, when a total sentence of four months was imposed on an individual who possessed more than 30 eggs and who had material with him that was capable of being used to steal eggs. I am not sure whether extending the existing powers would achieve what Nora Radcliffe wants.

Mary Mulligan touched on the significant point that there has been no consultation on or significant discussion of the proposal, which would cause a large increase in the sentencing level. We have no pressing evidence to suggest that the judiciary has been frustrated by the lack of sentencing power in respect of the offences. That is confirmed by my evidence on the use of the powers. It is right to look for evidence to support such a change and that there should be proper consultation. I am not sure whether this is the bill in which to increase specific sentences one by one.

The bill has a particular impact on the Emergency Workers (Scotland) Act 2005, because the general increase in sentencing powers that we are giving sheriffs could have meant that more significant powers were available under one bit of legislation than were available under another. To ensure that the 2005 act retains significance, it is important to have some consistency. That is the only reason why we are acting on that and, as I said, this is not the bill in which to increase sentences across the board for individual crimes.

Members will be aware that, as I have said, the sections that relate to sentencing powers are not principally concerned with increasing the maximum penalty that is available for any offence. The bill is designed to allow the appropriate level of business that is currently dealt with under solemn procedure to be heard at the summary level in future. We should stick with that concept. The increase in the summary sentencing limit was a recommendation of the McInnes committee, whose view was that sheriffs should be able to deal with a wider range of business when sitting summarily, in the interests of speed and efficiency.

If we want to increase the absolute maximum penalty that may be imposed for a particular offence, Parliament should consider that proposal in the context of the appropriate bill, rather than piggybacking a proposal on something different. That would allow the substantive issues to be considered and any increase to be made from an informed position.

I do not disagree with Nora Radcliffe about the significance of wildlife crime. I reiterate that Parliament has shown its commitment to tackling that. If changes need to be made to the 1981 act in the light of experience and informed debate, Parliament should return to the issue in appropriate legislation. I hope that Nora Radcliffe will accept those assurances and withdraw amendment 165.

Nora Radcliffe: I take on board much of what the minister said. A lot of how the courts deal with crime is based almost on a perception of a crime's seriousness. Raising the maximum penalties so that they would be in line with those of similar offences seemed a good option.

The minister is right to say that the courts are not fully using the powers that they have. That almost suggests that they do not recognise the seriousness of the offences.

We have a network of specialist environmental fiscals, which is very good, but the difficulty is that the specialist fiscal does not always prosecute the crime. There is a lack of understanding about the seriousness of a lot of wildlife crime. The offenders

are often part of organised criminal networks that are equivalent to those involved in the trafficking of people and drugs.

It would be useful to match the penalties for wildlife crime with the seriousness of the offence. I take on board the minister's reasons for not using this legislative vehicle to achieve that, although I thought that the amendment would be quite a neat way of doing so. Given the minister's arguments, I seek to withdraw amendment 165.

Amendment 165, by agreement, withdrawn.

Section 34 agreed to.

Section 35—Sheriff summary: other statutory offences

The Convener: Amendment 119, in the name of the minister, is grouped with amendments 120 to 124.

Hugh Henry: Amendments 119 to 123 are technical in nature. They amend section 35 of the bill, which provides that the maximum period of imprisonment that the sheriff court may impose for a statutory offence that is triable under either summary or solemn procedure is to be 12 months when the offence is tried under summary procedure.

That policy is not changed by the amendments. In its consideration of the bill at stage 1, the Subordinate Legislation Committee asked the Executive to consider whether the generic translation in section 35(4) should be applied to powers in acts that create penalties as well as to actual penalties. Having considered that point, the Executive has lodged the amendments to address it. I can provide more technical detail on what each of the amendments actually does if members would find that helpful.

Amendment 124 inserts a new section between section 36 and 37 of the bill in order to ensure that the policy behind sections 33 to 37 as introduced is fully achieved. Section 37 increases the prescribed sum from £5,000 to £10,000, which means that the maximum fine that the sheriff court may impose for a common-law offence that is tried under summary procedure will be £10,000.

Section 37 has another effect that is not immediately obvious. As it stands, the effect of the provision is that the maximum level of fine that the sheriff may impose under summary procedure in respect of a statutory offence that is triable either way is also raised from £5,000 to £10,000, provided that the maximum level of fine that may be imposed on summary conviction is expressed in the statute by reference to "the prescribed sum" or "the statutory maximum".

Following the bill's introduction, it came to light that the maximum level of fine that may be imposed on summary conviction in respect of some statutory offences that are triable either way is expressed by reference to

"level 5 on the standard scale"

rather than "the prescribed sum" or "the statutory maximum". If it were left as it is, section 37 would not increase the maximum fine that may be imposed in respect of those offences. That would introduce an undesirable inconsistency into the system: the summary court would be able to impose a £10,000 fine on summary conviction for most offences that are triable either way, but it would be limited to £5,000—the current level 5 limit—in respect of some other offences. Our policy is clear: the sheriff summary court should be able to impose a fine of up to £10,000 in the context of all offences that are triable either way, so that an appropriate level of business can be dealt with under summary procedure.

Amendment 124 will ensure that the £10,000 summary maximum applies in respect of all statutory offences that are triable either way and all statutory powers to make new offences where the maximum penalty on summary conviction is expressed by reference to

"level 5 on the standard scale".

If the committee wants some more detail on the new section, I can give that.

I move amendment 119

Stewart Stevenson: I am perfectly content with the thrust of the minister's amendments; I just have a question that came up as I read amendment 124, which touches on other parts of the bill.

Under section 68, which relates to orders, any order to change the sentencing powers in the justice of the peace courts will be subject to the affirmative procedure, whereas all other orders will be subject to the negative procedure. Amendment 124 seeks to introduce another example of something that will be dealt with by orders under the negative procedure, I wonder whether the minister can lighten my darkness on why such a distinction has been drawn. I refer to section 68(3)(a), which relates to orders applying to JP courts, and section 68(3)(b), which relates to all other orders.

Hugh Henry: The orders that are subject to the negative procedure relate to the tidying-up process. I should point out that orders made under section 68 will increase the maximum penalty available in the JP courts. We have acknowledged that there is a problem in that respect and, in light of the suggestions that have been made, want to ensure that the matter is dealt with.

Stewart Stevenson: For the sake of clarity, are you saying that proposed subsection (5) of amendment 124, which says that ministers

"may by order amend the specification of a maximum fine",

does not give any power to alter the amount of the maximum fine? That is what I took from what you said.

Hugh Henry: It will allow us to do only what is already suggested on a general basis. For example, that approach will ensure that textual amendments of relevant powers can be made in due course and that those powers will make clear the level of penalty that might be set for any offence created under them. It will also avoid any on-going reliance on a general amendment.

Stewart Stevenson: I am content to support your amendments just now. I will consider when I read the *Official Report* whether I will need to do anything on this matter at stage 3, but I do not expect to have to do so.

The Convener: I want to be clear about the purpose of amendment 124. Minister, you said that the Executive had always intended the maximum fine for crimes that were triable both ways to be £10,000, but that you had not managed to achieve that in the bill as introduced.

Hugh Henry: We achieved our intention in most cases, but the existing statute actually refers to

"level 5 on the standard scale".

Amendment 124 seeks to correct that oversight in the bill and to bring the proposed provision into line.

The Convener: Do the amendments relate only to offences that are triable either way?

Hugh Henry: Yes.

The Convener: Does the order-making power that Stewart Stevenson has already mentioned apply exclusively to offences that are triable either way?

Hugh Henry: That is correct.

The Convener: There are no more questions. Do you have anything to add on this group of amendments?

Hugh Henry: No.

Amendment 119 agreed to.

Amendments 120 to 123 moved—[Hugh Henry]—and agreed to.

Section 35, as amended, agreed to.

Section 36 agreed to.

After section 36

Amendment 124 moved—[Hugh Henry]—and agreed to.

Sections 37 and 38 agreed to.

Section 39—Fixed penalty and compensation orders

The Convener: Amendment 125, in the name of the minister, is grouped with amendments 126 to 129.

Hugh Henry: Amendments 125 and 128 seek to remove from the bill provisions that would have allowed the discounting of fiscal fines in circumstances prescribed by order. Amendment 125 seeks to remove the requirement for a fiscal fine offer to state any discount that may be available, and amendment 128 seeks to remove proposed new section 302(7A) of the Criminal Procedure (Scotland) Act 1995, which would have given ministers the power to make provision for and in connection with discounts.

The proposal in the bill as introduced arose from a recommendation in the McInnes report and was motivated by a desire to encourage the timeous payment of fiscal fines. We recognise that the committee expressed concerns about the proposal in its stage 1 report—the committee took the view that discounts for quick payment might unfairly prejudice those who were less able to pay quickly. Having reflected on those concerns and thought the issue through, we now accept that the proposal could run the risk of discriminating against those who are on lower incomes and that the potential benefits of prompt payment in some cases do not outweigh that possible risk. As we made clear in our response to the stage 1 report, we want to respond to the committee's concerns by removing those provisions from the bill.

10:15

Amendments 126 and 129 will provide prosecutors with a greater degree of flexibility when offering fiscal fines and compensation offers. At present, the 1995 act appears to make it compulsory for payment by instalments to be offered to an accused when an alternative to prosecution is offered. In practice, instalments are always offered. Amendments 126 and 129 will make the offer of payment by instalments optional rather than mandatory and allow prosecutors to request payment of a fiscal fine or compensation offer in a single instalment in appropriate circumstances. Although instalments will continue to be offered in the majority of cases, it makes sense to build some degree of flexibility into the system. In some instances, it might be appropriate for the compensation offer to require payment quickly in a single lump sum if, for example, the

fine is not huge or the person is well able to pay the amount in a lump sum. Payment in full might also be required of fiscal fines against companies for regulatory offences. The provisions in amendments 126 and 129 will allow the prosecutor to tailor an offer to the circumstances of the case.

Amendment 127 is technical in nature. It makes a small change to the wording of section 302(2)(c) of the 1995 act. The effect of that section is unchanged.

I move amendment 125.

Mr Bruce McFee (West of Scotland) (SNP): I welcome the removal of the provision on fine discounts. Notwithstanding the reasons that the minister has given, the proposal sent out all the wrong messages, as it would have introduced what might be described as a two-for-one deal or a happy hour.

The changes to the requirement to offer instalments in all circumstances will be useful, especially if the use of compensation offers is to be expanded to cases in which, for example, the damage that has been done to property needs to be paid for pretty immediately. I welcome the amendments.

The Convener: I echo those sentiments. The committee raised the issue in its stage 1 report so we are delighted to see these amendments at stage 2.

Amendment 125 agreed to.

Amendments 126 and 127 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 166, in my name, is grouped with amendments 167 to 170, 173 to 175, 177, 178, 180 to 182, 130 to 133, 184 and 185. On pre-emptions, I alert members to the fact that, if amendment 182 is agreed to, I will not be able to call amendments 130 to 133.

The amendments in this group deal with compensation offers and, specifically, with the concept of opting in. The requirement for people to opt in if they want to go to court is a feature of various provisions of the bill that we will discuss later when we consider fiscal fines. The proposal in the bill would reverse the existing procedure, whereby people are required to opt out. In other words, under the bill silence will be deemed to mean consent, so if the person to whom a compensation offer is made does not reply, they will be deemed to have accepted the offer.

As the committee had some concerns about the implications of the proposed change, I felt that it was important to debate the issue before we draw matters to a conclusion and move towards stage 3.

My central concern about this provision and others is that there has been very little discussion about the range of people who might be affected. Marlyn Glen said the same last week in relation to trials in absence of the accused. We have not discussed in detail the groups of people who might find some of the provisions difficult to respond to. Although a breach of human rights might not arise from saying that a person who does not bother to respond to a clear message from the procurator fiscal could find themselves with a court appearance, we have not really thought about more vulnerable people, such as those who suffer from addictions or who have learning disabilities. Before stage 3, there must be discussion about how the Executive will satisfy itself that more vulnerable groups will be able to deal with the process and the concept of deemed acceptance. I am sure that members have similar concerns.

I move amendment 166.

Hugh Henry: Amendments 130 to 133 will adjust and clarify the system for seeking recall of fiscal fines and fiscal compensation offers where their acceptance has been deemed to have taken place. The bill as introduced provided that where an accused is offered a financial alternative to prosecution, he or she must take positive action to refuse the offer or it will be deemed to have been accepted after the expiry of the time periods that are set out in the bill. Provision was made for the accused to seek recall of that deemed acceptance, but only if he or she claimed not to have received the offer.

Some stakeholders were concerned about the provisions. In particular, there was concern that there was no way of having an offer recalled after the time limits had passed, even if there were compelling reasons or exceptional circumstances that could justify a recall. I also noted the points that the committee made in its stage 1 report, in which it called on the Executive to consider the practical measures that could be implemented to ensure the fairness of the deemed acceptance provisions.

Amendment 130 will introduce a new ground for recall. The accused will be entitled to apply for recall where it was not practicable, by reason of exceptional circumstances, for him or her to take steps to refuse the offer, despite having received it. The proposal will cover an accused who was hospitalised for a lengthy period, for example, and will avoid injustices occurring as a result of the deemed acceptance process. The amendment also clarifies that the accused can seek recall of a fiscal fine or compensation offer only if he or she would have refused the offer if they had received it and had been in a position to consider it and to take action to refuse it. That will help to prevent spurious actions for recall in which the accused

seeks to have an offer recalled only for it to be reissued and for the accused to accept it. That would be a waste of time and resources and would be of no benefit to the accused.

Amendment 131 addresses concerns that have been expressed about the time limits during which an application for recall can be made. In the bill as introduced, the clerk of court could consider applications for recall only within certain time limits; no exception was provided. Amendment 131 will give the clerk power to consider an application for recall outwith the time limits "on cause shown", which will permit an accused who is incapacitated or unable for good reason to take action within the time limits to apply to the clerk of court to have his application for recall considered.

Amendments 132 and 133 are technical and consequential.

I hope that amendments 130 to 133 address the concerns that have been raised about the deemed acceptance provisions, while retaining that procedure for the majority of cases, in which it is inactivity, rather than desire on the part of the accused to contest the allegation in court, that leads to the fiscal fine going unanswered. As the McInnes report made clear, such situations have costs for the police, the prosecutors and the courts. In the majority of cases, the situation is also prejudicial to the accused, who pleads guilty, receives a fine and gets a criminal record but to no great benefit.

The convener's amendments 166 to 170, 173 to 175, 177, 178 and 180 to 185 seek to remove from the bill the provisions that relate to deemed acceptance of fiscal fines and compensation offers. The deemed acceptance provisions were recommended by the McInnes committee, which estimated that the new procedure would result in around 10,000 fewer court prosecutions every year. That is 10,000 wasted court hearings that, in the main, are necessitated because the accused persons cannot be bothered to respond to the offer of a fiscal fine. Those 10,000 hearings could be used to speed up the summary justice system. The McInnes report also observed that, in three quarters of cases in which a fiscal fine goes unanswered—7,500 cases every year—the accused is cited to appear in court and then pleads guilty at the first opportunity. That is a waste and we must tackle it.

The bill will reduce the amount of court time that is spent on cases that could have been dealt with properly by way of an alternative to prosecution. However, nothing in the provisions will deny an accused the opportunity to have his or her case dealt with in court if they so wish. In fact, the new provisions will make it more likely that people will sit up and take notice of the offer of a fiscal fine and take responsibility for their actions. In every case, there will be a 28-day period from the date on which the offer is issued for the accused to consider his or her options and decide whether to accept the prosecutor's offer.

I appreciate that committee members had differing views on the proposals at stage 1 and that the committee's stage 1 report raises several issues. In particular, the committee asked for practical safeguards to be put in place so that the system of deemed acceptance operates fairly. I assure the committee that we have considered seriously the points in the stage 1 report. We agree that the provisions need to be amended, which is why we lodged amendments 130 and 131, to which I have already spoken. The amendments will ensure that applications for recall can be made in appropriate cases, without losing the clear benefits of the opt-out system for the vast majority of cases. It will always be possible for someone who has received an offer to seek to have it recalled, as long as cause can be shown, no matter how much time has passed. Non receipt of the offer will not be the only basis on which recall may be sought, as would be the case under the present proposals. Other compelling reasons, including some of the examples that committee members gave at stage 1, such as periods in hospital or an inability to understand the offer, may lead to a recall, provided that the clerk or the court is convinced that the reasons justify that.

The committee is concerned specifically about the ability of people with learning difficulties or other communication problems to respond to an offer. The accused's circumstances, including any learning difficulties that they may have, will be highlighted in the police report that is submitted to the procurator fiscal's office. Under current Crown Office and Procurator Fiscal Service guidelines, it is highly unlikely that persons with a learning disability would be offered a fiscal fine. Notwithstanding that, each case is decided on its circumstances. Alternative disposals are usually considered, such as an opportunity to participate in a diversion from prosecution. The Crown Office and Procurator Fiscal Service has a clear commitment to consult relevant agencies on the marking policy in respect of people with learning disabilities or mental disorders.

10:30

As a result of amendments 130 and 131, if a person with a learning difficulty inadvertently received a fiscal fine, they would be able to apply to the court to seek recall of the offer even after the expiry of the period that the bill sets down. The matter would then be for the court to decide. That means that, if someone in that person's family or a support organisation with which they were in contact realised that something inappropriate had

happened, they could assist the person in seeking recall. Indeed, the Lord Advocate wrote to Jeremy Purvis on that point on 2 November 2006—I believe that a copy of that letter has been given to the clerk. The Lord Advocate's letter states:

"In their report to the Procurator Fiscal, the police will normally detail all relevant information about the accused's personal circumstances, including any known learning disabilities or difficulties. The Procurator Fiscal will consider such factors in deciding what action, if any, is appropriate. Current COPFS policy is such that it is highly unlikely that persons with a learning disability will be offered a fiscal fine. Decisions about the appropriate action are, of course, based on the particular facts and circumstances of each case. In many cases, a different alternative to prosecution will be considered appropriate, for example, the opportunity to participate in a diversion from prosecution scheme."

Thanks to the committee's recommendations at stage 1, and to stakeholders who expressed their views, we have now proposed a system that, I think, gives us the best of both worlds and the benefit of avoiding a huge number of unnecessary court cases, at great cost to the system, coupled with the safeguards of an enhanced recall procedure.

The amendments lodged by the convener seek to retain the current system for fiscal fines and to adopt the same procedures for compensation offers, but I think that that would mean that prosecutors and courts would continue to have to deal with people who ignore offers out of apathy but subsequently plead guilty at the first stage of court proceedings. That problem will only get worse if there is to be greater use of fiscal fines in future. I hope that the convener will be assured by what I have said on the record today and by the changes that the Executive has introduced specifically in response to the committee's concerns, and that she will therefore not press her amendments.

Stewart Stevenson: The amendments in this group address some quite deep matters of principle, and it will probably take us some time to discuss them. The minister referred to the McInnes report, and it is important to recall that it was precisely that: a report to legislators to inform our debate. We have made it clear that we are not going to accept the McInnes report's recommendations on JP courts, and the Executive is proceeding, with the committee's support, in another direction. Therefore, I do not think that we are in any sense bound to accept anything that John McInnes says.

In particular, the argument that it is operationally efficient for the courts to proceed along the lines recommended in the McInnes report, so as to avoid 10,000 hearings, is not appealing. It would be operationally efficient for summary justice to be converted into a policy of the policeman on the beat shooting offenders on the spot, but that is not something that anyone in this Parliament is likely to propose or contemplate. We have to take a balanced view of operational efficiency, and it may be that the McInnes proposal is a step too far.

I would like to explore some of the difficulties, as I see them. I still come to the matter with a relatively open mind. I broadly welcome amendment 131, in the name of the minister, which provides for a bit of a safety net. It would be useful if the minister could explore further what "on cause shown" might mean. He has referred to learning difficulties, and I have some concerns about expecting the police to be diagnosticians and always to be capable of putting on the relevant form that someone has learning difficulties. I am not 100 per cent confident that that will happen, but I am not overconcerned if there is a safety net in which that information can be caught later. There are also many people living and working in our country who have no English language. That is another example of the sort of case that we are talking about, and I am sure that the minister is not seeking to exclude such people. Perhaps a little more explanation is required.

However, the fact that we are making such a provision highlights something that goes to the heart of the debate. Under the bill as introduced, if after a significant period no action has been taken by the person to whom the offer was made and who is deemed to have accepted it—in other words, if no fine has been paid or no commitment has been made to the programme that was offered—the ends of justice have not been served, because nothing has been done to address the victim's concerns, and the person who is accused of having committed an offence has done nothing about addressing that. There is a gap, as it appears that we cannot automatically recall the offer and reinstate the original prosecution.

If I have misunderstood the bill, I would be happy for the minister to correct me. The issue may be raised as part of a person's record when they appear again in court or elsewhere in the criminal justice system, but if, by chance, they are never in that position, nothing will happen. There is no process that will enable the ends of justice to be served. If there has been a misunderstanding, the minister will doubtless explain the position to me.

I am minded to support Pauline McNeill, if she presses her amendments. I will also listen carefully to what committee colleagues have to say. The whole business of deemed acceptance must be balanced with ensuring that that serves the ends of justice at the end of the day. If we can get the balance right—I am not satisfied that the bill does that—there are circumstances in which I might be prepared to accept the inclusion of provision for deemed acceptance in the bill.

Mrs Mulligan: The minister can take it as read that all members understand the need to improve the efficiency of our system—I hope that that can be done without anyone being shot. There are concerns about the issue of opt-out or deemed acceptance, however we choose to refer to it.

There are three issues that have not yet been explored. First, I am concerned about the issue of vulnerable people, to which the minister referred. With his usual perceptiveness, he referred specifically to those with a learning disability, although those who are vulnerable could come from a range of situations and could include people suffering from drug and alcohol addictions.

I recognise the quote that the minister read out from the Lord Advocate's letter to Jeremy Purvis. As the minister indicated, the Lord Advocate states that

"the police will normally detail all relevant information about the accused's personal circumstances, including any known learning disabilities or difficulties."

I am concerned about the use of the word "known". How do we expect the police, the clerk of court or the procurator fiscal involved to have that level of understanding, given their workloads and their knowledge of the issue? I seek reassurance on how we can assist them to acquire that understanding.

Secondly, I am concerned about people's ability to pay fiscal fines. I know that the next group of amendments deals with the level of such fines, but I am concerned about whether, when setting a fine, we recognise other issues that affect the individual concerned and whether we will make it difficult for them to respond positively.

Thirdly, I welcome the fact that the minister has responded to the stage 1 report by lodging amendments that provide for a more flexible timescale, which is helpful.

I know that this might be a bureaucratic question, but what happens if someone who says that they have a reasonable excuse for not having responded is told that their excuse is not reasonable? Where is the arbitration? Who decides what is a reasonable excuse for not responding? We need to ensure that we know what the procedures will be.

Marlyn Glen (North East Scotland) (Lab): I welcome the greater recognition of people's difficulties by the Executive and the Crown Office, which is a huge step forward. I echo what Mary Mulligan said about "known" learning difficulties. Eventually—perhaps a decade down the line—people with learning difficulties will feel able to be upfront about them, but, at the moment, right across the board, it is difficult to persuade people to count themselves as disabled.

The University of Aberdeen is being applauded for running courses for teachers to help them recognise dyslexia—the story is in the newpapers today. I suggest that everyone who works at the Crown Office and the police should be made aware of learning difficulties as part of their equal opportunities training. It is a huge thing to ask people to be conscious of such difficulties, but, given the percentage of people in prison who are dyslexic, perhaps it should be pushed up the agenda. I welcome the Executive's recognition that learning difficulties are a real problem for some people.

If the letters were written in plain English, that would be a huge step forward that would help most of the population. We are talking about adding red tape: if someone does not understand the first letter, an application for recall can be made, but it is with such a process that some people have difficulties. I welcome the moves that have been made so far.

Mr McFee: Most members of the committee had some difficulty with the opt-out provision when it was first proposed. However, I am not convinced by the alternatives. We are being asked to believe that those who have difficulties because English is not their first language, those with chaotic lifestyles and those with learning difficulties will better understand a letter that says "opt in" than one that says "opt out." I do not accept that proposition. We are being told that some individuals would rather have an opt-in mechanism, but I suspect that a letter that said that would require the same level of understanding, so the same problem could arise.

I have heard arguments against the opt-out system, but I fail to see how vulnerable people would have a better prospect of understanding the procedures surrounding a trial than they would of the procedures for paying a fine. I wonder whether the argument is self-defeating.

I welcome amendment 130, which I think provides a basic safety net. However, I would not advocate our going much further than that, simply because if we extend the grounds for recall too far, people will play the system again. We are talking about people who play the system and take things up to the last minute.

I am concerned about the fact that the proposed opt-out procedure will not leave the individual with a criminal record, unlike the opt-in procedure that we have for speeding fines and so on. Indeed, if someone is found guilty after a trial—bearing in mind the fact that the vast majority of cases do not go to trial—they are left with a criminal record.

No system will be perfect, but I am now convinced that, if the system is going to work, we must change the emphasis to one of opt-out,

rather than opt-in. An opt-in system would not work because the wasted time would not be removed from the system.

10:45

Margaret Mitchell (Central Scotland) (Con): If the bill's provisions were going to remain as they were, I would have supported Pauline McNeill's amendments. The minister's amendments 130 to 133 go some considerable way towards reassuring me. Deemed acceptance can be balanced against any exceptional circumstances—that is a catch-all arrangement. The Executive's proposals take into account particular circumstances, such as when someone has taken an extended holiday: the offer might have been delivered to them, but they have not seen it. Other examples include people who have been hospitalised or who have learning difficulties, which would be taken into account by the marking policy. A diversion from prosecution scheme might be more beneficial to the accused, and that could be highlighted.

I welcome the movement that there has been on the matter of time limits, which were far too restrictive. In particular, I very much welcome the fact that there will be no time limit to prevent someone from bringing forward an "on cause shown" argument, if appropriate.

I take on board the reference to the 10,000 cases per year that would not have to go to court. Having sat in the district court, I cannot begin to tell the minister how many times people plead guilty, despite the offer of a fixed-penalty fine. There is an element of people saying, "Stuff it. I'll leave it to the court," and then pleading guilty because they are really annoyed about getting caught speeding—or having done whatever it was—and want to play the system to the end. Not everyone falls into that category, but many people do. Given the opt-out provision, with the safeguards, checks and balances that the Executive amendments introduce, I will support the minister's amendments.

Mike Pringle: Bruce McFee and Margaret Mitchell have already said much of what I was going to say. I, too, recall from sitting in the district court as a JP the number of times that people who had come before us were given the opportunity to pay a fiscal fine but just ignored it. That used to frustrate me considerably. It was a complete waste of my time. Of course, my time cost nothing, and it could be argued that that was not an issue, but a sheriff's time is extremely expensive. If we are going to prevent 10,000 cases from going to court and to save the time that sheriffs currently spend sitting in court listening to evidence in such cases, that can only be positive.

Marlyn Glen referred to dyslexia. I have not seen today's newspaper story, but I hope that, as a result of the proposed changes, the question of people's disabilities, perceived or otherwise, will become more of an issue. Another obvious example is that of a policeman who has to deal with someone who cannot speak English. If the policeman cannot understand what that person is saying, there is clearly a problem. The University of Aberdeen is addressing the subject of dyslexia. I hope that more and more effort will be made by the police in that regard and that the changes in the law will lead to a better understanding of that condition.

The Deputy Minister for Justice has listened to the committee's concerns, which were expressed in the stage 1 report. I am convinced that he has addressed the issues. If we can prevent 10,000 cases from going to court, as the minister has said, there will be a huge saving in time, effort and expense. That will allow the courts to concentrate on using their time better.

The Convener: All members have had an opportunity to speak. It would be helpful if Hugh Henry would respond to one or two further points. As the issue has been raised by other members, I would like to know whether we are sending out correspondence in ordinary language. When someone receives a fiscal fine offer, is it obvious that that is what it is? I am sure that many people, including committee members, have had experience of offers under the current system. I am not giving anything away.

Stewart Stevenson: No.

The Convener: I hear that the type is very small and that it is not always immediately obvious what is in the envelope. This is a serious point. Just because someone has a disability does not mean that they will be unable to pick up the fact they have been offered a fiscal fine. It is about clarity in the process. What do we know about how the offers are presented?

Would it be deemed acceptance if someone has not spotted that they have been given an offer? It is important that we hear what the minister has to say about that. It would become apparent that they do not know about it when they do not pay the first instalment. It would be helpful to talk through what would happen if someone—for whatever reason—ignored an offer or did not pick up that they had been made one.

Hugh Henry: I will endeavour to respond; if I miss anything, please let me know.

I will start from Bruce McFee's observation about the system being played. I think that that is right. Margaret Mitchell alluded to that as well—perhaps not so much the system being played as someone who cannot be bothered or who is so

angry that they want to let the matter go through to the final point. Bruce McFee highlighted the danger of moving from our original intention and going so far that, five or six years down the line, someone decides to make a point and says, "Wait a minute. I want a recall." I recognise that danger, but I also recognise that it was right to respond to the committee's concerns about the original proposals.

I hope that one of the ways in which we safeguard ourselves from abuse of the system is by having the ground of exceptional circumstances. I hope that that ground is not interpreted so rigorously that it acts unfairly against people; equally, I hope that it is seen by both sides to be just that—exceptional circumstances—and that it cannot be used on a whim by somebody who says, "I want to challenge that—I want it recalled."

Stewart Stevenson and others asked what kind of circumstances might be deemed "exceptional". It could be an issue of language; it could be someone in hospital; it could be someone who fully intended to make a payment then fell ill just before the payment was due to be made; or it could be someone working away from home. It could be someone who is subsequently found to have problems of dyslexia—it is remarkable the number of people who are not picked up by the education system and who hide a problem for many years. I hope that the term would be interpreted humanely but justly. It could anticipate a wide variety of genuine issues.

Stewart Stevenson: It would be useful if you were to say some words on the other side, if you like. Will you give us some examples of what you would not expect the court to consider to be exceptional circumstances? I give as examples cases involving people of normal intelligence who, once they had received an offer, could reasonably have been expected to understand its implications and for whom one would expect there to be no circumstances under which the court would operate within the provisions in question. It would be useful if you could put on the record some illustrations—or whatever explanation you care to give.

Mike Pringle: An MSP would be such a person.

Stewart Stevenson: Indeed.

Hugh Henry: That was the very example that I was going to give, to which the convener has already alluded. There may be members who have received such an offer. Such people are able to understand procedural processes and must read and absorb information as part of their day-to-day job. They would be aware of the significance and the implications of what was on offer. There are people in many professions who are of normal intelligence and who have no hidden disabilities—which, as Marlyn Glen has suggested, are an issue—or other issues.

Such a person might receive an offer and fail to read it properly, or they might not read it at all and just ignore it. They might be triggered into action only when they receive the final demand and think, "Wait a minute—I want to challenge that." There are people who simply leave such matters aside and do not attend to them. I am such a person—not in relation to the bill, but in other fields. I am one of those people who tend to think that there are other, more important things to do in life and who leave aside administrative matters such as paying their bills or making their expenses claims. There is a range of reasons why people overlook tasks that they should complete timeously. However, I do not think that it would be right for such a person to be able to thwart or disrupt the system in that way.

If someone falls out with the police or the procurator fiscal over another issue six years after receiving a fiscal fine and thinks that they could get their own back by challenging the fine, such a challenge should not be considered after that length of time, unless there is good cause. I am sure that more examples will emerge as the process unfolds.

Margaret Mitchell: I interrupt to observe that it is unhelpful to focus on particular categories of person. The whole point is that any person could find themselves in a set of circumstances in which, if they had received an offer, they would have had no excuse for not attending to it had they not been on an extended holiday or hospitalised. As usual, Stewart Stevenson has got us all running round in circles. It is better to focus on the circumstances. The provisions must be fair to all.

Hugh Henry: Margaret Mitchell is correct, but I was asked to give examples of specific categories of people and if I had not done so, I would have been asked why not. She is right to point out that the provisions are general. I have talked about circumstances in which there was no obvious impediment to someone taking action—such as a hidden disability or some other impediment—and no good reason for them not to do so.

Stewart Stevenson asked whether it would be right that if someone took no action, that would be allowed to pass, but that is not the case. After deemed acceptance, the fines enforcement officer would start to take action. It is certainly not the case that nothing would happen.

Mary Mulligan asked who would decide what a reasonable excuse for not responding would be. In the first instance, the clerk of the court would consider the matter and if they did not agree to a

recall, the accused could go to court. There is a double safeguard in the process.

11:00

Stewart Stevenson: I seek clarification. Fines enforcement officers are okay where there is a financial penalty, but what about where there is not? I am opening up the subject beyond the immediate section that we are discussing.

Hugh Henry: We are talking about fiscal fines.

Stewart Stevenson: I accept that.

Hugh Henry: I am struggling to think of a fiscal fine that would not involve a financial penalty.

Stewart Stevenson: I am opening up the argument, for which I could be ruled out of order by the convener. I will, perhaps, return to the matter.

Hugh Henry: Someone's inability to pay could also be referred back to the court. If someone has not paid, the matter has been referred to the fines enforcement officer and it has become obvious that the person is unable to pay, the matter will be referred back to the court. There is a process for safeguarding the person. If the fines enforcement officer is genuinely unable to recover the money, they will report that back to the court and it will then be a matter for the court to determine an appropriate penalty for what has happened.

I have dealt with Marlyn Glen's points about dyslexia, so I turn to the wider point that she and other members have raised about the forms. All Crown Office and Procurator Fiscal Service publications and communications should be proofread to ensure that they are in plain language. Work is also under way to improve the information in the standard police report. Nevertheless, the Executive, the Crown Office and the police all need to reflect on the strong views that are being offered by the committee. It is incumbent on us all to try consistently to improve the quality of the information that we issue. The convener referred to some of the typescript potentially being too small. I know that the Lord Advocate is passionately committed to improving the way in which communications are made and I trust that the matter will be looked into and the situation continually improved.

Given the fact that the quality of the information that is sent out is not a legislative issue, the committee might want to return to it at some point in the future. You might ask to see examples of the literature that has been and is being produced, so that you can comment on the quality of it. It is probably something to which the Parliament has not paid sufficient attention. At some point, as well as addressing the legislation, committees may wish to address the detail of the information that is given out, to see where it could be improved. It is a matter that Parliament might want to look into.

The issue was raised about the need for the forms not just to be written in plain language but to be made available in other languages. Offers should be issued in the relevant language. If it transpires that that has not been done appropriately, there will be good cause for the matter to be referred back.

The convener asked what would happen if someone did not know that they had been made an offer. That would become apparent when the fines enforcement officer became involved. At the point at which the first payment was not made, they would be able to take action. The person would have the opportunity to say to the fines enforcement officer that they had not received the offer, had not understood it or were not aware of it, and that information would be fed back into the process. Nevertheless, if the circumstances were not exceptional and due cause was not shown, the person would still be liable to pay the fine.

The Convener: I think that you are right that there is a trigger point when the fines enforcement officer gets in touch to say that a person is due to pay a fine or an instalment of it. Could that trigger the recall process?

Hugh Henry: Yes.

The Convener: What if a person simply says, "I did not get anything from the procurator fiscal's office. I just do not have any record of it being mailed to me at my home address."

Hugh Henry: The fines enforcement officer could take that information back and it would be considered. It would not be for the fines enforcement officer to make a decision, but someone might be able to demonstrate that nothing had been received, or that they did not understand the letter because they did not speak English. Marlyn Glen mentioned the case of a person with dyslexia who might say that they did not know what the letter was. In such a case, the fines enforcement officer could take that—

The Convener: Yes, but I was more concerned about what would happen if the conversation went like this: "I didn't get anything from the fiscal's office," "Yes you did," "No I didn't." The fiscal might be able to prove that the letter had been sent, but how could someone prove that they had not received it? They cannot prove a negative.

If you are saying that it is possible at that point to use the recall procedure, I think that that strengthens the process.

Mike Pringle: May I ask the minister a question to clear this up? If I am going to receive a fiscal offer, I presume that it will not just come in a plain envelope addressed to me. I presume that it will

arrive by recorded delivery or by some form of registered post. I do not know, but perhaps that will help to clear the point up.

Hugh Henry: I am not sure. I am trying to think of the current process for fixed penalties for speeding and of what form such letters take.

Mike Pringle: Perhaps, as the convener has suggested, somebody on the committee who has received one of those might be able to enlighten us. Unfortunately I cannot do that.

From my memories of the district courts, I understand that there would be a record of letters having been sent.

Hugh Henry: I do not have an answer for the fines as they are levied at the moment, where the person has the right to go to court. The Crown Office will clearly be influenced by the current system.

I hesitate to give a commitment on how letters will be sent out. Because of the significant numbers involved, ensuring that everything was done by recorded delivery could lead to a substantial cost. If letters are to be sent by ordinary post—although I am not quite clear as to how that would be done—

The Convener: May I interrupt? Having listened to points that have been raised round the table, I feel that we need to know what the present system is. There seems to be a lot of support for the basic principles of what should happen when a person of average intelligence ignores a fiscal fine offer. However, people have been raising concerns over different kinds of cases.

It could be argued that it is in someone's interest to have a fiscal fine offer to keep them out of court—although I know that that is not the purpose of such offers; the purpose is to take cases from the summary court.

We are reversing the process, so there has to be clarity. It is important that what the fiscal sends out to people is clearly marked and readable. If there are going to be arguments—along the lines of "I didn't get anything from the fiscal," "Yes you did"—it will have to be possible to demonstrate how the letter was sent. Could you get information from the Crown Office on what the present system is?

Hugh Henry: The Crown Office advises me that it intends to send the letter out by ordinary post. There is no suggestion that it should be done by recorded delivery.

Mr McFee: I come to the matter from a different perspective from the convener. My concern is that if we are going to expand the system to the extent that we are talking about and do not use registered or recorded delivery, we open up a big loophole and end up with a weakness in the system that could be exploited. The issue does not affect what I think of the amendments, but I would be concerned if we are setting up a new system with an inherent weakness that means that there could be a challenge on the grounds of non-receipt. Irrespective of what is in the bill, the practice would have to be addressed.

Hugh Henry: Bruce McFee is right that this is not a legislative issue; it is about the practice. I give a commitment that we will reflect on the matter and discuss it further with the Crown Office. There may be reasons to change practice in the way that has been suggested, but it may well be that the Crown Office believes that what is currently proposed is sufficiently robust. The best approach in these circumstances is for the Crown Office to come back to the committee directly to explain further how the system would work and to answer any questions that the committee may have about perceived or potential weaknesses in the system.

The Convener: I want to clarify another point, given that section 39 deals with compensation offers and fiscal fines. Someone might receive and be happy to accept an offer of a fiscal fine but might not be happy to accept the compensation element. What would we gain in respect of reducing the number of cases if one part of a combined offer is accepted and one part is not, or do you think that there would not be many challenges?

Hugh Henry: It is not so much that there would not be many challenges, although I will come back to that. The point is that in the vast majority of cases no compensation will be involved. It will be a question of a fiscal fine being issued for something that has happened. In the minority of cases in which compensation is involved in addition to a fiscal fine, the person will of course have the right to take the matter to court if they are unhappy with what has been suggested. I do not perceive there to be a problem with the number of such cases.

The Convener: So a person could say yes to the fiscal fine but no to the compensation offer.

Hugh Henry: No. The two are intrinsically linked. If the person is not happy with either part of what has been suggested, they have the right to go to court.

Stewart Stevenson: So, in effect, it is a single offer with two parts—or perhaps a number of parts.

Hugh Henry: It is. If the individual is not content with what is being suggested, they can choose to have the matter dealt with in court.

The Convener: I can think of situations in which someone might think that the fiscal fine is fair but the compensation offer is harsh. Surely they should be able to challenge the compensation offer separately.

Hugh Henry: In that case the matter would have to be dealt with by a court. It is better for the court to deal with the totality, rather than picking and choosing. If the court is going to deal with the compensation offer, it is as well for it to deal with the fine too.

Mr McFee: My understanding is that the prospect of a compensation offer was introduced because, in many circumstances, such as the classic example of a shop window being broken, a prosecution had to be pursued in order to pursue compensation. Under the proposed system, there could be a fiscal fine with a compensation offer attached. Someone could not accept one without the other, because if they did not accept that something happened, there would be no ground for the compensation offer.

Hugh Henry: That is absolutely right. If someone accepts that there has been a misdemeanour, they accept the principle that there has been some damage that may involve compensation. If that person then wants simply to argue the level of the compensation, they are as well arguing the whole case at court. The procurator fiscal will have made a calculation, and if the person is not happy with it, they can allow the case to proceed to court.

11:15

Mike Pringle: My understanding is that the percentage of fiscal fines to which a compensation offer is attached is relatively low. I would have thought that fewer than five fiscal fines in 100 have a compensation offer attached. I do not know whether the minister can confirm that.

Hugh Henry: The system is completely new. My point was that compensation features in only a small minority of cases that currently go to court. Most cases go to court to deal with the misdemeanour rather than compensation. The new system should take pressure off the courts—a central part of what we are trying to achieve—and early restitution for victims is important when there has been damage to a shop window, car or other property. If the offer of a fiscal fine can both make someone face up to their responsibilities and help the victim quickly, that is a win-win situation. Of course, if the accused person is not prepared to face up to either aspect—saying, "Yes, I put in the window, but why should I have to pay for it?"—it should be left to the court to decide.

The Convener: My reason for asking was that someone might accept a compensation offer but disagree with the level of it.

Hugh Henry: Someone could allow the case to go to court if they were not happy with what was on offer.

Margaret Mitchell: I want to expand that point. I am very much in favour of compensation offers and think that the fiscal fine and compensation offer must be treated as one offer. However, if someone is willing to accept the fiscal fine in principle but thinks that the calculation is wrong and disagrees with the offer, their only remedy is to go to court. If they did that, their offence would be deemed a conviction, whereas a fiscal fine would not be. I am a bit uncomfortable with the rationale behind that.

Hugh Henry: We should reflect on whether a further change is needed to deal with situations in which the procurator fiscal miscalculates or draws wrong inferences on what is required. However, I do not want to introduce an appeals system in which the procurator fiscal's every decision on a compensation offer leads immediately to an appeals tribunal.

That takes us back to the point made by Bruce McFee earlier. If there were an appeals mechanism, some people would say, "Okay, I did it, but they deserved it and I'm damned if I'm going to pay £300 for the window. They can have a tenner—I'm going to appeal." A balance needs to be struck between ensuring that the procurator fiscal uses the correct set of parameters in calculating an offer and saying that someone will just have to go to court if the calculation is wrong. I hesitate on whether such a procedure should be formal. It would not help anyone if, in trying to improve the system, we introduced another set of complicated procedures that slowed the process down, but I will consider the point further.

Mike Pringle: The minister may not have the information to confirm this—he can reflect on it or ask the procurator fiscal—but I am not sure that the procurator fiscal decides how much a shop window or dent in the back of a car costs. Along with all the other information that goes with the case, the procurator fiscal will have been given something that says that the window costs £500 or whatever, and he will base the compensation offer on that. They do not pick an arbitrary figure out of the air; the amount of the compensation is based on evidence that they have of cost.

The Convener: And, of course, the accused person's income.

Mike Pringle: I am not talking about the person's ability to pay; I am talking about the cost of the thing. When the compensation and the fixed penalty are set out, the fiscal fine is X, the

compensation is Y and the amount of the compensation is based on the cost that is involved.

Hugh Henry: Mike Pringle is correct. The procurator fiscal will have information that gives an indication of what an appropriate restitution would cost. Whether the person is able to pay that or, indeed, the fiscal fine, is a separate issue. If there is an inability to pay, that would be decided by the court. If the person feels that they cannot afford to pay the compensation that is involved or the fine, they could take that to the court.

The Convener: Given what you have said, my main concern is still about ensuring that it is as clear as possible that failure to respond is deemed to be an acceptance. I would like there to be some discussion before stage 3, so that we can be sure that we have got this absolutely right, for the reasons that members have outlined today. I think that the amendments will help in that regard. However, compensation offers are a new part of the process and we cannot yet know how that will work out. I can foresee situations in which someone would challenge one element but not the other. However, if the two elements go hand in hand, perhaps that will mean that more people will go to court and raise a challenge at that point. Given our uncertainties, I think that we need some clarification around how those offers are made so that we can decide whether we think that there is more that could be done to make people aware that there will be a process of deemed acceptance. We have to remember that we are completely changing a process that exists at the moment. On that basis, I am prepared to support the amendments in the name of the minister and not press those in my name.

Does the committee agree to my withdrawing amendment 166?

Stewart Stevenson: No.

The Convener: The question is, that amendment 166 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

ABSTENTIONS

Stevenson, Stewart (Banff and Buchan) (SNP)

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

Amendment 166 disagreed to.

Amendments 167 to 170 not moved.

The Convener: Amendment 171, in my name, is grouped with amendments 172 and 179. If amendment 171 is agreed to, I cannot call amendment 172. I should say that both amendments 171 and 172 are in my name, which is a bit of a quirk.

Amendment 171 is about the level of the fiscal fine and its being raised from the current level to £500. In its stage 1 report, the committee expressed concerns about the potential effect of raising fiscal fine levels. I found it difficult during stage 1 to get information from the Crown Office about the types of offence that would be caught by the fiscal fine.

If Parliament is being asked to increase substantially anyone's powers, whether it be the procurator fiscal or the police, we should be clear about the effect. I am simply not prepared to sign up to anything in the bill if I do not have a broad understanding of how it will change things. Although the Crown Office has given us a bit more information about the types of offence that are likely to be caught by the increase in fiscal fines, I am not convinced that they need to be raised to the level in the bill.

Amendment 171 is a Law Society of Scotland amendment that would keep the level of fine where it is. Amendment 172 would peg the level of fine at £300. We have heard from the Crown Office that the maximum level of fine is not commonly used at the moment—if we change them, I imagine that that position will stay the same. We are clear that many more offences are likely to be taken out of the summary justice system, but we should also be clear about the impact of that.

I move amendment 171.

Margaret Mitchell: Like the convener, I am not convinced that the case has been made to move the level of fiscal fine to £500, so I am minded to support the retention of the £300 level. I have discussed informally the rationale of that with the Crown Office.

Mr McFee: I want to hear the minister's response to the amendments. Several committee members, including myself, have expressed concerns about the matter. When first we considered the issue, we wondered whether its effect would be to increase the penalty for particular offences. We were assured that it was not intended that there should be any drift in the level of fines. The only conclusion that we can draw is that the fiscal fine intends to cover a whole other range of offences. I do not think that we have received any assurances about the type of offence that might be dealt with. It has all been very hazy and wrapped up in how the Crown

Office does not want to disclose its case-marking policy, for example, but we need to have some general indication of the direction of travel that the Executive intends our courts to take before we will be entirely satisfied. I am in favour of many of the provisions in the bill, but am yet to be persuaded about this element.

Hugh Henry: Amendment 171 would retain the status quo and would not allow prosecutors the full use of alternatives to prosecution, which would be a missed opportunity. I hope that the convener will reflect on that and not press amendment 171.

The convener has made some strong arguments for amendment 172 and other committee members have echoed her concerns. We always felt that only a small minority of cases would be considered for the upper limit of £500. It has always been our view that a level of £300 would allow prosecutors to deal with the vast majority of cases—that is what was intended. It is right to reflect on the committee's concerns on the issue, so I am prepared to support fully the convener's suggestion. We are happy to work with the committee on the issue, but some technical issues arise in respect of amendment 172, so if she is prepared to consider lodging another amendment at stage 3 that would have the same effect and would introduce the principle for which she has argued, we will be content to accept such an amendment at stage 3. Acceptance of amendment 172 would have implications.

11:30

Amendment 179 seeks to lower the maximum compensation offer that a prosecutor will be able to make, from level 5 on the standard scale, which is currently £5,000, to level 3, which is currently £1,000. Compensation offers are being introduced under the bill as a result of a recommendation of the McInnes committee. Stewart Stevenson commented that the McInnes report contains merely recommendations. The McInnes committee recommended that there should be no upper limit on the amount that the fiscal can offer as compensation. We considered that but, as Stewart Stevenson said, we are not duty bound to accept everything in the report, so we have decided that £5,000 is a more appropriate and proportionate limit.

The main reason why the maximum compensation offer is to be higher than the maximum fiscal fine—the McInnes report acknowledged this as, I hope, the committee does—is that some relatively minor criminal acts cause substantial loss. A person may do something in a moment of drunken madness, such as break a patio window or cause damage to a vehicle, that causes not only significant distress but significant financial problems to the individual who suffers the substantial loss. As anyone who has taken a vehicle in for repair will know, a minor bump can suddenly land a person with an extremely substantial bill. In such cases, full payment for the damage could be well in excess of a fine that the court had imposed. However, if the individual is willing and able to make such a payment direct to the party who has suffered the loss, that may be a more equitable solution for that party and a more proportionate punishment for someone who can afford to pay. Such a settlement would also keep the case out of court.

Stewart Stevenson: I have a question that arises from a constituency case. If the window of a retail outlet is kicked in for the umpteenth time and that leads to the withdrawal of any reasonable insurance cover, would the minister consider it reasonable for the loss of that insurance cover to be part of the compensation that should be paid? The minister may defer giving an answer to that, because I realise that the question is difficult, but it is a real question for people who suffer loss.

Hugh Henry: I accept what Stewart Stevenson says but, in such a case, it would be open to the fiscal, depending on the sums involved, to suggest compensation for the full cost of replacing the window, which would have the same effect as ensuring that insurance covered that. The one point on which I hesitate—

Stewart Stevenson: But minister—

Hugh Henry: Please let me finish this point.

Stewart Stevenson highlighted the example of a window being kicked in for the umpteenth time. My opinion—which, of course, fiscals are not bound by—is that such a sustained pattern of behaviour might be better dealt with in court, not by a fiscal fine.

Mike Pringle: I agree entirely. For many years, I ran 19 shops; during one year, they all had their windows kicked in at least twice. We had reason to believe that the same person was doing it but, as we could never catch them in the act, we could never prove it. Someone was caught in only three or four of the incidents, but it did not turn out to be the same person.

The point is that if a compensation offer is made for the full cost of the window—which might be, say, £600—one will not have to make an insurance claim because the cost will have been covered. However, in the longer term, such matters affect one's insurance, and there might well be an excess to pay.

The Convener: Does Bruce McFee want to say something?

Mr McFee: My point was similar to Mike Pringle's.

Hugh Henry: I will continue with my remarks.

The £5,000 maximum will give prosecutors the flexibility to deal with offences for which the offer of an alternative to prosecution might be suitable. For example, if a company caused some form of quantifiable damage for which compensation would be the likely outcome of a court case, court might be avoided through a compensation offer. Payment of such an offer is more likely to take place earlier than a payment following a court case: that might be of benefit to the party concerned.

Mr McFee: On your example of a company causing damage, is the £5,000 maximum applied only to the action in question? If many people were affected directly by the action, would each be able to seek compensation up to £5,000?

Hugh Henry: That would depend on what the individual—in this case, the company—was charged with and the number of offences. If there were multiple offences against different people, the compensation offer might be applicable in each case.

Mr McFee: If, for example, an act of pollution affected 10 people, could each of those 10 people claim a maximum of £5,000 compensation?

Hugh Henry: If there were a single offence, there would be a one-off compensation payment. Of course, the fiscal has to consider whether it would be appropriate to deal with the matter in that way.

That reinforces the point that any loss that was caused by a more serious crime would remain a matter for the court. However, the powers will provide the best outcome in cases in which compensation might be appropriate and represent good use of the court's time.

I also remind members that the use of compensation offers by procurators fiscal will be subject to the Lord Advocate's guidance and that training will be provided to ensure that the powers are used appropriately. In cases such as that which was described by Bruce McFee, the matter would need to be considered very carefully. I emphasise that it will be made clear to accused persons that they can reject any compensation offer and instead choose to have the matter dealt with in court.

I hope that, with that assurance, Pauline McNeill will consider not moving amendment 179.

The Convener: I am pleased by the response in respect of amendment 172. That response will certainly provide the best way forward: after all, one would expect at least an inflationary increase in the level of fiscal fine. From what we have heard about cases for which such alternatives to prosecution would be appropriate, the proposed level might well be enough.

I lodged amendment 179 because we needed to have a debate on compensation offers, part of which we have just had. I want to be as clear as possible about how the power will be exercised. We have not pressed the minister for answers, but how many people who go through the summary justice system are likely to have the means to pay compensation? We have talked largely about people who have the means, but many do not. I am not sure whether compensation offers are a gesture or whether fiscals will attempt, in so far as they can, to secure reparation for victims. I need to know roughly what the guidance will say on that.

What will be the aims of procurators fiscal in determining whether a compensation offer is applicable and what the level of compensation will be? I can envisage circumstances in which the person has the means and in which damage and the impact on the victim's insurance can be quantified, but there are many cases in which compensation will not be payable. Some victims will get compensation because the accused has the means to pay it, but that will not be applicable to all victims. The system will be patchy. Is it right to set the level of compensation at £5,000? If the level were lower, I would have fewer concerns about the provision. I would be a lot happier about it if the minister could give me and the rest of the committee an understanding of how, broadly, the system will operate.

Mike Pringle: I am wondering about the circumstances that the convener has described. Let us consider the case of a fairly normal Friday or Saturday night in the middle of Glasgow, Aberdeen or Edinburgh: someone goes into a pub or restaurant and comes out drunk—there may be an increase in the number of young women getting drunk, but in my experience the problem mostly affects young men—and, while walking up the street, gets upset, happens to kick the back of a car, break one of its windows or kick off its wing mirror, and is arrested. Is it appropriate to say that an MSP who earns 54 grand a year should pay compensation but that 18-year-old unemployed students on grants, with no serious income, should get away with not paying just because they happen not to have the means to do so? The offence would be exactly the same.

The Convener: I understand that fiscals are already required to consider a person's means—they have to consider someone being on a low income or on benefits. If the value of the damage is £1,000 and that sum is to be payable regardless of income, I have misunderstood what we are trying to achieve in the bill. Would the minister like to comment on that?

Hugh Henry: The dilemma that has been described exists currently in the courts. There are people who go to court and are fined but do not have the means to pay substantial compensation. However, the justice system expects some penalty to be levied on them.

11:45

It will be no different for fiscals. In the situation that Mike Pringle described, a fiscal would have to consider whether the person was able to pay substantial compensation. We are trying to address situations in which it is clear that people have the means to pay. In that situation, they should make restitution and should do so quickly so that there is no need for the case to go to court.

Fiscals will be able to levy fines even if they determine that the person does not have the means to pay it; however, in such circumstances the fiscal might determine that it is best not to levy a fiscal fine and the case might then go to court. Of course, the court would then have to consider the circumstances and decide whether it was appropriate to impose a penalty that the person could not afford to pay. However, it is right to begin to shift the emphasis towards providing restitution to victims, because—

The Convener: I am asking how you expect procurators fiscal to exercise the power. Do you expect them to start with a valuation of the damage—the case might involve damage or it might involve personal injury—and to seek part of that sum?

Hugh Henry: That question takes us back to an earlier discussion. If a window is kicked in or a car is damaged, the fiscal will have an estimate of how much it would cost to repair the damage. If the amount is reasonable in the circumstances and the person has the ability to pay, I see no reason why they should not be asked to pay the full cost of the damage that they caused, up to £5,000.

The Convener: So, if there was £4,000-worth of damage, the fiscal would seek £4,000 in compensation, but would also judge the person's ability to pay.

Hugh Henry: That is correct.

The Convener: Okay.

Mr McFee: I understand what you are saying, minister. I hope that you will confirm that the changes are intended to provide victims with reparation for financial loss, although the old saying about blood and stones comes to mind—if the wherewithal is not there, ye cannae get it oot.

Do you agree that it is time for us to reverse the assumptions that we make in such cases and to consider victims' financial circumstances? Often, they are left with large bills for damage even though their income is considerably smaller than that of the person who caused the damage.

Hugh Henry: In essence, we are starting to do that for all victims regardless of whether the offender has the means to pay. We start from the presumption that it is fair for victims to get reparation and restitution for damage. Why should they suffer? We hope that compensation offers will be a speedy way to ensure that that happens. The problem, which exists at present and will continue even under the new system, is that some people do not have the means to pay. As Bruce McFee suggested, you cannot get blood from a stone.

However, there are often people who have the means because they are in work and have a reasonable income and perhaps savings: such people should be asked to pay. If someone who has perpetrated an offence is saving money for a nice holiday later in the year but someone else is suffering because they have a broken window that needs to be repaired, priority should be given to the repair of the window rather than to the guilty party's holiday.

The Convener: I do not disagree with that. My concern is whether we can identify those who are not in a position to pay. We should not give the impression that the system will ensure that all victims will get compensation. It is clear that a high percentage of victims will not get compensation, notwithstanding Bruce McFee's point that the victim's income is sometimes lower than the offender's income, which I acknowledge. We do not have any firm information on the point, but it is likely that many accused persons do not have the ability to pay.

I would be much happier if, before stage 3, we were clearer about how fiscals will determine individuals' means. I am not concerned about people who can pay; I am concerned about being able to identify people who are not in a position to pay and about giving the wrong impression. It is right that victims should be given reparation for damage, but we should not give the impression that all victims will receive such reparation under the system.

Hugh Henry: I will undertake to have information on that provided to the committee ahead of stage 3.

The Convener: For future reference, what is wrong with the drafting of amendment 172?

Hugh Henry: We want to consider whether the £300 limit that it suggests is meaningful. Because the power to increase the limit by order would appear in the same subsection as the power to prescribe the scale by order, it is possible that a single order could prescribe a scale above £300, which might defeat the amendment's intention. We

simply want to ensure that the convener's intention is fully achieved. We accept the principle that is involved and will work with you to ensure that what you want is delivered at stage 3.

The Convener: You cannot say fairer than that. In that case, I will not move amendment 172.

Amendment 171, by agreement, withdrawn.

Amendment 172 not moved.

Amendment 128 moved—[Hugh Henry]—and agreed to.

Amendment 173 not moved.

Amendment 129 moved—[Hugh Henry]—and agreed to.

Amendments 174 and 175 not moved.

The Convener: Amendment 176, in my name, is grouped with amendments 183, 138 to 140 and 186.

The amendments relate to the debate on whether the deemed acceptance of a fiscal fine would be disclosed to the court within two years. At stage 1, there was considerable debate in the committee about whether a significant change to the bill should be made.

As members know, acceptance of a fiscal fine is not disclosable under the current system as far as the courts are concerned, although under the general disclosure and enhanced disclosure certificate process a range of information can be revealed to employers, for example. I am not wholly convinced that such information should be put before the court. If we want to go down that road, I want to be clear about how the court is expected to use such information. The Executive has said that such information is not meant to be treated as a previous conviction would be, but I wonder how the court could differentiate if it is put in front of a sheriff. If it is thought that it is relevant and should be considered, I presume that sentence will be passed using it. If there is to be a requirement for disclosures to be put before courts, I want to be clear about how the courts will deal with them.

I move amendment 176.

Do any other members wish to speak?

Mrs Mulligan: I share some of your concerns, convener, about the disclosure—

The Convener: Mary, I am sorry, but I have made a mistake. It is the minister's turn to speak.

Hugh Henry: Amendments 138 to 140 clarify the status of accepted alternatives to prosecution when they are referred to in subsequent court proceedings. Section 41 provides that, where the accused pleads guilty to or is found guilty of another offence within two years of accepting an alternative, the existence of the alternative can be disclosed to the court after conviction but before sentencing. The committee's stage 1 report expressed some concern about the fact that an accepted alternative might be treated as a previous conviction for the purpose of certain sections of the 1995 act.

I hope that amendments 138 to 140 put it beyond doubt that any accepted alternative that is disclosed to the court following conviction for a subsequent offence has the status of an alternative disposal, not a previous conviction. It will still be competent for alternatives accepted within a two-year period prior to conviction for a subsequent offence to be considered by the court before passing sentence, but amendments 138 to 140 make it absolutely clear that such alternatives do not carry the status of previous convictions.

Amendments 176, 183 and 186 would remove from the bill the provisions that allow for courts to be told about accepted fiscal fines, compensation offers and work orders for a limited period. We are clear that acceptance of an alternative to prosecution does not equate to a conviction, and amendments 138 to 140 put that point beyond any doubt.

At present, if someone who has accepted an alternative to prosecution reoffends, the court is not made aware of the fact that they accepted an alternative to prosecution in the recent past. If the use of alternatives is expanded, it might be the case that some of those who are covered will have committed more serious offences in the past. The Executive's proposal will allow courts to be made aware of those alternatives only at the sentencing stage, in the event of the accused pleading guilty or being found guilty of an offence. That is important, because only those who reoffend and are prosecuted and convicted will be affected. It is not a general provision. Even then, the information will remain live for a period of only two years. For those who do not reoffend, there will be absolutely no difference. For those who do reoffend but do so after two years or more have elapsed, there will also be no difference.

I recognise that members have some concerns, and I am prepared to hold further discussions with the committee on the point, to clarify the Executive's intentions. I hope that we can persuade the committee, but if that is not the case committee members will have the right to revisit the matter at stage 3. I make you this offer, convener: should you decide to withdraw and not move your amendments, we would not necessarily see that as the end of the process. There will be the opportunity to continue with further discussions before stage 3.

Stewart Stevenson: I know that the minister uses language carefully when he makes such comments to the committee, and I note the consistent use of the word "offence". Would he like to make it clear to the committee that, when offers that have been accepted are disclosed to the court, the disclosure will be in terms that make it clear that an offence has been committed and that the person who has accepted the offer has accepted that that offence has been committed? The distinction between the acceptance of offers and the record associated with those offers and the record derived from convictions in the court is not a distinction in relation to offences having been committed, but merely a distinction in relation to the process by which a person has been dealt with, so there should be no softening of the court's response to an offence dealt with in one way compared with an offence dealt with in another way. Can the minister confirm that?

Hugh Henry: Stewart Stevenson raises an important issue of semantics. I need to make it clear that, in accepting the offer of a fiscal fine, a person does not necessarily admit to having committed an offence, but accepts the fiscal fine because of an incident that occurred. Notwithstanding that important semantic point that the person has not necessarily admitted to an offence, Stewart Stevenson is right to draw that distinction in relation to whether the person has been convicted. There is no conviction at the fiscal fine stage—

12:00

Stewart Stevenson: May I respond to that?

Hugh Henry: Let me just finish the point.

The issue is that, if someone subsequently commits an offence, for whatever reason, and is found guilty by the court, the court should be able to refer to an earlier pattern of behaviour, including fiscal fines. Whether or not the person admitted to the offence, the person accepted a fiscal fine because of an incident that occurred.

Stewart Stevenson: That moves the issue back a bit, to my slight discomfort. In legal terms, will the court be told that the person on whom a fiscal fine was imposed accepted that an offence was committed, albeit that no admission of guilt was made? Will the disclosure to the court nonetheless state that an offence was committed, or does the minister entirely resile from his use of the term "offence" in relation to fiscal fines?

Hugh Henry: The court will be told that an alternative disposal was accepted.

Stewart Stevenson: Will the court be told that that was in relation to an offence?

Hugh Henry: Yes, in relation to an offence.

Stewart Stevenson: That is fine. That is all that I wanted to clarify.

Mrs Mulligan: I wish that I had just continued speaking before, as I might not have been so confused now.

I preface my comments by saying that I previously had concerns that, in providing for further use of fiscal fines, we might not be able to identify a recognised pattern of behaviour. If a person who accepts a fiscal fine is convicted of a further offence, I would want the existence of the fine to be known, because it is part of a pattern of behaviour. I do not disagree with the minister's proposals, because such disclosure is an appropriate response when someone exhibits such behaviour.

However, the convener's comments reflect my concern that the informal nature of the fiscal fine—which will not require an appearance in court—means that people could downplay the matter and not view it seriously. How will we ensure that such persons are aware that the fiscal fine relates to a serious event in their lives that will be recorded and, if they are subsequently charged and convicted, noted by the court prior to any subsequent sentence being issued? The less formal nature of the fiscal fine might not have the same impact as a court appearance.

Hugh Henry: Mary Mulligan makes an important point. It has never been our intention to allow people to trivialise their behaviour by thinking that accepting a fiscal fine will absolve them completely of any culpability, responsibility or future impact. People should not just think that, if they commit a series of offences that are liable just for fiscal fines, they will be okay.

The fiscal fine is a means of effecting a solution without going to court. Stewart Stevenson is right to say that the fiscal fine is an alternative disposal for an offence that has taken place. Mary Mulligan is right to say that people should be aware of the significance of the fiscal fine. The bill already provides that the conditional offer shall state that

"the fact that the offer has been accepted, or deemed to have been accepted, may be disclosed to the court in any proceedings for an offence committed by the alleged offender within the period of two years beginning on the day of acceptance of the offer".

We need to ensure that people are aware of the implications and of how an acceptance might be used. That can be debated if the committee decides to have a further discussion with the Crown Office about the content, layout and format of correspondence.

The words that are in the bill must appear in the offer. I hesitate to respond because, after reflecting on comments by the committee, I think that it might be useful to provide a plain English

explanation of what the words that must appear in the offer mean. I am not satisfied that simply taking the words from the bill and putting them in an offer will mean that a person understands them. That may well be the case, but those who are responsible must reflect on that and, if they appear before the committee, must give assurances that if some clarification is needed it will be given, so that no one is in any doubt about the implications of what is being done.

Mike Pringle: You have re-emphasised the point that I was going to make. I am not sure whether I picked you up right, but I cannot conceive that somebody who is offered a fiscal fine and is told all of what you have just said will say, "I'm not guilty, but I cannae be bothered going to court, so I'll just pay the 100 quid." My experience from talking to constituents who have approached me about problems in court is that the situation is exactly the opposite: people all want to go to court to prove their innocence. How often will anybody say, "Oh well, I'll just accept the £100 fine, though I don't think I committed the offence. I won't try going to court"? I suggest that that would be an exceptional case.

Mr McFee: The question is at the nub of the matter. The bill creates almost a hybrid system. If somebody accepts a fiscal fine, the public will equate that with a guilty plea. I have no doubt about that, particularly for the reason that Mike Russell—Mike Russell, good grief.

Mike Pringle: I have not joined the SNP yet.

Mr McFee: I like the word "yet", but I do not know what it has done for your promotion prospects. You should have a word with Hugh Henry, who has been doing well at that game.

The committee faces a dilemma, because although we are presented with a scheme that we have been told is an alternative to prosecution, it is, in effect, to be treated like an offence in its influence on sentencing. I am not sure whether you can have it both ways. It might have been easier to introduce a range of fiscal fines for specific offences in specific circumstances and to have treated them like a guilty plea, but I understand that that would have opened a new Pandora's box. It is a difficult line to walk, because mixed messages are being sent out.

Mary Mulligan is right: we do not want patterns of behaviour that apparently will not be admitted to to continue. We want the court to intervene in some situations. The minister said words to the effect that people should not believe that they can simply keep on behaving in that way without the court taking action but, after two years, that is exactly what they will be able to do.

The system is a hybrid. From day one, we have seen where it wants to go, but it has been poor at explaining itself. The fiscal fine is neither an alternative to prosecution in some cases nor always seen as meaning that a person is not pleading guilty. I welcome further discussion of how that will be presented, because there is a danger in it. If I were accused of an act of vandalism or street disorder, I would regard receiving a £100 fine through the post as getting off lightly. That is my only concern about the system: it has a tendency to play down offences by saying that the offenders are not pleading guilty when everyone thinks that they are.

Margaret Mitchell: I would welcome more discussion of the system at stage 3. I understand that the heart of the provision is not to prevent someone's history of receiving fiscal fines from being disclosed at the relevant time. In a way, the bill gives the benefit of the doubt in allowing someone to accept a fiscal fine, which we hope will not be abused. Disclosure at sentencing goes some way to addressing a difficult set of circumstances. However, I would welcome clarification of whether disclosure will apply only to analogous offences or whether the provision is being introduced to indicate to the courts a pattern of offending behaviour that has not been treated as such because it has been dealt with under alternatives to prosecution.

Hugh Henry: On Margaret Mitchell's query, disclosure can be made for any offence rather than just an analogous one.

On Bruce McFee's comments, the fiscal fine is an alternative to prosecution—that is its point. However, we are also trying to recognise that although someone has not admitted committing an offence, something has happened and an alternative disposal has been used. If there is a pattern of behaviour in the two years before a person commits an offence that ends up in court, it will be appropriate for the court, after conviction and before sentencing, to consider whether it is relevant that the person was involved in something previously.

My offer is to have further discussions, because points of clarification need to be made. Bruce McFee talked about a hybrid system but, as the convener knows, that is not entirely new. Under our disclosure procedures, similar things happen and matters are disclosed whether or not the person has been convicted in court. As a society, we are used to that.

Our amendments 138 to 140 clarify the situation. I am prepared to discuss the convener's amendments 176, 183 and 186 further, in whichever way the committee wishes to do that, whether in writing, at a further meeting or in another way.

The Convener: I thank the minister. I welcome his amendments 138 and 140 and the offer to discuss the points further, because they need further discussion. I am not sure that we are achieving a great deal by completely changing the system from one in which we do not allow information on accepted alternatives to prosecution to be disclosed to courts to one in which we do. We need to think carefully before stage 3 about whether there is any justification for that.

We are talking about alternatives to prosecution, and we cannot have it all ways. In the past, offences dealt with by alternatives to prosecution have not been disclosed in court, but the bill fundamentally changes that. The case seems to be that, because someone has been offered a fiscal fine, that should be disclosed. Given that we are raising the level of the fines from £100, more offences may be caught. However, I am still not clear about what patterns of behaviour will be looked for. The bill will mean that all the offences that are currently covered by alternatives to prosecution will be disclosable—everything from speeding offences to more serious offences—given that we will increase the level to £300.

I particularly welcome what the minister said about trying to avoid such a fine being treated as a previous conviction. That is extremely helpful, but I would like to have further discussions about whether the provision is now needed at all. On that basis, I am prepared to ask members to agree to my withdrawing amendment 176.

Amendment 176, by agreement, withdrawn.

Amendments 177 to 182 not moved.

Amendments 130 to 133 moved—[Hugh Henry]—and agreed to.

Section 39, as amended, agreed to.

Section 40—Work orders

Amendment 183 not moved.

12:15

The Convener: I propose to stop at this point, because we have more business to cover before we close the meeting.

Minister, I thank you and your officials for appearing before the committee this morning. I believe that this is the last time that we will be able to exchange arguments with you across the table. I am sure that the committee will miss those exchanges, but I am sure that members will all want to join me in congratulating you on your new appointment to Cabinet as Minister for Education and Young People.

Stewart Stevenson: You ought to say, "On the prospect of your new appointment to Cabinet."

Mr McFee: Given the number of consensual meetings to which he has consented this morning, I suspect that the minister is somewhat demob happy.

Hugh Henry: It was all done with the best of intentions, convener.

The Convener: I am sure that the commitments that you have given this morning have been given in the best possible faith, minister, and I am sure that Johann Lamont, if her appointment is approved by Parliament, will enjoy her exchanges with the committee just as much as you have, and that she will honour the commitments that you have given today.

Hugh Henry: If it is the decision of Parliament that I am not here next week—and I would not want to pre-empt Parliament's decision—I would like to thank the committee for its co-operation during what has been a hectic period.

Mike Pringle: That is an understatement.

Hugh Henry: There has been a huge amount of legislation, and members' tolerance and good humour has helped ministers in the process of passing some significant legislation. I wish the committee all the best between now and next year. There are still many challenges ahead of you.

12:19

Meeting suspended.

12:22

On resuming—

Subordinate Legislation

Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2006 (SSI 2006/515)

The Convener: Item 2 is subordinate legislation. We are dealing with the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2006. I welcome to the committee Gillian Mawdsley and Ian Vickerstaff. I believe that Gillian Mawdsley wants to make some introductory comments on the regulations.

Gillian Mawdsley (Scottish Executive Justice Department): I thought that it would be best if I set out the purpose of the regulations, which are intended to give effect to the interim increase in legal aid fees payable to solicitors for providing legal advice in solemn proceedings. The interim increase provides an 8 per cent increase for advocacy work and a 12 per cent increase for all other categories of work. The increase provides for work carried out in relation to identity parades and judicial examinations but also for all duty work, both solemn and summary. The increase has been backdated to cover all work done on or after 1 December 2005.

Ian Vickerstaff (Scottish Executive Legal and Parliamentary Services): We considered the vires issue carefully before we made the regulations. The Scottish Executive's position is that the Legal Aid (Scotland) Act 1986 allows the Scottish ministers in certain circumstances to make regulations that enable payments to be made for work concluded before the date on which the regulations come into force, so long as the retrospective application of the regulations is not unfair to those directly affected or concerned by them.

In coming to that view, we relied upon the case of Wilson v First County Trust Ltd no 2, which came before the House of Lords in 2004, in which their lordships questioned the reliability of the general presumption against making retrospective legislation. Reference was made to the principle that Parliament is presumed not to have intended to alter the law retrospectively in a way that is unfair to those affected by such a change, unless there is a contrary intention. It was held that the appropriate approach was, in accordance with that statement of principle, to identify the intention of Parliament in the relevant statutory provisions and to consider whether the consequences of applying the provisions retroactively would be so unfair that Parliament could not have intended them to be applied in that way.

The regulations provide for an increase in solicitors' fees for work in solemn proceedings. We are satisfied that there is no detriment to solicitors from the making of the regulations and that the Legal Aid (Scotland) Act 1986 does not expressly prohibit the making of retrospective legislation. Accordingly, the Executive considers that, in light of the House of Lords decision, the enabling powers in the 1986 act allow the approach that has been taken in the regulations.

Stewart Stevenson: You said,

"We are satisfied that there is no detriment to solicitors",

which indeed seems to be the case, given the increases of 8 per cent and 12 per cent. Where did those increases come from?

Gillian Mawdsley: The percentages were part of the discussions that took place with the Law Society of Scotland in the summer of 2006. The intention was to introduce an interim increase in the rate because some of the fees had not been increased since 1992. An increase in fees took effect in 2004, but that affected only a limited range of the work that solicitors undertake. It was acknowledged that we should seek to reward the work that solicitors do, which is why interim increases were brought in.

Stewart Stevenson: If we compare them with the rises in the cost of living or in average earnings since 1992, the changes are probably a reduction rather than an increase. I suspect that both those figures have risen by more than 12 per cent in that period.

Gillian Mawdsley: I do not know what the exact inflationary increases have been. All I can say is that it was acknowledged that fee levels had not been increased for some of the work and so the increases were appropriate. One of the intentions is properly to reward work that solicitors do.

The Convener: Are the regulations now the permanent ones, or are they further interim ones?

Gillian Mawdsley: The increases are interim ones. Since the summer, work has continued with the Scottish Legal Aid Board and the Law Society of Scotland on a scheme of block fees for solemn criminal legal aid, which will support an efficient and effective criminal justice system for the most serious cases. That work is actively on-going and takes fully into account aspects such as the Bonomy reforms, with which members are familiar. The interim increase was introduced partly because it was not possible to finalise the block fee arrangements, which had been worked on for some time, as quickly as was hoped. At present, the scheme is being worked on by all parties.

The Convener: To be clear, are we considering the final set of regulations or interim arrangements?

Gillian Mawdsley: The arrangements are final in that they are a permanent increase in the fees, but we will seek to introduce a completely new system for the operation of block fees in solemn cases. However, the increases are permanent.

The Convener: Until then.

Mr McFee: I have a question on the retrospective element of the regulations. I hope that Ian Vickerstaff does not mind me paraphrasing him, but I think that he said that we have to be satisfied that there is no detriment to the parties that are involved. We were told that that means an 8 per cent increase in fees for solicitors for one type of work and a 12 per cent increase in the fees for another type. I suggest that another party is involved: the taxpayer or the public purse. Are you satisfied that there is no detriment to the public purse and, if so, how did you come to that conclusion?

12:30

Ian Vickerstaff: When I spoke about detriment as a result of retrospective application of the regulations I was referring to the persons directly concerned and affected by the regulations—the solicitors who will undertake work under them.

Mr McFee: That is exactly what I took you to mean. I was suggesting that the other party that is directly affected is the taxpayer.

Gillian Mawdsley: Your question is probably more for me. One of the policy intentions is that solicitors who provide publicly funded legal assistance should be appropriately remunerated for the work done. I cannot comment on the effect on the taxpayer, but taxpayers will be concerned to have publicly funded legal assistance as well as an efficient and effective justice system. Those policy intentions led to the interim increase being brought into effect. It was thought that fees should be increased by the interim amount to ensure that solicitors receive appropriate remuneration for the work that they undertake.

Mr McFee: I understand that. I was asking about the retrospective element. The test that was established is that there should be no detriment to the parties involved.

The Convener: We have dealt with this issue before.

Mr McFee: I just want to find out how the test was come up with. I suspect that I know the answer.

The Convener: Clearly, the test relates to the solicitors and advocates who are part of the legal aid system.

Mr McFee: Indeed, but there is another party involved, whose interests are—

The Convener: I hear the point that you are making.

Margaret Mitchell: McCall v the Scottish ministers covered the retrospective element. The test ensures that none of the parties involved will be adversely affected by the change in fees. It does not consider the wider issue of what is in the public interest.

Ian Vickerstaff: That is correct. The McCall opinion covered the retrospective elements. The regulations were found to be ultra vires in respect of their being to the detriment of counsel. Given that these regulations provide for an increase in fees to solicitors, there is no argument that they cause detriment.

The Convener: I am not familiar with the McCall case. Which regulations were deemed to be ultra vires? Did they come before the committee?

Gillian Mawdsley: I am not sure whether they came before the committee. The regulations at issue in the McCall case were the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005, SSI 2005/113.

The Convener: Every time there is an agreement between the Scottish Executive and the Law Society of Scotland, the Scottish Legal Aid Board and the Faculty of Advocates, we get a new set of regulations and we go through the same process. This is the fourth time that I recall our considering such regulations. We should have been told that regulations that were put before the committee were deemed by a court of law to be ultra vires. Perhaps you see our role as being just to rubber stamp the regulations, but we see our role as being to scrutinise what is before us. Therefore, I have a few more questions.

Ian Vickerstaff: With respect, we did highlight the McCall case in the Executive's response to the letter from the Subordinate Legislation Committee. The paragraph in the Executive's letter says that the approach in the regulations

"is consistent with the approach taken in McCall v The Scottish Ministers (29 November 2005). In that case Lord Carloway held that the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005 (SSI 2005/113) were ultra vires as regards the applicability of new fees to work done prior to the commencement of those Regulations solely on the grounds that this was an unfair interference with the Petitioner's right to peaceful enjoyment of the (higher) fees which she had earned before commencement."

The Convener: My view is that this is perhaps a matter that we should raise further up the line. The matter should have been drawn formally to our attention. We are dealing with regulations. For obvious reasons, we do not have total recall with regard to cases and we have missed that part of the correspondence.

I feel that if regulations that we have passed are later found not to be in order, there should be a procedure to let us know that.

We would probably have wanted to spend more time on the issue, but there is nothing in the note to say what happened or that the matter is being looked at again.

Stewart Stevenson: I recognise that our difficulties arise from the fact that this is a negative instrument, on which we are not required to express an opinion directly.

Nevertheless, it would be useful if we—as individuals and as a committee—could be made aware of challenges to things that we have done. Therefore, I suggest that the committee write to the Minister for Justice and ask that such a process be put in place.

The Convener: Does the committee agree to that suggestion?

Members *indicated agreement.*

The Convener: The significant Bonomy reforms were achieved with a great deal of co-operation from members of the legal profession. The dean of the Faculty of Advocates raised a specific issue with us, on which the committee has been proactive. Some members of the legal profession have found themselves in a detrimental position, which is why it is important that we continue to be proactive.

The specific issue that was raised was that many cases that do not fit neatly into the block fee have been dealt with by reference to the auditor of court. The dean of the Faculty of Advocates was quite clear that his organisation would like that facility to continue. Has that issue been resolved?

Gillian Mawdsley: First of all, the regulations deal with solemn fees for solicitors. To that extent, the Faculty of Advocates does not have a particular interest in them; the Law Society of Scotland is the relevant professional body.

The block fee system that will be introduced will still involve recourse to the auditor in decision making. Obviously, there will be a number of block fees, but there will still be a role for the auditor.

The Convener: We have three options: the committee can approve the regulations; a member can lodge a motion for annulment; or we can defer our decision until next week, if we still have questions that we want answered. The committee has agreed that I should write to the minister to make it clear that we expect to be informed if regulations that have been put before us have been referred to in a court case. That point can be pursued independently of our position on the regulations, so I think that we should simply note them. Is the committee happy to do that?

Members *indicated agreement.*

Meeting closed at 12:39.

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