JUSTICE 2 COMMITTEE

Wednesday 15 May 2002
(*Morning*)

Session 1

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CONTENTS

Wednesday 15 May 2002

JUSTICE 2 COMMITTEE
† 20th Meeting 2002, Session 1

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Bill Aitken (Glasgow) (Con)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
*Mr Duncan Hamilton (Highlands and Islands) (SNP)
*George Lyon (Argyll and Bute) (LD)
*Mr Alasdair Morrison (Western Isles) (Lab)
Stewart Stevenson (Banff and Buchan) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Roseanna Cunningham (Perth) (SNP)

WITNESSES

Margaret Anderson (Association of Directors of Social Work)
Andrew Cameron (Association of Chief Police Officers in Scotland)
Brenda Doyle (Association of Directors of Social Work)
Professor Antony Duff (Scottish Consortium on Crime and Criminal Justice)
Diane Janes (Convention of Scottish Local Authorities)
James McDonald (Scottish Police Federation)
Colin MacKenzie (Association of Directors of Social Work)
Norman MacLeod (Scottish Police Federation)
Anne Pinkman (Association of Directors of Social Work)
John Scott (Scottish Consortium on Crime and Criminal Justice)
Dr Richard Simpson (Deputy Minister for Justice)
David Strang (Association of Chief Police Officers in Scotland)
Dr Jacqueline Tombs (Scottish Consortium on Crime and Criminal Justice)
Mr Jim Wallace (Deputy First Minister and Minister for Justice)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Fiona Groves

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 2

† 19th Meeting 2002, Session 1—joint meeting with Justice 1 Committee held in private.

Scottish Parliament

Justice 2 Committee

Wednesday 15 May 2002

(*Morning*)

[THE CONVENER *opened the meeting in private at 09:34*]

10:14

Meeting continued in public.

The Convener (Pauline McNeill): Good morning. While our witnesses are finding their seats, I welcome everyone to the 20th meeting this year of the Justice 2 Committee. We took item 1 in private to agree our line of questioning for witnesses this morning. I have received no apologies.

Crown Office and Procurator Fiscal Service

The Convener: The conveners liaison group will shortly be considering bids for committee debates in the Parliament in the autumn. I invite the committee to agree that our report on the Crown Office and Procurator Fiscal Service should be put forward for plenary debate. Is that agreed?

Members *indicated agreement*.

Criminal Justice (Scotland) Bill: Stage 1

The Convener: I welcome to the committee Roseanna Cunningham MSP and our witnesses: Dr Jacqueline Tombs, honorary director of the Scottish Consortium on Crime and Criminal Justice, Professor Antony Duff from Stirling University and, a late addition, John Scott. Thank you for the thorough statement that you provided to the committee. We have about 40 minutes, which is not long. After members have asked questions, I will give you a chance to comment on any burning issues that you feel have not been aired.

Scott Barrie (Dunfermline West) (Lab): I will start with part 1 of the bill. Your submission is relatively critical of the proposals on orders for lifelong restriction. You seem to suggest that such measures can never be justified. Is that a correct summation of your position?

Professor Antony Duff (Scottish Consortium on Crime and Criminal Justice): No. We accept that there is a small group of dangerous offenders for whom such orders may be necessary. Our worry is that the provisions are so broad that they put at risk a far larger group than one could justifiably subject to such orders. In particular, our concerns are: the broad list of qualifying offences; the fact that it takes only one offence to become eligible for assessment; the evidence that the assessor can attend to, including alleged offences for which the person was never tried or for which they were acquitted; and the fact that the court needs to be satisfied on the balance of probabilities, rather than beyond reasonable doubt, that the person is dangerous. The specification is too broad.

Scott Barrie: Given that you consider that the proposals are too broad, how could they be better defined? What offences would you consider to be appropriate?

Professor Duff: We would prefer a more tightly defined list of qualifying offences. Serious sexual offences and offences of violence are currently defined in general terms; we believe that they should be defined more tightly. For less serious offences, we would like a requirement for someone to have at least two convictions, rather than one, before they become eligible for a report. We would like tighter controls on the evidence that the assessor can attend to. In particular, the assessor should not attend to alleged conduct for which a person was acquitted. We would like the court to have to be satisfied beyond reasonable doubt, rather than just on the balance of probabilities, that a person is dangerous. That

does not rule out such orders altogether—there is still room for them to be made, but in a much smaller class of cases.

Scott Barrie: Would that help us? Do you have a helpful definition of "serious", given that what counts as serious to one person may not count as serious to another.

Professor Duff: Not to hand, no. I could draft one, although not on the spot. The explanatory notes list 20 sexual offences, running from rape through indecent assault, sodomy and importing indecent photographs. The list is huge. I am slightly uneasy once we get beyond rape and serious indecent assault. A violent offence is defined as any offence inferring personal violence, which includes fairly minor assaults. We do not have to hand a definition of "serious", although we could produce one, if that would help the committee.

Scott Barrie: It would be helpful if you could produce a definition. Given that you are concerned that part 1 of the bill is too widely drafted, any suggestions would be welcome.

Professor Duff: I am sorry, we should have done that in advance.

Scott Barrie: Sorry to put you on the spot like that.

Professor Duff: We will produce a definition soon.

The Convener: We presume that the bill has been proofed to be compliant with the European convention on human rights, but we do not have access to the legal opinion that was given to the Executive. Will John Scott offer us a perspective on risk assessments from the human rights point of view?

John Scott (Scottish Consortium on Crime and Criminal Justice): Our written evidence mentions some concerns about human rights, which relate to the aspects of part 1 of the bill that Antony Duff mentioned. I do not have much to add to what is in our written evidence or to what Antony Duff said. There are concerns about the sort of evidence that can be taken into account in the assessments. The bill as introduced does not appreciate that even previous convictions are not as straightforward as they seem—the accuracy of records of previous convictions is regularly questioned in courts. If there is a problem with the accuracy of hard information on previous convictions, what chance do risk assessors have of getting accurate soft information on allegations that have not been proved, for example?

Scott Barrie: On some occasions, the risk to the community that a person poses—regardless of whether they have been convicted of an offence in the past—is so great that the professional opinion from a variety of sources suggests that they are more than likely to commit an offence in future. Do the witnesses accept that such reasons of public safety give sufficient grounds to take action?

Professor Duff: In a few cases, yes. It depends on what kind of professional evidence you are thinking about. Cases in which people have a violent disorder are different from cases in which the person does not have a disorder but is still thought to be dangerous. That is an important distinction. I would be uneasy about assessments that were not based firmly on prior convictions for serious offences, although others in the consortium might have different views on that.

Scott Barrie: I am thinking of cases in which, although the offence for which the person has been convicted is not considered to be serious—however we decide to define that—a pattern builds up and it is more than likely that there will be an escalation and that the person will commit a very serious offence.

Professor Duff: Do you mean a pattern of convictions for increasingly serious convictions, which are not yet at the very serious end of the scale?

Scott Barrie: Let us not beat about the bush. I am talking about cases in which the professional opinion is that the person will murder someone or commit a violent sexual offence at some point, although they have not done so yet. Is not that a reason to take action on the ground of public safety?

Professor Duff: I doubt that there is evidence that would allow us to say with confidence that a person—one who does not have a pathological disorder—will commit murder or rape in the future when they have been convicted only of much less serious offences. I am not sure what evidence would make it sufficiently certain that someone will commit a serious offence and would justify locking them up to make sure that they do not do so. We should bear in mind the constant theme from the empirical research that it is hard to give accurate predictions of serious crimes. We are worried that, because there is so much focus on dangerous people, the people who might be caught in the same net will be forgotten.

Dr Jacqueline Tombs (Scottish Consortium on Crime and Criminal Justice): I support what Antony Duff has said about the empirical research evidence on precautionary sentencing. The available research evidence on preventive detention in England and Wales shows that a range of people who do not commit serious offences and who are not likely to do so—although they might be habitual criminals—are caught in the net. That is the evidence available to us and that is what concerns us. We are okay with that small but

difficult group to which Professor Duff referred of people who have demonstrated a pattern of convictions of escalating seriousness and would be available for a risk assessment report.

John Scott: It is important to remember that risk assessment is not a science, although it is being sold as a science. If you provided a team of experts from different disciplines to say that someone was a serious risk to the public and could commit a serious offence, as a defence lawyer, I could find a team of experts from the same disciplines to say the exact opposite.

The Convener: We accept that. Are you saying that the authors of the MacLean report got it wrong or are you saying that they got it broadly right but it needs some tidying up?

Professor Duff: We accept the principle that we need such provisions for a small group of offenders. I do not know enough of the details of the MacLean report to know how far the bill mirrors it.

We recognise that there is a genuine dilemma—the desire to protect potential victims, which the bill emphasises, and the concern to protect those who are either innocent or not dangerous from being unjustifiably swept up in the net.

In a trial, we insist on proof beyond reasonable doubt because that stresses the importance of proof of guilt and protection of freedom even though we know that it will allow some guilty people to escape. Our fear is that, in dealing with people who are being convicted and are dangerous, the bill goes too far the other way. Although we recognise the dilemma, we feel that the balance is being shifted too far in favour of the capture of the dangerous, even at the cost of capturing too many of the non-dangerous. We agree with the report in principle, but in practice we are worried about the way in which it is being worked out in detail.

Bill Aitken (Glasgow) (Con): The presumption of innocence is one of the cornerstones of Scots law. However, the presumption of innocence has been lost in this case because the individual who is likely to be the subject of one of the orders has committed a serious offence and has been convicted by a court. Therefore, the presumption of innocence no longer applies.

Professor Duff: That individual commits an offence on the specified list, but that offence might not be a serious one. The list of offences is broad and the offence that qualifies a person for a risk assessment order might be a minor assault.

Bill Aitken: Is that true? Last week we took evidence from Scottish Executive officials and we were told that the number of persons likely to be made subject to the orders was minimal—the orders would be restricted to those who committed what we all regard as serious offences attracting a high-tariff sentence.

Professor Duff: For a person to qualify for a risk assessment order, the bill requires the offence to be of a sexual or a violent nature, which are defined broadly. Perhaps in practice we might hope for the circumstances to which you refer—the provisions will not be used that widely—but the bill defines the category of qualifying offences broadly and does not capture only those who have been convicted of serious offences.

Let us limit ourselves to serious offences and imagine a person who has been convicted of such an offence. They are proved guilty of that offence, but then we must deal with how likely it is that they will commit further offences. The restriction order goes beyond the punishment that they would deserve for the offence of which they are proved guilty and they are detained for longer to prevent them from committing further crimes. They are guilty of something, but not guilty of enough to justify indefinite detention. They have been treated as if they were going to be guilty of other offences, which they are now prevented from committing, but the proof for that is weak.

Bill Aitken: Do you agree that it would be bizarre if a prosecutor were to apply for, or a judge were to impose, an order in a case of simple assault, for example?

Professor Duff: The bill refers to people who show

"a propensity to commit any such offence".

The notion is so vague that who knows how that would work out in court? If we could trust prosecutors and judges to behave sensibly, all we would need would be legislation to lock up those who are dangerous. We need constraints on what official bodies can do; that is reflected in the rules governing trials and it should be reflected in the bill on how risk assessment reports can be ordered and acted on.

Bill Aitken: I have grave difficulties with much of the bill but, on this aspect, there is a right of appeal against any order. Surely that is a safety net.

Professor Duff: Not enough of one. The report could be based on alleged criminal conduct of which a person was acquitted. The report will show, on a balance of probabilities, only a likelihood that the person will commit further offences. There are many people of whom that could be true but who are not dangerous.

10:30

Bill Aitken: The witnesses are better qualified

than I am to comment on this. Surely those who would be carrying out investigations now have available to them psychological assessments and tests that would determine whether a person had a propensity to violence and whether offending behaviour would recur.

Dr Tombs: Yes, those are available. However, John Scott made an important and significant point. Risk assessment is not an unambiguous scientific tool. There are many multidisciplinary aspects to the assessment of risk. As Antony Duff said, some of the psychological tests would be more appropriate for people who are mentally disturbed or pathological than for some of the people who might be caught in the net because of the way in which the bill is drafted. If a defence lawyer wanted to challenge some of the psychological tests that are currently used, he would have no difficulty. The MacLean report relies too heavily on psychological testing for risk and not heavily enough on some of the other risk assessment tools that have been developed in social work and health care.

Bill Aitken: Surely the safeguard is that Mr Scott, for example, would be able to challenge test results.

Dr Tombs: Absolutely. However, if we create a situation that gives rise to a huge number of legal challenges, with expert witnesses having to be called, we would have to ask whether clogging up the courts in that way was a responsible use of public money. I predict that we would create such a situation if things go ahead as they are.

Bill Aitken: If I recollect correctly, evidence that we heard last week suggested a maximum of 10 cases a year. That would hardly be fertile ground for a large number of challenges.

Professor Duff: The bill contains nothing that would limit the number of cases to 10 a year—in principle, far more cases would be eligible. Given the broad way in which things are defined in the bill, there is no assurance that only that small group would be captured.

I would like to make a final point about dangerousness. Some of the best predictors of dangerousness lie not in psychology but in factors such as unemployment, youth and broken homes. Taken together, those are actually quite good predictors, but I would hate to see them used as grounds for detaining a person indefinitely. The predictors that we have are reliable only to the extent that they draw on factors such as unemployment and home background, but it would be worrying if they were brought into the system to justify detaining a person.

We acknowledge that we need to capture a specific group of people, but how can we draft a statute that will capture them? Our fear is that the bill leaves too much to the discretion of those who will be applying it for us to be sure that the measure will be limited to only a few cases. Other people will be endangered.

The Convener: Are you opposed in principle to assessing the risk that a particular offender presents to the safety of the public?

Professor Duff: No.

The Convener: So you regard the types of test as unsound and feel that there may be other ways of assessing risk.

Professor Duff: We are worried about the tests but also about the fact that they may be used for a certain purpose. We are thoroughly in favour of a risk management authority as a way of doing serious research both on measuring risk and on ways of coping with risk. We are in favour of programmes to help offenders to manage their behaviour after imprisonment. Risk management measures that are carried out in the community seem entirely appropriate and welcome. What worries us is that the kinds of assessment that there would be if a breach was involved might be combined and used to justify indefinite detention instead of being used to generate non-custodial risk management programmes.

Roseanna Cunningham (Perth) (SNP): From my experience of how the courts work, I think that the risk assessment is more likely to be used as a way of reducing the likelihood of an order for lifelong restriction being imposed. Do you agree that the most persuasive predictor of the likelihood of future offending is the schedule of previous convictions that is in front of the judge?

John Scott: Yes.

Roseanna Cunningham: The risk assessment will be an adjunct to the schedule of previous convictions, which will remain the most persuasive predictor. Given those circumstances, do you agree that, at least as often as not, the risk assessment may be used to reduce the impact of the schedule of previous convictions? You seem to assume that the risk assessment will always be used to substantiate that schedule.

John Scott: I hope that the risk assessments could be used in that way. However, the danger is that many of those who carry out risk assessments, including social workers and psychologists, find themselves in an isolated position. They carry a lot of responsibility because of the weight that is increasingly being attached to their reports.

My experience of the reports is that people hedge their bets and are increasingly reluctant to say that there is no or little risk of reoffending. Often, the starting point appears to be that there is a medium risk of reoffending, whereas in a similar

situation five years ago the report might have said that the risk was low. No one wants to be the risk assessor who is caught out as the one who said that the person would not reoffend only to find that the person is on the front page of the papers the next day for having done the very thing again. Risk assessors are finding that they must be a bit more cautious in their comments and conclusions.

Roseanna Cunningham: Are your concerns entirely about the process of risk assessment rather than about other evidence that the judge might have, such as the schedule of previous convictions?

John Scott: I certainly agree that the schedule of previous convictions will be the main thing. Obviously, there cannot be any quarrel with that.

Roseanna Cunningham: For all the discussion about risk assessment, the schedule of previous convictions will always be the most persuasive predictor. The list of offences that can be taken into account is wide so that half the previous convictions cannot be eradicated on the basis that they were trivial and therefore unimportant. We might be talking about a pattern of offending that started off with relatively trivial offences but progressed to offences of increasing severity. The relatively trivial offences in the person's history should not be excluded simply because they are not in the list of offences that can potentially help to persuade the court.

Professor Duff: There are two separate issues. One issue is the list of qualifying offences—to generate the whole process, the current conviction must be a qualifying offence—and our objection is that the list is too broad. There is a further question about which prior convictions can be introduced as relevant once the judge has received the risk assessment report. We have not said that any and every prior conviction should not be able to be brought in. Our objection is not that all prior convictions of a non-serious kind should be excluded from the court's attention but that the offence that generates both the risk assessment report and the process that makes an order for lifelong restriction possible must be a serious one.

Roseanna Cunningham: Have you heard of the straw that breaks the camel's back?

Professor Duff: Yes.

Roseanna Cunningham: Could that apply to what might appear on the surface to be a relatively trivial offence? For a particular individual, the current offence might be merely the straw that breaks the camel's back.

Professor Duff: That image is not useful in this context. Look at the list of offences. How could lewd behaviour or importing indecent photographs be the straw that breaks the camel's back? By itself, that makes it look like—

The Convener: I am afraid that we will have to stop on that subject, because we have a few other areas that we want to cover in the time available.

Let us move on to section 44 in part 7. You state in your evidence that you support

"the diversion of 16 and 17 year olds from the adult criminal justice system, permitting appropriate access to effective approaches to addressing offending by young people."

You go on to mention the United Nations Convention on the Rights of the Child. Is that your main or primary reason for wanting those who are under 18 to be dealt with through the children's hearings system?

Dr Tombs: No, although it is one of them. Our reasons are outlined in the "Rethinking Criminal Justice in Scotland" report. In fact, we are disappointed that the bill does not go far enough with the pilot studies that are proposed for that age group.

We have heard good, strong empirical evidence from Scotland and other jurisdictions about methods for diverting people aged around 16 or 17 from a hard, established career in crime. The adult justice system is not the appropriate place in which to try out such methods. We would like the bridging pilots to go ahead, but we would also like the children's hearings panels to be given more powers to use some of the non-custodial penalties that the bill will introduce. For example, drug treatment and testing orders would be appropriate for some 16 and 17-year-olds and may prevent them from going all the way down to a criminal career.

The Convener: So your position is that all children up to the age of 18 should be referred to the children's hearings system.

Dr Tombs: Not necessarily all of them. We would like that approach to be tried with some groups of young people who have not previously been referred to the hearings system. We would like some more imaginative community sentences to be given out, as that has been shown to work in other jurisdictions.

The Convener: What type of offender are you referring to? Concerns have been expressed that the only sanction for a child who has, say, been a repeat offender since the age of 12 has been to refer them to the adult court system at the age of 16. Members of the public have certainly suggested to me that the adult court system would provide the only sanction that would act as a deterrent. Do you accept that?

Dr Tombs: I do, but, under the bill, the procurator fiscal still has a pivotal role in deciding whether the young person is referred to one of the pilot projects or to the adult justice system. That

safeguard remains.

The Freagarroch project and the Apex cue ten project dealt specifically with people whom we would call young persistent offenders, who had had long strings of appearances before the children's panel. Those projects, although they have operated on a small scale, have given us some positive results in reducing reoffending among that group.

The Convener: Could you explain that? You are saying that we would have a chance of reducing offending if 17-year-old persistent offenders who had not previously been in the criminal justice system could be dealt with under the children's hearings system. Why would they stop offending at that age if they were persistent offenders? I do not understand the logic of what you are saying.

Dr Tombs: There are more in-built, wider supports in the children's hearings system than in the courts. The children's hearings system has a more holistic approach to the problem of offending than the adult justice system does and can take account of more of the factors associated with juvenile offending. Links with other agencies—education, social work and so on—are part of the whole process. The hearings system would be the appropriate place in which to try to integrate a 16-year-old into society for the first time, as the adult court system has to deal much more strictly with standards of legality—the same options are not open to the adult courts.

The Convener: Finally, are you concerned about the capacity of the children's hearings system to deal with an age group that it has not dealt with before and about whether it has the resources to do so? I presume that you would accept that additional training would be required for the children's panels that are to deal with the new age group.

10:45

Dr Tombs: I accept those points about resources and training for panel members. They would need to be examined.

Scott Barrie: Although I broadly support a pilot scheme, I am confused by some of the evidence that you have given. You seem to be saying that the panel system is a better vehicle for diversion than the adult court system. I am not sure how that can be the case, given that at present in the case of 16 or 17-year-old offenders, procurators fiscal do not have to proceed those cases to an adult court, but can and do use diversion schemes successfully. We need to look at how to bridge the hearings system at the artificial age limit of 16. As long as diversion and other community disposals are available, it is not important whether hearings happen in the children's panel system or in the adult court system. Do you accept that that is the real issue rather than in which of the two systems it takes place?

Dr Tombs: I accept that that is part of the issue. However, that is why we included in our submission the point about the best interests of the child being a central matter of principle. That is how the children's hearings system is supposed to operate. The adult criminal justice system is not supposed to operate in that way.

It may be possible for the adult criminal justice system to take the broader, social education approach that is at the root and the heart of the philosophy and background to the children's hearings system. If that were to be the case, we would like to see the development of the bridging system.

Scott Barrie: You are right to say that in the children's hearings system it is the best interests of the child that are paramount rather than punishment, which is one of the main criteria of the adult court system. However, given that no young offender under the age of 21 and no first offender can be imprisoned without a social work report, is there not in the adult system an element of the approach that you describe? Although it may not be doing so at the moment, is the adult system not capable of considering those issues and dealing more appropriately with that age group?

Professor Duff: It is a matter of the short term as opposed to the long term. Adult courts deal with young offenders in a slightly different way. In the short term, we would rather see the greater protection that is provided at the moment by the hearings system. It is a question of tactics rather than final aims, and relatively short-term tactics will provide the best way forward.

John Scott: The fact that social inquiry reports require to be called before people under 21 can be sent to detention does not give them a huge amount of protection. Young offenders who have a panel history that includes quite a lot of offending are almost doomed to failure as soon as they enter the adult system. They end up in custody far earlier as a result.

The adult system does not deal well with those offenders. If it does not begin to do so, there will be further victims in the future. We are talking about what works and not about being soft for the sake of it. What we suggest is based on the evidence that it is possible to stop young people offending even as late as 16 or 17. However, that is not possible the way that things are going at the moment. The panel system will need to be beefed up and have its range of powers extended to enable it to be more effective.

The Convener: We are coming to the end of the 40-minute period. I would like to have an indication from members who have final questions.

Bill Aitken: If the offender has a long series of appearances in front of the panel before he hits the adult courts, is that not an indication that the children's hearings system is not working?

John Scott: That may be an indication that the hearings system is not working and that it needs to be beefed up a bit. It also means that we have not tried hard enough.

Bill Aitken: How should that system be beefed up? I know that you are talking about DTTOs. Might community service or compulsory detention after hours or at weekends be the answer? What about compulsory grounding?

John Scott: I am not sure about the specifics of the disposals, but the range of disposals that are available to the panel should be extended.

The Convener: There are no further questions and I am afraid that we have no more time. I said that I would ask whether you wanted to raise any issues with the committee before you left. Would you like to do so?

Professor Duff: I have one point about prior convictions, which relates to part 1. It is said that prior convictions are included as the best predictor of future offending and that they are the right kind of evidence, because people have shown themselves dangerous by their prior offences. If the bill said that risk would be measured by prior convictions unless evidence showed that, despite them, a person was not a risk, it would be a different bill and would be much less disturbing. Prior conviction is central to the assessment of risk. If the bill were changed to say that, many of our concerns would be met. The bill does not give prior convictions that important role, but it should.

The Convener: It is helpful that you have emphasised that point. I thank the three witnesses for their evidence, which was clear and concise. I also thank you for your statement.

Good morning to our second set of witnesses. From the Association of Chief Police Officers in Scotland, we have David Strang, who is the chief constable of Dumfries and Galloway constabulary, and Andrew Cameron, who is the chief constable of Central Scotland police. From the Scottish Police Federation, we have Norman MacLeod, who is the deputy general secretary, and James McDonald, who is the research officer.

I thank you for attending the meeting. If "Good Morning Scotland" is anything to go by, we know your primary concern about the bill already. I also thank you for your submissions, which it was helpful to see in advance. We have about 40 minutes of questions. I will ask at the end whether you would like to add anything to your evidence before you leave. As you represent two organisations, I know that you will have different perspectives on some aspects of the bill, so it will help if you indicate when there is more than one answer to a question. We will begin with section 43.

Scott Barrie: I direct my first questions to ACPOS. Your submission says that enforcement of the proposals in section 43, on the physical chastisement of children, could involve practical difficulties, but notwithstanding that, you generally support any additional measures that would protect children. What are the practical difficulties?

Andrew Cameron (Association of Chief Police Officers in Scotland): First and foremost, we emphasise that we support any steps to protect children more against assaults. The practical aspects revolve around the potential for a significant number of smacking incidents to be reported to the police. In the main, when that happens at present, no action is taken when that is considered parental chastisement. We support the proposed concept, but we are mildly concerned that it could significantly increase involvement in such investigations.

Scott Barrie: This might be tangential, but I will reach my point. At present, are police concerned about trivial assaults among adults being reported? Do police feel that they must investigate some allegations—for example, that someone has pushed or assaulted a person—that are a waste of their time?

Andrew Cameron: When a member of the public decides to make a complaint to the police about being assaulted or to report that they have witnessed an assault, we do not consider that to be a waste of time. We are very much led by our requirement to report those matters to the procurator fiscal. It is for the fiscal to decide whether proceedings should be taken. We do not consider that to be outwith our requirements. Although operational officers may at times consider a set of circumstances to be of a minor nature compared with types of serious assault, they—and we, as chief officers—have a responsibility to ensure that we deal with the complaint of a member of the public and report the matter to the procurator fiscal.

Scott Barrie: If section 43 becomes law, do you anticipate any additional difficulties in the referral to the police of what people might consider to be trivial assaults on children?

Andrew Cameron: There is obviously a likelihood that more work will be required to be undertaken by police officers to investigate the smacking of children under three years. That may be inevitable. However, one of the strengths of

policing in Scotland is that we work closely with our partnership agencies and with communities. Common sense is a strong part of policing.

Although we raise the issue of the potential for practical difficulties, it is important to emphasise that we are strongly behind any steps that can be taken to give children added protection from being assaulted.

Scott Barrie: Are you aware of any recent examples of difficulties in enforcing the current law when the excuse of reasonable parental chastisement is given and when the waters become muddied because of that?

Andrew Cameron: I am not aware of such difficulties at the moment, and I am not sure whether my colleague David Strang is. Police forces, working closely with local authority social work departments, have specialised units to deal with such incidents. My force, Central Scotland police, has a family protection unit, and investigates such matters jointly. We have a close working relationship with social work departments with a view to what is in the best interests of both parents and children.

Mr Duncan Hamilton (Highlands and Islands) (SNP): I will ask about section 61 in a second, but I would like to pick up on what has just been said. Is it your evidence that, with the police working as part of a multi-agency approach, there is no current confusion about the common law position and the ability to enforce the common law?

Andrew Cameron: That is correct.

Mr Hamilton: Is that also the position of the Scottish Police Federation?

James McDonald (Scottish Police Federation): We think that there is benefit in clarifying what constitutes reasonable chastisement, as that has often been a bone of contention in the court. I do not know how much benefit the stipulation of an arbitrary age would be. As ACPOS colleagues have said, there is the potential for more work to be generated for the police. All reports will be investigated, but we would certainly welcome clarification of what constitutes reasonable chastisement.

Mr Hamilton: The federation's submission is based on section 61. I found it very useful, but very worrying with regard to the bill's potential impact.

Two aspects come through in your submission. The first is your fear that the new role of police custody and security officer would undermine the current position, under which many of the federation's members have extensive training, legal knowledge and experience, and are under clear professional supervision.

I will come later to the funding implications of the new role, but first I want to ask about the practicalities. I would like more detail on three or four issues that are outlined in your submission. The first is about court security duties. Your submission makes a strong claim that safety issues are involved in the creation of the new role. It states:

"No matter how well intentioned or how well trained or how well equipped support staff members may be, they would not be able to provide the level of security that police officers provide by their very presence."

That will be deeply worrying to many people—perhaps you will expand on it.

11:00

Norman MacLeod (Scottish Police Federation): Officers who are involved in court security duty have considerable operational police experience prior to their placement in that role. As our submission highlights, that role is very demanding because courts are one of the few places where it is guaranteed that criminal elements will congregate, which means that the pressures are considerable. There is no substitute for experience in dealing with people in difficult situations. Operational policing gives officers a good grounding prior to working in the courts. Dealing with confrontation and being able to talk it down comes only with considerable experience.

Mr Hamilton: I want to ensure that we understand exactly how serious the issue is. Your submission gives an example from Portree in which

"police officers were required to use incapacitant sprays against members of the public who were bent on attacking the accused".

How regular are such occurrences and how frequently are police officers required to use their experience and training to talk people down so that situations do not reach that stage?

Norman MacLeod: Thankfully, the occasions on which physical force is required in courts are fairly limited in number. However, officers use daily their people skills and their operational policing skills to defuse situations. Police officers' presence in court makes people feel comfortable. That does not apply only to the people who are there all the time, such as the judiciary and other police officers. It is vital that we ensure that civilian witnesses and others feel safe when they attend court. Our fear is about that issue. In every court in the country, police officers must use daily the people skills that they have amassed over the years.

Mr Hamilton: Your submission also mentions a possible change in turnkeys' relationship with prisoners. You state that the bill would create an

added point of pressure—the added tension that there might be a flash point—where at the moment there is a relatively peaceful relationship.

If we take the points that I mentioned together, what you seem to be saying is that, although there might be a role for civilian support staff, the worst places for such staff to enter the system are the points of maximum stress.

Norman MacLeod: That is an excellent comment and an ideal way of putting the matter. On many occasions, turnkeys have defused situations in which the arresting officer has appeared in a police station or at the bar with someone who is giving them grief. Turnkeys, by virtue of the fact that they do not have a confrontational relationship with the prisoner because they are simply doing their job, can take a bit of heat out of the situation.

Mr Hamilton: I also want to ask about funding. Two points in your submission are worthy of comment. First, you claim that, unless there is an increase in the budget, the measures will not impact one whit on the provision of front-line policing. That would be a point of concern if such an impact were the policy intention behind the bill. Will you comment on that?

Norman MacLeod: If the new role is introduced, our ability to provide front-line policing will be reduced because police officers offer a flexibility that court security officers could not offer. For example, police officers who are deployed in court are there Monday to Friday—that is their job—but on a Saturday, they can be deployed at a parade in Princes Street or at a football match. If a specific role is created, operational flexibility will be lost.

Mr Hamilton: I would like to ask the Association of Chief Police Officers in Scotland to comment on that subject, in particular on the issue of flexibility. The provision may take some of the flexibility out of the system that allows you to manage resources as best as you can.

David Strang (Association of Chief Police Officers in Scotland): I approach the issue with a slightly different emphasis. The provision will introduce enabling legislation. No compulsion is involved, nor is there any intention not to have police officers in courts. I understand the federation's concerns and I share them in respect of risk assessment. If an enhanced risk of violence were perceived in a court case, police officers would be present, as is the case at the moment.

One of the reasons why we support the measure is that, at the moment, police officers are trained and have powers and experience that are not required in cases, including fraud cases, where there is no threat of violence. Police officers are tied up with those duties simply because custody officers do not have the powers to undertake them.

I support the provision, which would enable us to introduce the flexibility to deploy police officers where their skills are best required. We should not be tying them up in tasks that, quite frankly, do not need an officer with that training and experience.

Mr Hamilton: What would you say to the argument that, although the intention behind the provision might be to free up additional police resources, it would not do so? The additional cost of training support staff up to the required level needs to be taken into account. If there were to be no increase in the budget, surely the situation would not stay the same but get worse

David Strang: It depends on the funding equation. Support staff would cost less than police officers. At the moment, hundreds of police officers in Scotland are tied up in court. By freeing up those officers and replacing them with custody officers, notwithstanding the training costs, there would be a net gain. As a result of employing custody officers, I would expect there to be more police officers out on the street. If that were not to be the case, we would not go ahead with the measure. We will only do so if it is of benefit to the public and to policing in general.

Mr Hamilton: How will you know that there is a net gain? Do you have figures for that?

David Strang: I am basing that statement on the principle whereby a police officer is replaced by someone who costs less. Even if no additional funding were made available, it would be possible to reinvest funding in providing for additional police officers who could be deployed out on the street rather than being tied up in courts.

Mr Hamilton: To ensure that I understand—

The Convener: Will you please make the point your last one, Duncan?

Mr Hamilton: The point that I made was that additional start-up costs are involved. Are you saying that there would be an overall saving despite those additional costs? I want to see how that could possibly stack up. What are the figures?

David Strang: Police officers are more expensive. There would therefore be a net saving that could be reinvested in policing on the street. I am also saying clearly that we would only proceed if that were the case.

George Lyon (Argyll and Bute) (LD): I have a point of clarification on your last piece of evidence. What is the percentage of your officers who are tied up in court duties on an on-going basis?

David Strang: It is difficult to give an exact figure. It varies from day to day and some officers may be involved for only part of the day.

Strathclyde police has more than 200 officers who are involved in court duties throughout the week.

George Lyon: What is that number as a percentage of Strathclyde police officers?

David Strang: Strathclyde police have about 7,000 officers.

The Convener: I want to be clear about what ACPOS is saying about the provision. Do you believe that the provision will result in a saving to the police force?

David Strang: There would not be a saving in absolute terms. That is because our budgets are fixed. However, the provision would result in increased flexibility. We would not have to tie up an expensive police officer resource in a job that does not require those skills.

The Convener: Are you saying that, if there were to be fewer police officers in court, there would be more police officers on the street?

David Strang: Yes. If we are able to replace 100 police officers with 100 support staff, it would be possible to re-deploy police officers on to the streets. We would go ahead only if we could work out that equation.

The Convener: We need a firm answer on that. ACPOS's evidence, which is important and weighty, presents a position that, along with that of the Scottish Police Federation, we have to consider very seriously. After all, you are the operational staff. We need to be clear about this. If you are saying that more police officers will be available and on the street, I would like to see some figures for that. What are you saying?

David Strang: I am saying that the bill would give us the flexibility to employ civilian support staff where appropriate, and the result of that—

The Convener: Yes—that is a provision of the bill.

David Strang: Sorry?

The Convener: That is the point of the bill.

David Strang: Yes. I am saying that we would welcome that flexibility. The bill does not compel us to take on those support staff, but it allows us to do so where appropriate.

The Convener: We are trying to understand why you welcome the provisions. We understand that the point is to give chief constables flexibility, but we are trying to establish what good would come of that. The key questions are whether there will be more police officers on the street and whether courts will be safer. Can you give a categorical answer about that?

David Strang: I can say that we would be able to redeploy police officers to the streets as a result of the proposals. We would still carry out risk assessments on individual courts. If we needed police officers for particular cases, they would be provided. I cannot this morning give you the absolute number of officers that would be freed up, but the net benefit would be that we would have more officers.

The Convener: We would like to know that figure. If the change does not achieve the outcome of more officers being freed up, there does not seem to be any sense in proceeding with it.

Let us take Glasgow sheriff court or Glasgow district court. I am sure that I can speak freely here and that the Scottish Police Federation representatives will not mind my saying this: the court is not exactly a safe place to be sometimes. The presence of the police force at courts is essential. Do you feel that sheriff courts, district courts or the High Court would be as safe places to be if civilian officers were there instead of police officers?

David Strang: To reiterate what I said earlier, we are not saying that there would not be police officers in the courts. Clearly, there will always be a requirement to have police officers there. The point is that police officers often sit in courts when it is not absolutely necessary for them to be there. Each case will be risk assessed, which will give us the flexibility to employ custody officers there.

The Convener: I will rephrase my question. With a reduced strength of police in the court system, will the court be as safe a place as it is now—yes or no?

David Strang: It will be a safe place, yes, but I would say that the question—

The Convener: Wait a minute—I am quite clear about what my question to you is. Can you say as part of your evidence that the court system will be as safe a place to be with less of a police presence than exists now?

David Strang: Yes—we would not go ahead with the proposals if that were not the case. The question is whether our police officers should be deployed on the streets or sitting in the court doing a job that does not require their police powers.

George Lyon: I would like some further clarification. Could you give us some figures that evaluate the potential impact of the bill on, say, Strathclyde police? What would you reckon to be the benefits in releasing front-line staff so that they could be out on the streets instead of sitting in court?

David Strang: I do not have figures for that, but I could ask Strathclyde police to provide them.

George Lyon: Could you submit them to the committee?

David Strang: Yes.

Bill Aitken: Are you in a position to give us the number of persons who have escaped from custody over the past two to three years?

David Strang: I do not have those figures with me now, but I could get hold of them for you.

Bill Aitken: In my experience, a great number of the police officers who do court duty—and who do an excellent job in diffusing potentially difficult situations—are more experienced officers. Sometimes the officers are less mobile, and many of them have had a health or injury problem. Were those officers to be transferred to full-scale operational duty, there would be a difficulty, because many of them are perfectly adequate to carry out light duties in the court but they might be in some difficulty pounding the beat of the east end of Glasgow, for example.

David Strang: You put that question very kindly for the officers concerned. We have considered those issues, and we would need to have a phasing plan. However, those points support the argument that we do not always necessarily need someone with the full fitness, skills and powers of a police officer.

Bill Aitken: Let me take the analogy that you used of the police not being required to attend at a fraud trial. At the trial's conclusion, the judge says, "Stand up. You're going to prison for four years." The accused says, "No, I am not. Bye-bye." Out the door he goes and a postcard arrives from the Costa Brava three weeks later. Is not there a difficulty there?

David Strang: Yes. That is why the custody officers would need to have the powers that might be required for such a case. We would certainly not go ahead if there were a risk to security and safety in courts.

The Convener: We will have two final questions on section 61.

George Lyon: I want to seek clarification on the Scottish Police Federation's written evidence, which states:

"It is also true that some of the officers employed on court security are nearing the end of their service and many are probably not fully fit to carry out the full range of police duties."

Does not that contradict the federation's statement that the courts will become less secure if those police officers are taken out of the system?

Norman MacLeod: It is fair to say that, in many cases, the officers do not lack physical fitness, but they may have problems with their diet and so on. For instance, some officers cannot work shifts. If the statement that you quoted conjures up in the mind a picture of somebody who requires the aid of a walking stick, that was not its intention. The statement refers to the fact that the officers might not be able to work the full range of shifts, and to other such operational matters.

George Lyon: I am concerned that the argument about court safety is contradicted by the fact that such police officers are unable to do front-line duties. I do not see how that circle can be squared.

11:15

Norman MacLeod: There may well be limitations on what the police officers who are on duty in court can do but, prior to their being deployed, they will have been medically examined by a doctor, who will have said that they are fit to do the job that they perform.

Let me clarify one point. The Scottish Police Federation is keen to see police officers return to front-line duties. The more officers we have on front-line duties, the better. However, that must be weighed against the concerns that are highlighted in our submission. A balance must be struck and the courts must be safe for people to attend. Our view is that the courts will not be as safe as they are at the moment unless police officers are deployed.

The Convener: Duncan Hamilton will ask the last question on the subject.

Mr Hamilton: David Strang said that there were two reasons why he might not proceed with using custody officers: first, if he was not convinced that doing so constituted best value: and secondly, if doing so involved any diminution in court safety or the perception of court safety. So that we can get to the heart of the matter, will David Strang provide the committee with the figures on which he has predicated his judgment that the use of such officers would constitute best value? Those figures must take into account all training and start-up costs. Will he provide the committee with those figures?

David Strang: Yes. I am happy to do that.

Mr Hamilton: Secondly, how does one gauge the risk of diminution of safety in court? How is that risk assessment carried out? The Scottish Police Federation, which purports to represent 98 per cent of the police force, states in its written evidence:

"Our unequivocal view is that only police officers can ensure proper order within a court and that in practical terms and in considering best value, this is the best option."

I am curious to know how a risk assessment could be made that did not involve police officers as a central component? They are the practitioners who know the issue, so what else has been considered?

David Strang: Edinburgh sheriff court conducted a pilot that used civilian custody officers who did not have police powers. Although there were concerns about what impact that would have and whether there would be more unruly behaviour, the conclusion from the pilot was that such problems did not arise. The number of cases in which there are difficulties is small. Thousands of cases in the courts each week have no problems. A risk assessment would be done that would take into account the seriousness of the case, the accused, the likely sentence and so on. That would be done at local level.

The Convener: Okay. We must stop there on section 61 because I want to leave the last 10 minutes for consideration of the youth crime pilot study. However, Roseanna Cunningham has a question on something else.

Roseanna Cunningham: I want to ask a question that arises from our earlier evidence regarding children. I have read the ACPOS written submission, which is a model of what I might call deniability. The submission is carefully constructed to give the impression of an increased work load without saying that outright. I ask the ACPOS witnesses for what will be only a guesstimate, as you probably do not have the figures today, on the percentage of minor crime that requires investigation and is reported to the fiscal but does not result in proceedings.

Andrew Cameron: Roseanna Cunningham is right that we do not have figures with us. It is true that many of the minor crimes or offences that are reported to the procurator fiscal are for a variety of reasons not actioned by the fiscal. That is a general statement without figures.

Roseanna Cunningham: The fact that such crimes are not actioned by the fiscal does not mean that they have not been investigated and that the police have not followed the full procedure.

Andrew Cameron: That is correct.

Roseanna Cunningham: Based on experience, if the bill is enacted, by how much would the number of police investigations that do not result in proceedings increase?

Andrew Cameron: We could not quantify that, but suffice it to say that we would expect the number to increase because of the bill.

Roseanna Cunningham: You have nothing that would allow you to guess what the figure would be.

Andrew Cameron: We do not know how the public will react to the proposed provisions on the smacking of children under three.

Roseanna Cunningham: Do the Scottish Police Federation witnesses have a feel for what will happen if the bill is enacted?

James McDonald: It is difficult to say, but as the proposals have been given some publicity, we agree with ACPOS that the number of complaints is quite likely to increase.

Roseanna Cunningham: I will move on to the matter of 16 and 17-year-olds, which has been explored. ACPOS expresses serious concern about that, which I assume the Police Federation echoes. Is the current way of dealing with youth crime—even by people under 16—working? I ask ACPOS then the Police Federation to reply.

Andrew Cameron: Do you want a yes or no answer?

Roseanna Cunningham: I would prefer that.

The Convener: We want to save our line of questioning on the youth crime pilot study for later, if that is okay.

Roseanna Cunningham: I want to ask about 16 and 17-year-olds.

The Convener: You can do that, but George Lyon is going to lead on that, if you do not mind.

Roseanna Cunningham: Am I allowed to ask my question?

The Convener: As the convener, I say that we wish to have a 10-minute session on the youth crime pilot study, so I ask you to move on.

Roseanna Cunningham: It would have been useful to be advised of that. If you are going to do that, it is obvious that I cannot ask my questions.

The Convener: I said that five seconds ago. Do you have any further questions?

Roseanna Cunningham: No.

George Lyon: ACPOS suggests that diverting young offenders to the children's hearings system

"would not be welcomed and indeed, would further burden police resources".

What do you mean? How would that affect police resources?

Andrew Cameron: Our view mainly concerns recidivists—people in that age category who persistently reoffend. We want to ensure that recourse to courts is available to deal with the small minority who are recidivists and who constantly commit crime. If opportunities exist to divert from criminality individuals who are entering the system, and other options are available through the children's hearings system, we would support a pilot study on that and we would support investigation into whether measures to take youngsters in that age category away from more serious crime can be improved. That qualification

is made against a background of concern about using the children's hearings process to deal with recidivists.

George Lyon: I want to be clear about that. You are not against the principle of piloting such schemes, but you are concerned about the types of youths who might be directed down that road. Is that a true reflection of your position?

Andrew Cameron: That is exactly the case.

George Lyon: So in principle you are not against such a scheme.

Andrew Cameron: Definitely not.

George Lyon: However, you are concerned that repeat offenders might be directed down that road.

Andrew Cameron: What is important is that there must be proper decision making. My understanding of the bill is that the procurator fiscal would be the master of the instance in deciding what would be the best course for individual cases. ACPOS is keen to support any initiatives that take youngsters away from criminality using other options, but the hard reality is that a minority of people in that age category are recidivists who continue to commit crime. We want such individuals to be dealt with through the courts.

George Lyon: Have you any views on how we should define which youths should be directed into the children's hearings system? The question of how narrow or broad the children's hearings system should be and how many children it should deal with was clearly an issue in the evidence that the committee heard last week. Have you a view on who should and who should not be included in the system? What crimes should be involved?

Andrew Cameron: On many occasions, the youngsters that might come to the fore in that category are those who might be first-time offenders who have committed acts of disorder, breaches of the peace, common assault or vandalism. Our view is that a pilot study would be worth while to see whether there would be any success in providing different options for those individuals, instead of having them enter the adult criminal justice system. Day in and day out, we see youngsters graduate from involvement in those types of quality-of-life offences to more serious acts, which can lead to a proliferation in car thefts or to more serious assaults. ACPOS would support any pilot scheme to try to divert youngsters from criminality.

George Lyon: ACPOS suggests that diverting young offenders into the children's hearings system

"would without doubt lead to an increase in reported crime."

Will you explain what you mean by that?

Andrew Cameron: We are talking about an increase in reported crime if 16 to 18-year-olds are dealt with under the children's panel system. However, I am not so sure that we are suggesting that there would be more crime committed as a result of that. We would need to consider the success or otherwise of the pilot.

George Lyon: Will you clarify that statement from your written evidence? You will find it in the final paragraph of the section of your submission that deals with part 7 of the bill.

Andrew Cameron: It is true that a high proportion of crime is committed by the 16 to 18-year-old age group, so it could be anticipated that more crime might be committed if proper remedial action were not taken. Although we make that comment, I think that we would need to wait and see the outcome of the pilot.

George Lyon: If I may go back to the question that was asked by Roseanna Cunningham—she will perhaps follow up on this question—is the current system working?

Andrew Cameron: That depends on your definition. It is a fact that a high proportion of crime is committed by people under 21 years of age so, based simply on statistics, it could be said that the system is not working. Looking at it another way, you might say that the children's hearings system has had many successes because it takes into account the interests of the child. It also allows ways to be explored of trying to avoid continued offending. The answer depends on the definition of success. We support children's hearings, but cognisance needs to be taken of the seriousness of the crime or offence. I am sorry that I am not being more definitive, but I cannot be.

11:30

George Lyon: Does the Scottish Police Federation have any views on that issue?

James McDonald: Our views are not very different. However, for more than 30 years, the weakness in the children's panel system has been the small group of young offenders who commit a disproportionate amount of crime. That group has as serious an effect on the public as any criminal does. We fear that extension of the provision to 16 and 17-year-olds could exacerbate matters. We are not against diversion from prosecution under certain circumstances, and it does not matter whether the fiscal or the reporter makes a decision, but we would like the presumption to be that, at least when someone reaches 16, they will come against the full rigour of the law in the court system. It is all right if the fiscal or someone else decides to divert them to other measures—I would presume that a value judgment had been made. The public must be protected from a small group

of people who are not amenable to any forces that are applied to them by the children's panel. We have seen that for more than 30 years and we think that matters will worsen if the age group is extended.

Andrew Cameron: I would like to clarify that our view of the increase in crime was in respect of recidivist offenders. We would be keen to ensure that such recidivists—the minority to which the Scottish Police Federation refers—are dealt with through the court system.

Bill Aitken: You referred to first offenders who are 16 and may have been charged with a breach of the peace public disorder offence. You said that you would have no objection to such cases going to the children's hearings system. Have I understood you correctly?

Andrew Cameron: Yes, in general terms, but the procurator fiscal would have to consider the police report that would be submitted in such cases. There are different types of breach of the peace. Group disorder—rowdy behaviour—is the sort of thing to which I was referring.

Bill Aitken: When you say group disorder, do you mean gang fights?

Andrew Cameron: I mean a group of youths cursing, swearing and causing annoyance in public. A gang fight might be a serious incident that causes considerable fear and alarm. It is important that the procurator fiscal should consider all the circumstances that are reported by the police.

Bill Aitken: Let us consider group disorder at the lower end of the scale. Would someone who is 17 and has no previous convictions be likely to find himself or herself in court as a result of being charged with such a breach of the peace?

Andrew Cameron: Would he find himself in court?

Bill Aitken: Yes.

Andrew Cameron: That would be a matter for the fiscal.

Bill Aitken: I know that it would, but in day-to-day practice, he would not, in all probability, find himself before a court, would he? He would be given one of the existing avoidances of prosecution. Could not he be given a warning by the police or the fiscal, or a fiscal fine?

Andrew Cameron: Yes. Those options are open.

Bill Aitken: A first offender would not go to court. He might be a first offender because he has no court convictions, but basically only those who have been through the gamut of diversionary processes would be prosecuted for a breach of the peace.

Andrew Cameron: Whether there is an appearance at court, whether the matter should be dealt with through the procurator fiscal service and the courts, whether there is a conditional offer of a fine, a fiscal's warning or whatever depends on interpretation. However, in my view, that is different from a case being dealt with through the children's hearings system.

Bill Aitken: I want to be clear about what you are saying. Do you feel that it is appropriate that someone who is charged with breach of the peace and who has had the appropriate diversions and opportunities should go through the children's hearings system?

Andrew Cameron: It is appropriate if there exists the potential to put that individual on the straight and narrow through the children's hearings system, which will consider all aspects of the offence that was committed. We must explore ways of discontinuing offending; the pilot project will provide an opportunity to do that.

Bill Aitken: What other offences might be appropriate for the pilot study? We should bear it in mind that people up to 18 might be involved because, if the children's hearings system orders a period of supervision, that period might go beyond the person's 18th birthday, just as such a period can go beyond 15th birthdays at present. That aspect of the system has been well utilised by many in order to stay out of the adult prosecution system.

Andrew Cameron: The other side of that argument is that the system contributes to discontinuation of offending. There are examples of both aspects. Bill Aitken asked what type of offences might be appropriate for the pilot study: breach of the peace is one. Other suitable offences might be minor acts of vandalism and different types of vehicle crime. We must consider what the right process is to help each individual to avoid continuing to offend. We cannot make generalisations; we must decide for each individual what the outcome of the process should be.

Bill Aitken: Surely the outcome must be measured against the wider interests of society.

Andrew Cameron: Yes. ACPOS's view is that it is in the wider interests of society not only to provide reassurance and to reduce the fear of crime, but to consider innovative ways of providing other options for youngsters. Youngsters commit a disproportionate number of crimes and we must explore all possible avenues of improving that situation.

Bill Aitken: How young must a person be to be defined as a youngster? We should bear it in mind

that one may get married at 16.

Andrew Cameron: One can be subjected to the whole criminal process from the age of criminality. I think that that age is going to be changed but, at present, 16 is the cut-off age under which youngsters do not go into the court system.

Bill Aitken: If people are considered mature enough to be married at 16, surely they should take responsibility for their own behaviour and should not be treated like children.

Andrew Cameron: The children's hearings system has many positive aspects, one of which is the consideration of the needs of 16-year-olds, whether they are married or unmarried.

Bill Aitken: Does the SPF have a view on the matter?

James McDonald: As I said, we are in favour of proposals that would successfully divert people away from the justice system and from prison. However, the public must be protected. The weaknesses in the present children's panel system, which involves only under-16s, would be exacerbated if 16, 17 and 18-year-olds were included. People could carry on in the children's panel system for much longer than they can at present.

Roseanna Cunningham: I want to be absolutely clear about what you are saying. Are you saying that for the small group of repeat offenders who create most of the problems—every community can identify some of them by name—the present system does not work and does not achieve what it is meant to achieve?

James McDonald: That is correct.

Andrew Cameron: ACPOS agrees.

Roseanna Cunningham: So the current system does not work for persistent young offenders and extending its use to people aged up to 18 would simply compound the lack of success in that group. Is that your evidence?

Andrew Cameron: That is not my evidence.

Roseanna Cunningham: The witnesses from the Scottish Police Federation are nodding their heads and you are not.

James McDonald: We are separate organisations.

Roseanna Cunningham: I know that. You are nodding; do you agree that the system does not work for that group and that an extension would compound that lack of success?

James McDonald: Yes. We agree with that.

Roseanna Cunningham: Does ACPOS have a qualification to that?

Andrew Cameron: As far as ACPOS is concerned, it is not intended that recidivists who constantly commit serious crimes be dealt with under the children's hearings system.

The Convener: From your experience of dealing with victims, can you tell us how they might perceive the youth crime pilot study. I am thinking particularly of what you said about group disorder. We have had good local initiatives in my area. For example, elderly people have been scared by nuisance cases; the police have been able to deal with that by rounding up 16 and 17-year-olds and taking them through the adult court system. That has been effective. Has that aspect of the pilot study been considered? Have you any experience of the victims' side?

Andrew Cameron: Police officers deal with group disorder every day in life. It is one of the main issues that come up constantly when we consult our communities. Under the proposed system, we would still round up such offenders and be proactive in trying to reassure elderly people in the community. We also want to communicate to elderly groups the fact that we need to try ways through which to discontinue group disorder. We are not getting to the root of the problem. We are making no impact on levels of disorder. The youth crime pilot study is a way of trying to explore ways of getting to the causal factors to deal with the problem rather than dealing with the same problem every weekend.

The Convener: Do you accept that, notwithstanding the objective of reducing offending, referral to the children's hearings system is perceived as a soft option?

Andrew Cameron: I understand that perception. It is important that the various stakeholders try to communicate what the bill would like to achieve, which is to provide a better quality of life by reducing reoffending.

The Convener: I am afraid that we must finish our questions. I offer you the opportunity to say any final words to the committee that you did not have a chance to say during the course of the questioning.

James McDonald: I return briefly to section 61. We have gone around the edges of that matter in our evidence today. Employing police custody and security officers might make slight savings or it might not. However, that section will change the philosophy—and even the constitutional position—in Scotland to achieve its aims.

At the moment, the SPF is very strong on the idea that the only people in Scotland who can arrest someone and use force are police officers. Section 61 would abrogate that and push that responsibility on to less well-trained people. Police officers are highly trained in the use of their police

powers. They do two years' probationary service and are not allowed out alone until senior officers are happy that they can discharge their duties responsibly.

Every sounding that we have taken when talking informally with the public shows that they are quite alarmed about what section 61 will do. We are talking about local authorities being allowed to employ other people, potentially a company such as Group 4, to discharge the duties that section 61 mentions. It is not entirely clear to us whether such people would then have police powers when they were acting within court buildings. That adds further confusion to what the public will feel when they see a Group 4 officer. Would he or would he not have the power to arrest someone, for instance, in a hospital casualty department?

Section 61 would take a very serious step. As far as the SPF is concerned, the potential savings and the good that could come out of section 61 are totally disproportionate to the huge step that the section takes in proliferating the groups who can use police powers. Those groups will inevitably be far less well trained than police officers.

The Convener: I thank you for emphasising that point. I thank ACPOS and the SPF for their evidence this morning. It has been helpful and clear.

I propose that the committee have a five-minute break. Are we agreed?

Members *indicated agreement*.

11:44

Meeting suspended.

11:52

On resuming—

The Convener: While members find their seats, I welcome our third set of witnesses. The representatives from the Association of Directors of Social Work include Colin MacKenzie, who is the convener of the association's criminal justice standing committee, Margaret Anderson and Anne Pinkman, who are members of that committee, and Brenda Doyle, who is the convener of the association's children and family standing committee. The representatives of the Convention of Scottish Local Authorities are Diane Janes, who is the sociable neighbourhoods national co-ordinator, and Councillor Ronnie McColl, who is the spokesperson on social work and health improvement. Thank you for coming.

I do not know whether you heard the evidence that was given earlier, but I apologise for the delay. We are running a little short of time and you will appreciate that members have a lot of questions, so we will move straight into asking them. I will offer you the same opportunity that I have given previous witnesses to raise at the end issues that you think have not been covered during the questioning.

George Lyon: I will start with questions on non-custodial punishments.

COSLA has expressed concerns about the functioning of anti-social behaviour orders. For example, they may impact on innocent persons and there is inadequate exchange of information between agencies such as the police and social work departments. Are those concerns borne out in practice? Will the proposals in the bill improve matters?

Diane Janes (Convention of Scottish Local Authorities): The bill creates interim anti-social behaviour orders—that is the bill's only reference to anti-social behaviour orders, which are covered by the Crime and Disorder Act 1998. Such orders are a useful tool for local authorities, as they are not related to tenure. In the past, people tended to think that anti-social behaviour was something displayed by council tenants towards other council tenants. Anti-social behaviour orders moved matters on from relating anti-social behaviour to tenancies and helped to put the issue back into the social order arena. When they are properly targeted, they are useful tools, and local authorities are beginning to use them. Initially, the bigger urban authorities made the running, but now there are examples of the orders being used throughout Scotland. It would be fair to say that Scotland has been more proactive in using the orders than England and Wales have been.

The difficulty with anti-social behaviour orders is the same as the difficulty with the court system in general: delay. The process takes a long time for various administrative reasons and, in addition, the alleged perpetrators use delaying tactics, such as prolonging the process of applying for legal aid. We welcome the introduction of interim anti-social behaviour orders because they might speed up the process. However, a concern is that they might create another loop in the process. Will people who go for an interim order face further delays in getting a full order?

My submission details the problems that arise in court over the exchange of information in relation not only to anti-social behaviour orders but to eviction cases, in which there are also difficulties in obtaining information. There is a lot of confusion about the kind of information that can be exchanged. Section 115 of the Crime and Disorder Act 1998, which applies to Scotland, should have facilitated the exchange of information but, in practice, the section has rather restricted the way in which information is exchanged, particularly between local authorities and the police. That has reduced both the effectiveness and the use of anti-

social behaviour orders. It would be appropriate to introduce a more enabling and generalised section. For example, section 17 of the 1998 act, which applies only to England and Wales, allows for information to be exchanged to prevent disorder in an area. Such a provision would be helpful—it has certainly been quite useful in England and Wales.

Colin MacKenzie (Association of Directors of Social Work): The association has a similar view. Clarity on the issue of information exchange would be helpful, particularly in the light of data protection requirements. We would welcome action that would lead to more speedy court hearings. It is important that such hearings take place as soon as possible after something has happened or while it is happening in a community, so that the matter can be dealt with. The delays that arise do not help the situation.

George Lyon: The bill introduces a power of arrest for breach of a non-harassment order, but there is no specific offence of harassment. Would the creation of such an offence add to the protection of victims?

Anne Pinkman (Association of Directors of Social Work): The ADSW welcomes section 41 of the bill. We have nothing to add to what has been proposed.

Colin MacKenzie: The issue is that people are being harassed and are in situations of terror. If the bill gives the police the power to arrest people—which I think it does—that would be helpful because, as I understand it, breach of a non-harassment order is not an arrestable offence; the police can act only if there is a breach of the peace or another incident. The bill will give the police an additional power, which is welcome and which will help victims to feel more secure. We welcome the measure.

12:00

Diane Janes: It might be worth looking at the English and Welsh Criminal Justice and Police Act 2001, which contains sections on the intimidation of witnesses in civil court proceedings rather than in criminal court proceedings. Anti-social behaviour orders start out as civil orders, but they are a kind of hybrid, because breach of an ASBO becomes a criminal offence, in which case criminal law is appropriate. It might be worth examining the protection of witnesses in civil courts. We have the Protection from Harassment Act 1997—the stalking legislation—but that provides a remedy for which individuals must apply themselves.

George Lyon: Do you have any general comments on the use of non-custodial punishments?

Anne Pinkman: We have several comments on the use of non-custodial sentences. We support the introduction of report monitoring as a condition of probation orders. We have also been encouraged by the success of the restriction of liberty order schemes that have operated to date. We welcome the introduction of such orders as a condition of probation.

The ADSW believes that supervised attendance orders are useful and have not been fully utilised by the courts, in part because of difficulties with current legislation. The provisions in the Criminal Justice (Scotland) Bill will greatly improve the position, yet it might have been helpful to incorporate the opportunity to review such orders, so that, for example, when someone obtains a job and is in a position to pay a fine they can do so. As things stand, once a supervised attendance order has been imposed, it cannot revert to a fine.

Colin MacKenzie: We welcome section 42 of the bill, because it will help to complete the broad range of community sentences that are available to the courts. In time, their use should impact on the size of the prison population and help to reduce crime. That is important.

Anne Pinkman's point about restriction of liberty orders is that although they can be helpful in themselves, in pilot schemes they have been shown to be far more helpful when they are combined with probation orders or other orders that deal with attitudes and behaviour. Restriction of liberty orders help people to stabilise their lives, so they will be useful in drug courts, which the bill will introduce. We welcome the orders as a useful addition.

The Convener: I want to go back to anti-social behaviour orders. We may not have many opportunities to examine that aspect of the bill, so I am pleased to have Diane Janes here, so that we can discuss it.

I heard what you said about possible useful additions to the bill. Do you have any comments on the legislation that is currently available to deal with anti-social behaviour? I am thinking of the Protection from Abuse (Scotland) Act 2001, for example, which started life as a Justice and Home Affairs Committee bill but developed into a bill to deal with issues wider than domestic violence. I understand that the act could also be used to deal with anti-social behaviour. How does the existing law look? Does anything further need to be done?

Diane Janes: The provision in the Protection from Abuse (Scotland) Act 2001 to attach a power of arrest to any interdict, not just a matrimonial one, will be very useful. The act came into force in February. I do not know that anybody has used the provision yet, but it is useful because it means that any interdict in the context of an anti-social neighbour will now have more teeth. Some local

authorities use interdicts quite successfully and they certainly welcome the provision. It might encourage other local authorities to use interdicts. The virtue of interdicts is that they can be obtained very quickly compared with other legal mechanisms and thus transfer the impetus from the perpetrator back to the local authority that is taking out the interdict. We welcome the provision, but I do not have any examples of its having been used.

Most practitioners to whom I have spoken in the past year, through my audit of policies and procedures throughout Scotland, feel that there is enough law. The problems are the administration of the law, the delay that is caused and information exchange.

The anti-social behaviour order is very useful. A slight concern exists about how it will work in practice in relation to the Housing (Scotland) Act 2001, because the granting of an anti-social behaviour order will allow the local authority to convert a secure tenancy into a short Scottish secure tenancy—a probationary tenancy, as it were. Will that make sheriffs less willing to grant the ASBO because they might see it as a short cut to eviction? Issues have also been raised about the support mechanisms, but everybody welcomes the idea that we should support people who have dysfunctional families and who have problems. The Dundee families project has shown the way in that regard.

The main problems that local authorities have, other than the ones that I have mentioned, are to do with effective mechanisms for dealing with under-16s. The gap was touched on in the previous evidence. Currently, we cannot use an anti-social behaviour order until someone is 16. In England, they can be used for over-10s. I have to say that there was not much call from the people to whom I spoke—I have been round all the Scottish local authorities—to have anti-social behaviour orders for people under the age of 16. People do not like the idea of criminalising children, but there is distinct frustration among local authorities and their partners, such as the police, at the fact that there are no effective mechanisms to deal with under-16s.

People are now considering acceptable behaviour contracts, which involve joint working with the police to haul the miscreant, along with their family, into the local housing office or the local police station as soon as an incident occurs and a joint interview with police or housing officers—usually housing officers—to explain the implications of what they are doing. For example, if they had a council tenancy, they could be told that their parents could lose the tenancy. That cannot be backed up by the sanction of an anti-social behaviour order in the same way as it can in England and Wales. That said, there is not a huge call among local authorities for anti-social behaviour orders for under-16s, but there is a call for effective mechanisms to deal with that group.

The other problem is with large-scale stock transfers. In Scotland, the agent for applying for the anti-social behaviour order is the local authority, but after stock transfer, the local authority will not be the landlord. There are issues relating to registered social landlords' access to anti-social behaviour orders and information to pursue them. Some police forces and local authorities, but not all, have in their protocols for exchange of information requirements and facilities for information to be exchanged with registered social landlords and housing associations. In future that could be a problem, if the registered social landlord loses ownership of a case while it sits with the local authority or the court. It would be useful if that issue could be examined.

The Convener: Are you saying that the law would have to be adjusted to allow new landlords following large-scale housing stock transfers to get access to anti-social behaviour orders?

Diane Janes: To be honest, I do not know that I have thought it through to that extent yet, but I believe that the matter should be examined and research is being done. It might be what needs to be done to make the use of anti-social behaviour orders effective.

The Convener: That is a helpful point to make.

I want to deal with orders for lifelong restriction. We have heard evidence this morning from representatives of the Scottish Consortium on Crime and Criminal Justice, who have concerns about the detention of people because of what they might do rather than what they have done. Do you have similar concerns?

Margaret Anderson (Association of Directors of Social Work): Generally we welcome the new provisions on orders for lifelong restriction. The key issue is the quality of the early risk assessment. Nobody wants people to be detained when there is no evidence of a continuing risk to the public. We have had some thoughts about how risk assessments could be done and about the possibility of delegated assessors undertaking the work. From our experience of the Sex Offenders Act 1997, we feel that a multidisciplinary model that involves good information sharing across the range of agencies that might be involved with an individual would be able to come up with reasonable risk management plans. We have concerns about a single assessor being responsible for the preparation of risk assessment reports. We would hope that the methods that are contained in the guidance to the Sex Offenders

Act 1997 could be replicated for this bill, whether in guidance or by amendment.

The Convener: What do you mean by multidisciplinary assessment procedures?

Margaret Anderson: Following the implementation of the Sex Offenders Act 1997, comprehensive guidance was issued to all agencies. Although the police have lead responsibility for undertaking risk assessments under that act, the guidance makes it clear that the police are required to consult local authority social work services and any other services that may have information that has a bearing on the level of risk that a person poses.

Parallels also exist in child protection systems, which have long-standing models of adopting a multidisciplinary approach to identifying and managing risk. Incorporating such models into this new area of work would be useful. The bill does not make it clear whether that will be possible through the identification of a single assessor.

12:15

The Convener: I move on to part 2. We have not had a chance to air the issue of victim statements. You welcome the introduction of such statements and it would be useful to hear your view on whether they will materially improve the position of victims.

Anne Pinkman: As you said, we welcome the introduction of victim statements. For the first time, victims will have a stake in the criminal justice system. However, the consultation document is confused over the purpose of victim statements, so we ask for clarity—in the bill or in guidance—to prevent victims from becoming disillusioned. Victims' hopes could be raised unwarrantedly.

We accept that the accused has the right to access a victim statement, but that should be allowed only if a statement is provided after the accused is found guilty or has pleaded guilty. We have concerns about the availability of the victim statement to the accused and we hope that restrictions will be imposed. For example, could access to victim statements for people who are accused of offences of a sexual nature be restricted? Could the information that is provided to the accused be restricted? Could guidance be issued on restricting the accused's ability to misuse the victim statement, or consideration be given to that?

Mr Hamilton: I hear what you say, but I do not understand. What information should be restricted, and on what basis?

Anne Pinkman: If a victim in an abuse case is required in the statement to provide detailed information about the offence's effect on them and all that information is shared with the accused or the offender, we must ensure that the accused or the offender does not misuse that information. We assume that the information will be provided to the perpetrator after being found guilty or pleading guilty.

Mr Hamilton: How could the information be misused?

Anne Pinkman: The statement could include information about the offence's psychological or physical effect on an individual.

Mr Hamilton: Is not the point of a victim statement to enunciate clearly and publicly the effect of a crime?

Anne Pinkman: Absolutely.

Mr Hamilton: So why should not a person who has been found guilty have access to such a statement?

Anne Pinkman: In an extreme case, the guilty person could get a salacious kick from the information in some victim statements, if a victim were honest about the effect of an offence.

Mr Hamilton: To take another example, is there an issue to do with the rights of those who have been convicted?

Anne Pinkman: Absolutely. A balance has to be struck. We ask for the guidance to take on board consideration of how and when victim statements are made available.

Mr Hamilton: The minister will give evidence later, so I will be able to put the matter to him directly.

In the evidence that we took last week, there was confusion about whether victim statements should impact on the sentence. I agree with your point on that. Should victim statements impact on the sentence and, if so, are the sentences that are passed down incorrect by definition? Perhaps you do not want to comment.

Anne Pinkman: Victim statements should form part of a range of information that the sentencer takes on board.

Mr Hamilton: So victim statements should impact materially on the sentence.

Anne Pinkman: Yes, I think so.

The Convener: That is helpful. Are there any other questions on victim statements?

Bill Aitken: I hear what the witness says and I acknowledge the sincerity of her view. I will put the converse view and ask for comment. Let us take the case of rape. Two women are raped. One has been profoundly affected and the other has been badly affected. One is particularly articulate and

well able to put down in words the effect that the rape has had; the other is less able. It could be the case that the victim who has been traumatised and devastated by the event is the one who is not able to put that into words, whereas the one who has been affected to a lesser extent is able to express the impact. If the sentencer takes a verbatim view of the statements, that could result in a slight miscarriage of justice. Do you agree?

Anne Pinkman: The association hopes that the guidance that accompanies the legislation will provide clear guidelines on how victim statements should be prepared, so that witnesses will not be discriminated against in cases in which they are not as articulate as they could be. It might be difficult for some witnesses to provide a statement, especially a written statement. We must ensure that all witnesses who wish to provide victim statements are given assistance in preparing and providing them.

Bill Aitken: How do we ensure that the statements are spontaneous—in other words, how do we avoid them having the same effect as ticking boxes on a form? I do not know what the answer is and I wonder whether you have an answer.

Anne Pinkman: The relevant agency and the individuals who are responsible for the collection of victim statements should have clear guidance. Some witnesses might wish to prepare and submit a victim statement independently, but we must ensure that guidance is available for those who seek assistance and guidance. Those who are responsible for collecting or assisting in the preparation of victim statements should also have clear guidelines on how to go about doing that.

The Convener: The committee would agree with your statement that the purpose is not entirely clear from the provisions of the bill. We hope to clear up part of that issue when we talk to the minister. Your view on whether victim statements should influence sentencing once the policy objective has been established is important. You were slightly cautious in your reply to Duncan Hamilton. I want to be clear that you think that the victim statement should influence sentencing. If that is the case, how far should that go—should the victim express a view about the sentence?

Anne Pinkman: The victim statement should influence the sentence. As I have said, it should be part of a range of information that is available to the sentencer; it should be no more than that.

Colin MacKenzie: That is absolutely right. Sentencing should be impartial. The information that is available to the sentencer should comprise a broad range, to allow them to make up their mind. There is an issue about how to frame that. The situation in which an articulate person has a greater impact than an inarticulate person can be avoided through existing advocacy services, which do not put words into people's mouths but help them to explain what they think and to articulate what they want to say. That represents a useful way forward.

The Convener: That is helpful. Do members have any further questions about victim statements?

Mr Hamilton: We will put to one side the issue of whether victim statements might influence sentences, because I suspect that it would not be useful for us to explore that further. We do not yet know the minister's policy on the matter, so we are in the dark.

Who should take victim statements, and when should they be taken? If victim statements are taken at the same time as the statements on which the prosecution relies, should they be brought into play only at the conclusion of the trial?

Anne Pinkman: The association supports the bill's proposal that victim statements should be taken after offences have been committed. The bill usefully provides witnesses with the opportunity to provide supplementary statements at a later stage. That provision is crucial, because the effects of an offence may not be fully known to a victim in the immediate aftermath of that offence. The effects of an offence may not be apparent for six weeks or three months.

Mr Hamilton: So you assume that victim statements should be taken immediately after an offence has been committed, but that it should be possible to amend them. That would enable victims to update the impact of their statements, but would carry with it the risk of victims' recollection of offences fading or changing.

Anne Pinkman: I did not mean to imply that victims' recollection of offences would fade or change. As the bill indicates, supplementary statements would provide additional information.

Mr Hamilton: Who should take victim statements? If you do not know, it is all right for you to say so.

Anne Pinkman: I do not know.

The Convener: We will put that question to someone else.

We will finish with questions on part 7 of the bill.

Scott Barrie: In your submission, you broadly welcome section 44, which makes provision for youth crime pilot studies. You state that such studies will provide us with an opportunity

"to provide effective and appropriate services for young people that will lead to a reduction in offending behaviour".

On what do you base that statement?

Brenda Doyle (Association of Directors of Social Work): We would welcome the introduction of pilots to examine how the issue of youth crime can be dealt with effectively. Through the changing children's services fund, some moneys have been made available to councils to develop youth justice programmes and services. That is a positive development in the way in which we deal with young offenders.

We need to focus on how we tackle effectively the problems that those young people face. In general, we are talking about young people who are socially excluded, who have not had a smooth passage through life so far and who are quite immature. We view very positively the introduction of pilot studies that are aimed at examining whether, in the long term, community-based activity is more effective than a lenient disposal by a sheriff that may lead a young person to think that they have been let off, or a serious disposal that may lead them very quickly into the adult justice system and have no positive effect on them or their community.

Scott Barrie: From the different authorities that you represent, do you have any evidence of the effectiveness or otherwise of the children's hearings system and the community disposals that are available to it? Similarly, do you have any evidence of the effectiveness of the disposals that are open to the adult court system, which often involve no disposal or deferred disposal without any clear structure, and of the structured community disposals that operate through the adult courts? Which of those approaches is the most appropriate for dealing with youth crime? What are the differences between them?

Brenda Doyle: I listened to the evidence that ACPOS gave and agree that the children's hearings system in Scotland is very good but has had difficulty dealing with older children. Addressing children's needs is not sufficient; we also need to address their offending behaviour.

We feel that the bill would give us and other agencies the opportunity to address such issues, which would bring about more positive outcomes for young people and the community in the context of the community safety agenda.

12:30

Scott Barrie: Local authorities organise their social work services in different ways, and social work could be said to have stopped in a generic sense—except in a few authorities—as we have moved to a much more specialist approach. In the context of the introduction of national standards and of 100 per cent funding for criminal justice social work in the adult system, which has improved disposals and monitoring, does the transition from children's services and disposals through a children's hearings system to the adult system, which allows for probation or community service, present a difficulty as far as resources are concerned?

Brenda Doyle: The resourcing of those developments and of that transition in services would be an issue. The gap between the children's hearings system and adult courts is large. Perhaps we are losing some young people and continuing with their exclusion from society in a way that is helpful neither to them nor to society.

Scott Barrie: The way in which local authorities choose to discharge their functions would not require a change in the law. Do you see a role for criminal justice social workers in the children's hearings system if those functions were extended?

Brenda Doyle: The approach of many authorities now straddles children's services and criminal justice services. Most authorities take an inter-agency approach to youth justice through their children's service planning process, which involves learning the lessons from our criminal justice colleagues on addressing the offending behaviour, but taking into account the background and needs of the people concerned, who are still quite young, and preventing them from living a life of adult crime in the long run.

The Convener: I have often heard the contention that the jump from the children's hearings system to the criminal justice system is too great. Why is it okay to have a jump between systems at the age of 18, given that offenders of that age include young offenders who would be dealt with under the adult system at that point, compared with having that jump at 16? What is the important distinction?

Brenda Doyle: From my experience, many young people of 16 are still quite immature, and perhaps it is inappropriate for them to be entering the adult criminal justice system. Their problems could probably be dealt with more positively in the children's hearings system, which would prevent the situation with 18-year-olds that we have discussed. Most offenders at that age are young offenders and young adults.

A pilot scheme has been suggested, but we need to find out what the long-term solutions are. We know that the young people concerned probably have difficult backgrounds and come from communities where poverty exists. That all relates to the social justice agenda.

The Convener: I understand that, but I am trying to ascertain why we should not extend the children's hearings system to, say, 21. Offending behaviour of the sort that we are discussing goes on well past the age of 18—to the age of 23, I am

told. What is the reason for extending the application of the children's hearings system to people aged 18 and not older?

Brenda Doyle: At this point, we are discussing potential enabling legislation and considering other suggestions. This is about a pilot study, rather than setting in stone what we should do. It is a matter of looking at what works.

The Convener: So if the children's hearings system works for children up to the age of 18, you would say that we should extend it for offenders over that age.

Brenda Doyle: I do not think that that is for me to say at this stage.

The Convener: I am simply trying to understand the logic of your evidence. If you had charge of the criminal justice social work system and could divert young offenders from crime, why stop at 18? We need an answer to the question why we should support a pilot study that draws the line at 18. Are you saying that, if that were successful, you would not mind if children's hearings were to be extended beyond that age?

Brenda Doyle: As things stand, various options are open to the courts for dealing with young adults who are 18 plus. The issue that we identify is the need for early intervention and for continuing support for 16 and 17-year-olds.

The Convener: I am sure that we will hear more about that subject, but I am sorry to say that we must wind up at that. Does Colin MacKenzie want to say something to conclude today's session?

Colin MacKenzie: I would like to mention four issues that have been touched on briefly, but perhaps not to the extent that we would have liked. I understand that time has been an issue for the committee.

One issue concerns the Executive's intention about the parameters surrounding the risk management authority. Right now, my understanding is that the authority will deal with perhaps 10 of the most persistent serious offenders in the system. However, the legislation allows for that to be extended in the future. It would be helpful to know what the parameters will be.

Another issue is the funding of the risk management authority. I understand that the evidence that the committee has received is that, as such work is on-going, no additional funding will be issued. However, the bill contains the caveat that the risk management authority may seek additional funding from the Executive. We do not think that that is clear enough. The creation of the authority will result in additional and much more intensive work in supervising people in the community, so we must have a much clearer connection to funding.

On the question of who should take the victim statements, we can be quite clear about who should not carry out—or rather assist with—that task. The people who assist with the victim statements should not be from a statutory authority such as the police or the courts system, nor should they be statutory social workers because of the conflicts that would arise in such a system. It should be open to the victim to choose from a range of voluntary organisations that either provide such services already or that could be funded to provide them in the future.

On when it is appropriate for the victim statement to be taken, I think that that should depend on the victim. I would not like the bill to be too prescriptive. The issue is not so much about the evidence itself—I do not think that distance from the incident matters that much—but about how the offence has impacted on the victim. It is important that we get those two perspectives.

One area that we have not touched on today is the local authority functions that are provided for in the bill. We welcome the bill's proposals in section 57 for deferred sentences and for referral upon arrest. There are issues about how that might be provided in areas throughout Scotland, but that is perhaps an issue for another stage. It is important to see those proposals as part of the system that gives people access to services that will stop their offending at an early stage. We welcome that.

On part 11, we should take up the option of looking at throughcare in general. Throughcare is the services that people who go to prison should get from the day of sentencing right through to their return to the community. As we have said on previous occasions, throughcare is currently not a comprehensive system. It would be helpful if a duty was placed on local authorities to provide throughcare services. That duty does not exist at the moment, but such a duty would mean that we would have a much more comprehensive system than we currently have. It would also help to reduce offending behaviour.

The Convener: Thank you for that brief summary. I apologise that you have had to cram that in, but your evidence has been useful, especially your evidence on victim statements.

Our final witness is the Minister for Justice, whom we asked to appear before us to clarify some of the bill's policy objectives. We have until quarter past one, which is when the minister must leave us, but I am sure that we will be focused enough to get through our questions in that time. I also welcome the Deputy Minister for Justice and all the ministers' officials, and thank the ministers for appearing before the committee at short notice. We are grateful for that.

You have been given notice of the sections that we are interested in talking to you about today. Obviously, that is not an exclusive list of our issues but we want to deal with part 2, on victims' rights, and part 7, on the physical punishment of children and the youth crime pilot study. I suggest that we spend about 10 minutes on each subject.

The minister would normally appear before us at the end of our evidence-taking sessions. For today's purposes, we want to clarify the Executive's policy intentions rather than raise any concerns that we have. That is why it was important to have him here today.

The Deputy First Minister and Minister for Justice (Mr Jim Wallace): Thank you for allowing us this opportunity to clarify the policy issues on victim statements, the physical chastisement of children and the youth crime pilot bridging scheme.

It might be helpful if I were to make a short statement on victims' rights and take questions on that before making a statement on the physical chastisement of children and taking questions on that. Richard Simpson will deal with the pilot schemes.

As the committee recognises, the provisions in the Criminal Justice (Scotland) Bill give victims certain important rights for the first time in Scotland. They deal with: the receipt by victims of information concerning the release of offenders from prison; the making of representations to the Parole Board for Scotland; the passing by the police of information relating to victims of crime to certain support agencies; and the formalising of statutory backing to procedures that, in some cases, have been in operation for some time.

We believe that we need to go further. The Scottish strategy for victims set out a robust agenda that has been followed up by a number of organisations and has been agreed with organisations representing victims of crime. Much of the work is to improve information and provide better support. That is already being taken forward and, although it is not without challenges, is more straightforward to achieve. The victim statement scheme is the next stage in the process. It is more challenging but, given the momentum to deliver a better service to victims of crime, the Executive takes the position that the issue is not whether we should have a victim statement, but rather how best we can ensure that victim statements work well within the Scottish justice system.

We have consulted widely on the scheme and taken account of respondents' views. The scheme is intended to operate within existing procedures as far as possible and our aim is to ensure that the statements are effective in practice. We will pilot them from the outset and evaluate the results fully.

The statements give victims of certain crimes the right to make a statement about the crime's physical, emotional or financial impact upon them. The statement will be made available to the court by the Crown following conviction of the offender and will provide the court with an additional piece of information. As with all other information, it will be a matter for the court to decide what is relevant in determining the sentence. The guidance for victims will make it clear that the statement should not contain the victim's view on sentencing, which remains a matter for the court. That accords with the position taken by the criminal appeal court in the case of HM Advocate v McKenzie 1989. In that case, the appeal court held that, while it may be for the court to inquire into facts that might indicate the attitude of the victim subsequent to an offence, it is not appropriate to invite a view from the victim on sentence.

The statement will be of particular value where the victim does not have the opportunity to give evidence to the court—for example, when the case does not proceed to trial because the accused pleads guilty. I take the view that making available to the court more potentially relevant information cannot be detrimental to the sentencing process. The same crime will inevitably affect different people in different ways. It is therefore only right that the offender be made aware of the effect of their crime and that the therapeutic value to the victim is recognised. That concept is central to restorative justice.

The committee has expressed concern about the opportunity for the accused to challenge the victim statement. The statement will be given to the accused following a finding of guilt or a guilty plea. We took that course in response to concerns raised during consultation that were to do with the potential for increasing the victim's fears of intimidation. I can confirm that the accused will have the right to challenge the content of the victim statement. Already, there are procedures that allow for the court to hear evidence following conviction on matters that are raised in the accused's plea of mitigation if they are inconsistent with the evidence and cannot be resolved without hearing evidence. We are consulting the Crown Office on how those procedures, which are known as proof in mitigation, might need to be adapted to cover the victim statement.

We are considering the possibility of an amendment to the bill that would allow for the victim statement to be made available to the accused at an earlier stage. To do that, we need first to resolve procedural issues with the Crown Office and address the concerns of victims that were raised in our consultation.

Clearly, we will follow closely the committee's

examination of the issue. I hope that I will be able to give further guidance about our intentions on that issue when I next appear before the committee when it is dealing with the bill.

The Convener: That is helpful, as is your letter to the committee, which helps considerably to clarify a number of points. However, I am sure that there are further points that need to be clarified.

Are you saying that the main objective behind the victim statement scheme is its therapeutic value to victims?

12:45

Mr Wallace: That is an important purpose. The statements will also give the courts more of a picture of offences and their consequences. The two purposes are not mutually exclusive. I perceive—as have others—a system that, over the years, has not done much to incorporate the victim in its procedures. That has often led to a sense of frustration, in particular, as I indicated, in cases with a guilty plea. If the plea is not guilty, more likely than not the victim will have given evidence—they will probably have been the prime source of evidence—and will have been able to have their say.

I have had constituency cases—I am sure that other members have as well—in which not guilty pleas were lodged and evidence was not taken from the victims. In such cases, the victims felt that they had not had the opportunity to say how they were affected and to get that into the public domain. Victim statements, therefore, will be of beneficial therapeutic value, but when it comes to sentencing, they will also allow the court to view the broader picture. In the same way that the courts take into account pleas in mitigation on behalf of the accused, they will hear about the impact of the crime on the victim.

The Convener: The committee acknowledges the importance of the principle, but it is difficult for us to understand whether victim statements will have to have an impact on sentencing, or whether you are giving sheriffs or judges the freedom to decide. If they are given that freedom, will they have to say whether they took into account the victim statement in determining the sentence?

Mr Wallace: I have tried to make clear the distinction between the victim expressing a view on what he or she thinks the sentence ought to be—which is not the intention of victim statements—and the sheriff or judge giving whatever weight they think is appropriate to what was said by the victim in the victim statement.

The direct answer to your question is that the victim statement can be part of what the sheriff or judge has regard to in determining a sentence. Obviously, a number of other factors will be taken into account, but victim statements will be a factor. The weight that will be given to them will undoubtedly vary from case to case, and that must be a matter for the sheriff or judge to determine.

We do not wish to be prescriptive and say that in writing a judgment—in many cases there may be no written judgment; it may just be delivered verbally—the judge should indicate the extent to which the victim statement was taken into account in determining the overall sentence, any more than we are prescriptive about what is said in pleas in mitigation. If a case goes to appeal and there is an appeal against sentence, the sheriff or the judge will, in giving their view and notes to the appeal court, give some indication of that, but it is not our intention to prescribe that.

Mr Hamilton: You will be aware that last week there was a degree of confusion about this matter. Some of what you said provided clarification, in particular when you said that there is to be no attempt to give a victim the opportunity to express their view on sentencing. I understand that, but you have said that the victim statement might or might not impact upon the sentence.

The ADSW laid out clearly the contradiction that it sees in the policy. On the one hand, you are saying that victim statements should not have that impact on sentencing, but on the other hand the ADSW quoted from the "Consultation Document on the Procedures for a Victims' Statements Scheme", which states:

> "the victim should expect that the statement would be one of the sources of information made available to the judge in reaching his decision on the sentence to be imposed."

That gives a clear nod in the direction that the victim statement would have a material impact. I am still confused about whether you think that victim statements will have a material impact on sentencing.

I understand the point that has been made about the therapeutic value of a victim's making a statement—I do not think that anyone here disagrees that there would be such a value—but is it a policy decision that statements should materially impact on sentences?

Mr Wallace: I hesitate for a moment, as we could sit here all day and debate what "material" means.

I think that what Duncan Hamilton read out summed things up. I have not tried to suggest that such statements should not have any impact on sentencing. A statement should be one piece of information. In some cases, such statements exist currently, as a victim may have given evidence in the witness box, but in many cases—particularly those in which there have been guilty pleas—they

do not. I believe that there should be victim statements in cases in which they are appropriate and that a statement should be one factor that the sheriff or judge should take into account.

Perhaps I cavil at the word "material" because the last thing that one ought to do is legislate for every conceivable circumstance. The sheriff or judge will hear the full story. In some cases, the weight that is given to, and the relevance of, the victim statement might be considerable, but in others, other particularly relevant factors might give a statement slightly less relevance. Victim statements ought to be part of the picture that is relevant to the sheriff or judge in determining a sentence, but the circumstances of each case must determine what weight the sheriff or judge will give to a statement.

Mr Hamilton: In principle, victims will take from what you have said that a statement that they make after the conclusion of a trial would have an impact on the sentence. Are you trying to raise that expectation?

Mr Wallace: Yes, it would have an impact.

Mr Hamilton: In that case, I want to ask you about how a statement could be challenged. From last week, I understood that there are not yet rules of procedure in respect of how a challenge would operate and on what basis there could be a challenge. Can you tell us whether a statement would be available earlier in a trial? If a statement were taken at the time of the offence, perhaps it would be relevant to the trial. If there were a contradiction between what a victim statement claimed and a statement that was made as part of the prosecution, would it be fair for the defence to use that in evidence? I presume that victims' statements will be relatively pejorative—presumably, that is part of the therapeutic process through which a victim will go. Will not the victim be the last person who will be objective? Should not we have a court system that takes a step back from that? How will an accused challenge a victim statement?

Mr Wallace: I do not accept that statements will necessarily always be pejorative and I would not expect them to be objective. A victim of crime will say how a crime has impacted on him or her. They might say, "As a result of this injury, I have been off work for the past 10 weeks"—

Mr Hamilton: But they are likely to over-egg matters as opposed to underestimate the impact.

The Convener: Let the minister finish his answer.

Mr Wallace: If the victim has not been off work for the past 10 weeks, that would be a factual matter. Crimes affect people in different ways. The same crime may not have the same result in a different victim. I believe that a victim statement is relevant, but I do not accept that making a statement would be abused in the way that is suggested. We are discussing challenges with the Crown Office. I said that, at the moment, there is provision for proof relating to issues that arise in pleas of mitigation where there is an apparent contradiction.

On when a statement might be made, I made it clear in my statement that, in publishing the bill and in the light of our consultation, and taking account of victims' concerns, we concluded that it was appropriate that statements should be made available to the accused after conviction. We are not wedded to any huge principle in that respect and I have made it clear that there can be legitimate debate and discussion on the issue. Counter-suggestions have been made. The value of evidence and discussions is that we can weigh things up. I suspect that there is no right answer, but we had to make a judgment. In making that judgment, we took account of what was said to us in the consultation.

The Convener: We will need to move on, but we will return to the issue at a later date. Turning to part 7, on the punishment of children, I emphasise to the committee that, at this stage, we are trying to clarify policy objectives, rather than discussing the rights and wrongs of the provisions. The minister will make a statement before we move on to questions.

Mr Wallace: May I add a final point? The Home Office is not aware of challenges to victim statements in England. That is not to say that such challenges have never been made, but we have checked with the Home Office, which is not aware of challenges being made regularly.

On the physical punishment of children, we believe that it is time to improve the protection of children by spelling out more clearly what parents cannot do. In our view, that means that we must clarify the law by setting clear guidelines for courts and parents. I am confident that there is no contradiction, as has been suggested recently, between our proposal to clarify matters for parents and the discretion of the courts to deal with the wide variety of circumstances that they must already consider in the light of the factors enunciated in the case of A v the United Kingdom.

The United Nations Convention on the Rights of the Child is important when we consider the protection of children. In 1995, the UN Committee on the Rights of the Child said that it was worried about the UK's legal provisions on "reasonable chastisement" and that the imprecise nature of that expression as contained in those legal provisions may pave the way for it to be interpreted in an arbitrary and imprecise manner. Since then, the incorporation of the factors

identified in A v UK has met those concerns in Scotland. Our proposals on blows to the head, shaking, the use of implements and hitting under-threes provide even greater clarity for parents.

I accept and understand that parents are apprehensive about what the changes will mean for them. The Lord Advocate has confirmed that, as with any other case, proper prosecutorial discretion will be exercised in determining, in each case, whether it is in the public interest to prosecute. That discretion will include consideration of the rights of the child.

I also accept that we must work hard to persuade parents that protecting very young children through legislation is a good thing. All the properly conducted public opinion surveys agree overwhelmingly with our plans to ban blows to the head, shaking and the use of implements. On the age level, there is evidence to support the drawing of the line at the under-threes. I hope that the committee will test that evidence with appropriate witnesses from the fields of child development, psychology and paediatric neuropathology. Who can measure the effect of a blow to a small child to ensure that there is no damage? The age chosen also fits with other policies on promoting children's health and well-being, such as sure start, starting well and nursery schools for three-year-olds.

I remind the committee that we have already banned physical punishment by teachers, nursery teachers, childminders and foster parents who, in many cases, look after children who have serious behavioural problems. We must all be concerned about protecting the most vulnerable in our society and we believe that these proposals will encourage all parents to reflect carefully on the right to administer punishment to their children. To aid that process, we will provide information on the changes and advice on alternative strategies of discipline, which I hope parents will find useful in understanding why the legislation will help rather than hinder them.

It is our view that the proposed changes should discourage casual or excessive use of physical punishment or its use for inappropriate purposes, and that must be good for children.

The Convener: I will begin by asking about the Executive's policy position. Notwithstanding your comments about the provisions that will prevent a guardian or parent using an implement or delivering a blow to the head, I want to ask about what has become commonly known as the smacking provisions. I apologise for using that phrase, but I want to get to the point. Is it the Executive's intention that the police should deal with every complaint made about a parent smacking a child aged under three?

Mr Wallace: For a start, we are not putting in home guards or allowing people to spy through windows. I am not saying that laws are not broken, but that does not make it any less important to have those laws on the statute book. I also indicated that the police go through a sifting process in respect of the complaints that they follow up and, as with all cases, procurators fiscal and the Crown Office will exercise prosecutorial discretion. Therefore, I do not anticipate that parents who smack a child aged under three will be hauled into court in every case.

Let me remind the committee of what we said in our consultation document in February 2000. We said:

> "Whilst other forms of exercising discipline are available and usually preferable, many parents find on occasion that a mild physical rebuke has a place. However, there is a common sense distinction to be made between the sort of mild physical rebuke which is normal in families, and which most loving parents consider acceptable, and the beating of children. The law needs to be clarified to make sure that it properly reflects this common sense distinction."

We set out that view in our consultation document. That is the spirit in which we have brought forward our proposals.

The Convener: I am having difficulty understanding what you mean by a sifting process and the use of discretion. If the law is to be clarified by making it an offence for a parent to smack a child under three, the police will be involved and the parent will have to account for their actions in every case in which there is a complainer. I want to be clear that your understanding of the provisions is that every parent against whom there is a complaint for smacking a child under three will at least be questioned by the police, until the police decide whether to proceed with the complaint. Is that the case?

13:00

Mr Wallace: I cannot say how the police would deal with the matter in operational terms. There is no reason why every case should end up in the courts. The sifting process gives wide discretion. We know of cases in which although the law might have been broken technically, the police or the fiscals decide not to pursue the matter. That happens in other areas of the law, often for good reason. I do not anticipate that aspect of the way in which the system works being turned on its head.

The Convener: I appreciate what you are getting at.

The Deputy Minister for Justice (Dr Richard Simpson): Let us consider the law on abuse, on which matters are clearer. When complaints that parents have abused their children are made, they have to be investigated by the police. Although

some such complaints are undoubtedly mischievous, that does not mean that they should not be investigated. The police will not take the matter forward if they find no evidence of the alleged event.

Smacking is obviously a lesser offence in most cases, but the research evidence shows that there is no doubt that beating children under the age of three is done by a proportion of parents on a regular basis. That action falls short of what might be termed unreasonable chastisement. By clarifying in the law that one cannot beat children under the age of three, we are giving a clear policy steer and a clear statement about the Executive's intention on the matter.

The Convener: I do not disagree with what you have said. I am trying to be clear about what terms such as sifting process and discretion will mean in effect if the proposed provision becomes law. From what I can gather, you are saying that in every case in which a parent smacks a child under the age of three and there is a complainer, as part of the sifting process the police will question the parent to decide whether to hold further investigation. Is that the case?

Mr Wallace: It is properly the case that I cannot answer for the police. If someone were to casually remark to PC Murdoch that Oor Wullie's mother had hit Oor Wullie—an under-three Oor Wullie—as they were walking out of Tesco's because he had been doing something daft, I am not suggesting that PC Murdoch would think that he must follow up on that. However, there will be occasions when some basis will exist for making a complaint. Although the police almost certainly would follow up in such cases, the fiscal would not necessarily prosecute—a warning might be issued, for example. As you well know, a fiscal can adopt other remedies in such circumstances.

I have indicated publicly that, because of some of the studies that have been done, we think that three is the right age, but I am open to discussion on that. I hope that the committee will be able to help us on that as a result of the evidence that it takes. It is also important that our proposed provision sends out signals about what is acceptable and unacceptable behaviour. If we can build a culture in which resorting to hitting is not a reflex, but something that parents must stop and think about and then perhaps choose to use alternative strategies, in the longer term that must be for the benefit not only of children but of the wider community.

George Lyon: I have two points. Would a ban on smacking mean that parents would not be able to lift a hand at all to any child under three? Is there no discretion whatsoever? Is a parent touching a child with their hand a reportable offence?

Mr Wallace: No, taking a child's hand to cross the road is not a physical assault. The crime would be something that amounts to an assault. We are not creating a new law—there is a law on assault. Every touch is not necessarily an assault. If a kid is about to run in front of a car and the parent puts their hand out, that is not an assault.

George Lyon: I was thinking of a child throwing a tantrum, running one way and being grabbed by the parent to pull them back. That could be regarded as shaking.

Mr Wallace: If the kid was about to run in front of a car and the parent grabbed the kid, it would not be an assault.

George Lyon: Okay. What evidence is there that the present law does not protect children from real harm? Does the Executive have evidence of unjustified acquittals in Scotland, based on the defence of reasonable chastisement, or of cases that have not proceeded because of lack of clarity in the current legal provision?

Mr Wallace: One case was drawn to ministers' attention and I referred to that in the letter that I sent to the committee convener. When I asked the Lord Advocate whether there had been cases that had not been prosecuted, he did not know. I am pursuing that with the Crown Office.

We should not get diverted from the fact that we want to give some clear guidance to parents so that they know what would be deemed to be reasonable and what would be unreasonable—it is not just a question of a parent going to court and it being left to a sheriff to determine what is reasonable. We are not trying to ratchet up the crime figures by creating more criminals. We are trying to give out signals as to where the boundaries ought to be drawn. If, in doing that, we prevent physical abuse of children, it is something well worth doing.

As I said in my opening remarks, we will do what we can to provide advice and information. It is not simply a question of allowing cases to come to court after damage may have already been done. It is the role of the Parliament to indicate what is and what is not acceptable.

The Convener: I know that there are more questions and we must press on.

George Lyon: Can I clarify that point? Have there been cases where action could not be taken because of lack of clarity in the current provisions, rather than cases that had failed?

Mr Wallace: I indicated that there was such a case. We are in discussion with the Crown Office about that information.

There may have been cases where the recourse would not be through criminal proceedings, but

perhaps through a children's hearing, if there were concern about the welfare of the child. We have a figure, but I want to check it out before I give it to the committee. We are trying to get figures on the number of cases referred to children's hearings in the past year on the ground of physical maltreatment of children.

Mr Hamilton: You said that the Lord Advocate does not know how many cases were not prosecuted as a result of a deficient law—

Mr Wallace: To be fair, I asked him as he was walking into a Cabinet meeting this morning, so he did not have the figures to hand. As I said, we are in discussion with the Crown Office to see whether we can provide more information on that.

Mr Hamilton: I understand that. Your letter makes clear that there is no central database for such information; in other words, there is no means for us to quantify the problem or discover whether there is a problem.

You said that the proposed bill does no more than restate the current situation. That brings us back to the question of why we are bothering with the bill, given that we have a common-law position established under the case of A v UK. We asked last week exactly which of the provisions in the bill are not already covered by common law, and we could not find any. If you could point us to some of the measures in the bill that are not already covered under common law, I would be grateful.

Questions were asked last week about who is in doubt. I am not sure where the doubt exists. In your letter you referred to two cases with entirely different sets of circumstances that came to different conclusions. Just because there is flexibility and there are different interpretations, that does not mean that there is doubt about the law; it means that the facts in each case took the judge to a particular conclusion. That is not a sign that there is doubt about the law. Where is the evidence that the current situation has given rise to doubt for the courts, the parents or the Executive? I do not see the doubt that we are trying to remove.

Mr Wallace: Section 43 clarifies the circumstances in which the physical punishment of a child will not be reasonable. It is not unreasonable for us to put into statute the provisions in section 43(1), which reflect the factors that were enunciated in A v UK.

Section 43(2) indicates that the court may have regard to other factors that it considers are appropriate to the case, and therefore does not exclude other factors from being considered by the sheriff. That provision is provided because there is always the possibility that if the bill specified some factors and not others, factors could be left out.

Section 43(3) specifies what would amount to unreasonable chastisement. Section 43(3) is included specifically to remove doubt, because there could be doubt whether in some cases hitting someone on the head is reasonable or unreasonable. What we are trying—

Mr Hamilton: With the greatest respect, is that not precisely why under the common-law position—

Mr Wallace: May I finish the answer? We take the view that a blow to the head is not reasonable, and we are overwhelmingly supported in taking that view by the studies that have taken place, but it puts—

The Convener: I have to stop you both there.

Mr Wallace: It puts the circumstances—

Mr Hamilton: Is it not the whole point that the common-law system is more flexible than statute?

The Convener: Minister and Duncan Hamilton—

Mr Wallace: No, it is not—

Mr Hamilton: Is that not the whole point?

The Convener: Both of you, please, we need order.

Mr Wallace: It is a judgment, convener, and we take the view that a blow to the head is not reasonable. We were overwhelmingly supported in taking that view in the consultation that we undertook, and our view was overwhelmingly supported in all the surveys, scientific or otherwise, that came out subsequently. The bill goes beyond what would exist if it was just down to A v UK.

Dr Simpson: May I—

The Convener: I have to stop you there, ministers, because two other members wish to ask questions. I will let you reply.

Dr Simpson: I will add some facts from the central research—

The Convener: Just ignore me, everybody.

Dr Simpson: I am sorry. I thought you asked if I could—

The Convener: Honestly, please could I have some order. I will try to give ministers their say, but other members would like to contribute. Bear with me, because I am the convener.

Bill Aitken: I am sorry if I am being characteristically obtuse, but even after all this discussion I have still not established the policy position. A blow to the head is clearly an assault. The courts have determined that. There appears to be no issue with that. The common law of

Scotland is clear that judges and sheriffs have made determinations down through the ages on what is and what is not an assault. What is the problem here? In answer to a question from Mr Hamilton earlier, you said that the last thing you want to do is to legislate for every conceivable circumstance. With respect, that is what you are trying to do here.

Mr Wallace: If I can track—

The Convener: Richard Simpson wanted to speak earlier. Do you want to reply to that question?

Dr Simpson: I wanted to respond to an earlier point.

Mr Wallace: I certainly want to reply to that question. Mr Aitken understated his position in terms of being obtuse or, rather, he overstated it. He highlighted an important point, because he said that it is self-evident that a blow to the head is an assault. With respect, it is not. Under the Children and Young Persons (Scotland) Act 1937, a blow to the head may not be an assault if it is struck by a parent in the course of administering physical punishment to their child.

A blow to the head may be an assault if it is unreasonable chastisement. However, a sheriff in the Portree case found that a blow to the head was not an assault, but was deemed to be reasonable chastisement. Because we are dealing with the provisions of the Children and Young Persons (Scotland) Act 1937, the starting point is not that any blow to the head is an assault, as there are circumstances under which the law says that such a blow is not an assault. We are trying to clarify the position by saying that, in future, a blow to the head will be an assault.

The Convener: Before we move on, Roseanna Cunningham wishes to come in. I will allow the Deputy Minister for Justice to have the last word, if he so wishes.

Roseanna Cunningham: My question may have been answered already, but only partly so. I am intrigued by your evidence that you are not doing anything new in the bill, which explains why questions are being asked. Perhaps I should put my question in a different way. As a result of the bill's provisions, what category of incident do you anticipate will end up as a matter for court proceedings that could not already end up in court under the common law?

13:15

Dr Simpson: If a child, who is known to be and is recorded as a healthy child, is hit on the head and becomes evidently damaged, the courts can act under the present law. However, the problem arises below that level. There are a substantial number of incidents in which children who have been hit on the head are presented to doctors and where the defence is one of reasonable chastisement.

Roseanna Cunningham: But are those children aged under three?

Dr Simpson: In those cases, it is difficult to determine whether major damage has been caused by comparing the child's health with what it was before they were hit.

There is interesting evidence on head injuries from the royal hospital for sick children, Edinburgh. That evidence shows that 5 per cent of all children's head injuries result from severe punishment or abuse. In other words, parents do not set out to abuse children—they set out to punish them. The change in the law will redefine what is reasonable by excluding hitting on the head.

Information from the central research unit shows that

"61 per cent of parents use minor physical responses on children aged between one and two"

and that

"5 per cent use severe violence".

Severe violence may not result in immediate damage—it may take considerable time for damage to appear, through behavioural disorders and other psychological problems. Therefore, not using such chastisement—

The Convener: I am going to conclude our discussion on the physical punishment of children on that point. With respect, I do not think that that response answered the question. I also do not think that there is much disagreement with some of the statements that the ministers have made. The only issue that the committee must clarify for the purposes of today's meeting—we do not want to get into an argument today about whether the provisions are good or bad—is why the current law cannot deal with the situation. We need an answer to that question.

Mr Wallace: I will answer that question and also pick up on the point raised by Roseanna Cunningham. Even allowing for the fact that the courts are obliged to apply tests under the European convention on human rights, a blow to the head of a child of 10, 11 or 12—he does not need to be under three—could, in some circumstances, be deemed to be reasonable. Indeed, that was what happened in the Portree case. The change that the bill will make is that a blow to the head will no longer be legal. The defence of reasonable chastisement would not be available in the circumstances of a blow to the head. That change goes beyond the factors laid out in A v UK, under which there are

circumstances—as we saw in Portree—where such a defence would be legitimate.

The Convener: We need to hear more evidence on those provisions.

I move on to section 44 of the bill, on the youth crime pilot study. I am conscious of the time and will understand if you have to leave, minister.

Mr Wallace: I am in the committee's hands.

The Convener: We will spend the final 10 minutes of the meeting on the youth crime pilot study. Could you clarify—

Dr Simpson: May I make an opening statement?

The Convener: All right.

Dr Simpson: I seek your permission to do so, although I hate to interrupt you again.

The Convener: Go ahead, please.

Dr Simpson: The committee asked for clarification of our proposals on youth crime pilots and for a definition of which young offenders will be referred to those pilots. The committee might recall that the Scottish Cabinet's first strategy meeting was on youth crime, which demonstrates the high priority that we have given to the problem.

The action plan, which sets out our programme for the year ahead, builds on the additional £25.5 million that is being invested in tackling youth crime and is supported by the multi-agency teams that have been set up in each local authority. It includes work on the bridging pilots.

Our strategy on youth crime sits within our overall approach to reducing crime. The balancing of effective enforcement with policies that address underlying problems such as drug addiction is showing results. The level of recorded crime has come down by a quarter in the past 10 years, the police clear-up rate is at its highest since the war and the Scottish crime survey reported last week that the fear of crime is decreasing.

The proposals for the pilots should be seen as part of that broader strategy. They stem from the original advisory group recommendation to set up bridging pilots. I stress the word "pilots"—I will come back to that.

The proposals also seek to address the concern that the break between the children's hearings and the adult court for 16 and 17-year-olds is too sharp. At a conference on youth crime that was held at the end of last year, a member of the Justice 1 Committee commented that there was a chasm between hearings in the adult system and children's hearings. It was said that that fault line in the system meant that young men entered a creaking system at precisely the wrong time—at the point at which offending in that group was at its highest.

Our policy is to reduce the level of youth crime by focusing on interventions that have been shown to be more effective. Like the Justice 2 Committee, we want to break the present cycle of repeat offending that blights so many of our communities.

Procurators fiscal have several options open to them and prosecution is the last resort. The pilots will allow us to test a further option that will facilitate effectiveness and targeting. That option will work best for young people who are vulnerable and immature, who have committed minor offences and who are likely to benefit from a more integrated approach. The fiscal and the principal reporter will discuss the cases before they are referred to the principal reporter. The reporters' knowledge and experience of their localities will be crucial. To portray the move as an example of going soft is facile.

The letter from my colleague indicated that the proposal is not simply to refer those young people to the children's hearings system. We will invest further new resources in the pilots—they will be resourced—and will provide programmes to ensure that the pilots have an appropriate range of disposals. We will also ensure that the pilots have effective support. Joint teams will draw on the combined expertise of children and family and criminal justice social workers. Only if the guidelines are met will the Lord Advocate issue revised guidelines for procurators fiscal to make the pilots operational. That could not happen before next summer.

The intention of the proposed change is not to roll out children's hearings across the whole of Scotland; it is simply to allow us to undertake two pilots. We will test them, evaluate them and if they are found to be effective, we will come back to the Parliament to seek further primary legislation to roll out the programme across Scotland. Under the current legislation, we cannot even test pilots. That is what we seek to do under the relevant provision of the bill.

The Convener: The purpose of our questioning will be to clarify your policy objectives and the criteria for referral, on which we felt we did not get a clear answer at last week's meeting. At this stage, we cannot make a judgment about whether the provision is appropriate, because we have not taken very much evidence on the matter. I am concerned that to date the criteria for referral have been defined as crimes of dishonesty, petty crimes, non-serious crimes, first-time offenders, immature offenders, minor offenders and those likely to benefit. The criteria for referral are the most important thing that the committee needs to hear from you today. When you state what the criteria are, how can you guarantee that those

criteria will be used if the bill is enacted?

Dr Simpson: The convener will know that on a number of occasions I have gone on the record as saying that it should be minor, petty offenders who are referred. The object of the policy is to ensure that vulnerable, immature individuals who could benefit from the children's hearings system are allowed to do so.

The precise question that you asked about guidelines is not a matter for the Executive; it has to be a matter for the Lord Advocate. We have asked the Lord Advocate to prepare guidance and he is in the process of considering it. We accept that that has to be undertaken. We must give clear indications about who is going to be involved. A number of speakers in public arenas have made the suggestion that the bill will in some way put back into the children's hearings system recidivist, hardened individuals who have failed to benefit from it. That is patently absurd. That is not the intention of the policy. However, it would be inappropriate not to allow us the opportunity to divert individuals back into the children's hearings system.

The Convener: That might be the objective, but once the power is given to the children's hearings system, what is there to prevent it from being extended to other offenders? Are you sure that the provisions, as they stand, mean that the children's hearings system will only ever cover petty offenders?

Dr Simpson: I do not want to take up too much of the committee's time. Members should consider the eight or nine projects that are running that deal effectively with some of the persistent petty offenders. I refer to projects such as the Matrix project for younger people; the Freagarrach project in central Scotland; the children's hearing interface project—CHIP—in Edinburgh and the projects that are running in Aberdeen, Dundee, North Lanarkshire, South Lanarkshire and Ayrshire. All those programmes are designed to test whether we can get the persistent petty offenders away from the criminal system and they are demonstrating that they are effective.

The Convener: With respect, minister, that was not the question. I do not doubt what you say about the effectiveness of those schemes. If the bill allows the children's hearings system to deal with those aged up to 18, with whom it cannot deal at the moment, what is there to prevent a further extension of the system to non-minor offences? Are you happy that the provisions will be absolute and as contained as you want them to be?

Dr Simpson: The provisions will not be absolute because they are focused on the individual rather than on the particular crime. The Lord Advocate's guidelines cover people below the age of 16. I cannot anticipate the Lord Advocate fully, but I expect that his guidelines will also apply as an absolute to the 16 and 17-year-old group. The pilots will demonstrate whether the measures are effective and for which crimes and individuals they are effective. Once we know that, we can say that we want them to be rolled out and we can then be more precise about the groups for whom this approach works. Until the projects that I mentioned are concluded, we will not know which groups will benefit most. Once we know which groups will benefit most, we will use the pilots, for which we will have guidance in place, to target them.

Mr Wallace: I can give you further assurance, convener. Section 44(1) states:

> "The Scottish Ministers may provide, by regulations, for the carrying out of a study into the consequences and practicalities of referring to the Principal Reporter to be dealt with by that officer, whether or not by arranging a children's hearing to dispose of it, the case of a child of sixteen or seventeen".

Section 44 is headed "Youth crime pilot study". We cannot just roll out the approach without coming back, not just to the committee or for an order, but to the full Parliament for primary legislation. I hope that that gives reassurance. The study has to be evaluated. It is not a question of drifting into the never-never and adding a few more cases. It would be constitutionally improper for me to tread on the ground that belongs strictly to the Lord Advocate in the exercise of his independence. I understand that he is considering the criteria and guidelines for what kind of referrals would be made. That will be up to him, but it will be part of evaluating the study.

Bill Aitken: You must appreciate that, although some of what you say may be reassuring and although you would have to come back to the Parliament to extend the provisions, some of us regard extending the children's hearings system to deal with 16 and 17-year-olds as the thin edge of the wedge.

I will ask you for some factual information. As you are aware, a 15-year-old offender who goes before a children's hearing could have a supervision order placed on him for, for example, 12 months. It would be possible for a 15-year-and-nine-month-old offender to be kept under supervision of the children's hearing until he was 16 years and nine months old. Is it the case that such an offender, if he committed further offences, would not go before an adult court?

Dr Simpson: Yes. There are 192 individuals over 16 years old who are continued in the hearing system at present.

13:30

Bill Aitken: Is your proposal that, if the age goes up to 17 and similar provisions apply, such individuals could appear before children's hearings almost up to the age of 19?

Dr Richard Simpson: Technically, that is correct. The same provisions would apply under the revised hearing system.

Bill Aitken: Are you able to provide us with the reassurance—which I think we are all desperately seeking—of a definition of how minor "minor" is?

Dr Simpson: With reference to what we discussed earlier, not only the nature of the crime is important. There are obviously some absolutes in the matter. The Lord Advocate's current guidance covers that aspect. The effect on the victim and their community is also important. What the individual perpetrating the crime might regard as a minor crime could actually have a serious effect on the victim. Some of the studies that we are doing, such as those that Safeguarding Communities, Reducing Offending in Scotland—SACRO—is running for us, indicate clearly that the restorative and reparative approach that is being taken, which we would make available to the pilots, means that the offender addresses their behaviour.

I know that that does not answer your question absolutely, but it says that the nature of the crime must be judged in the context of the offender and the victim. That is where the procurator fiscal's discretion comes in and where the guidance from the Lord Advocate will be important.

Bill Aitken: Would only first offenders normally be dealt with under the new system or would continued and recidivist offenders be dealt with under it also?

Dr Simpson: At the moment, the average number of offences admitted to by a child who appears before a hearing is just under three. The figures broken down by number of offences show that the number of children before children's hearings who offend between three and nine times is 1,100. The number who offend more than 10 times is just under 800. Those figures have dropped by 15 per cent in the past year.

We are not talking about whether a child has committed a single offence, but whether the nature of the offending—even repeat offending—is minor and petty and whether the treatment that can be given under the children's hearings system will be effective. We are trying to address the issue from the other end. We are not trying to address it from the point of view of punishment, but through the Kilbrandon model of treatment and to allow the hearings to take those who can be treated effectively and treat them with programmes against offending.

Bill Aitken: Will there be any impact assessment, even an informal one, of the effects of an offence or series of offences on a community? There is great public unease about the matter.

The Convener: I stop you both there. That is a question for the evidence-taking session that we will have with the ministers on the effects of the provisions. We have come naturally to the end of the evidence-taking session on clarifying the policy objectives. We will be able to engage with the ministers further down the line on the provisions of the bill. There are many other issues. We have discussed the three about which we felt that we needed to speak to the ministers at the moment.

I thank the ministers for coming at such short notice and for providing a lively evidence-taking session. It has been very useful. We will see them in about three weeks. I will see committee members next Wednesday at the all-day meeting. We have agreed the witnesses.

Bill Aitken: This one was not an all-day meeting?

The Convener: Do you think that that was bad? You have eight hours of it next week.

Meeting closed at 13:33.

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