JUSTICE 2 COMMITTEE

Tuesday 19 November 2002
(*Morning*)

Session 1

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JUSTICE 2 COMMITTEE
42nd 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)

COMMITTEE SUBSTITUTES

Roseanna Cunningham (Perth) (SNP)
Lord James Douglas-Hamilton (Lothians) (Con)
Donald Gorrie (Central Scotland) (LD)
Dr Sylvia Jackson (Stirling) (Lab)

*attended

THE FOLLOWING ALSO ATTENDED:

Dr Richard Simpson (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Irene Fleming

ASSISTANT CLERK

Richard Hough

LOCATION

The Hub

Scottish Parliament

Justice 2 Committee

Tuesday 19 November 2002

(*Morning*)

[THE CONVENER *opened the meeting at 10:05*]

The Convener (Pauline McNeill): Good morning everyone and welcome to the 42nd meeting in 2002 of the Justice 2 Committee. This is our second time in this venue. I believe that one more meeting in the Hub is scheduled in our programme of events; for the rest, we shall meet in the chamber, which I am sure members will be pleased to note.

I have received apologies from Alasdair Morrison, who will not be with us this morning. I ask members to do the usual and switch off mobile phones and pagers.

Mental Health (Scotland) Bill

The Convener: The committee has been issued with briefing notes on part 1 of the Criminal Justice (Scotland) Bill, on mentally disordered offenders and disposals in cases in which the accused is found to be insane and how that relates to the Mental Health (Scotland) Bill. The notes are intended to inform members about the stage 2 consideration of that part of the bill. Members will recall that in our private briefing session we asked for a simplified note of the connections between the Mental Health (Scotland) Bill and the Criminal Justice (Scotland) Bill. We now have that and I hope that members have had the opportunity to look at it.

We now have to report to the Health and Community Care Committee on the Mental Health (Scotland) Bill and decide what comments we would like to make. If members have any comments to make at this stage, I invite them to do so.

Bill Aitken (Glasgow) (Con): The note that was supplied has been particularly useful in that it has cleared up some of the genuine confusion that reigned last week. Frankly, until then the appropriate documentation and explanations had not been all that clear. I am now in a reasonable position to make any determinations that are necessary in terms of the Criminal Justice (Scotland) Bill. I do not feel the need to raise the matter with the Health and Community Care Committee in any respect. It is approaching the Mental Health (Scotland) Bill from a different angle, which is quite proper given our different remits, and I am reasonably relaxed that we are now in a position to proceed.

Stewart Stevenson (Banff and Buchan) (SNP): Having read some more of the material that is available to me and having considered what was said last week, I am no longer concerned by some of the issues with which I came into last week's meeting. I am happy to pass on without further comment.

The Convener: If there are no further comments I shall take it that the committee is satisfied that all the issues have been examined and there is nothing to report to the Health and Community Care Committee on this subject. Is that agreed?

Members *indicated agreement*.

Criminal Justice (Scotland) Bill: Stage 2

The Convener: I welcome Dr Richard Simpson, the Deputy Minister for Justice, and his officials. This is our second meeting at stage 2 of the Criminal Justice (Scotland) Bill, so members will have the bill and marshalled list in front of them. I have a note of clarification. The marshalled list was republished this morning in view of Duncan Hamilton's amendments 26A and 26B. I understand that Duncan Hamilton wanted the two amendments to be voted on separately, so it was felt that the marshalled list should be republished to take account of that. I just want to ensure that members have the right marshalled list in front of them.

After section 41

The Convener: Amendment 71 is in my name and in a group on its own. I will speak to and move the amendment, then call other members to speak.

Amendment 71 is a probing amendment that resulted from an issue that was debated at Glasgow sheriff court. I thought that there should be discussions with the Executive at this point to ensure that it is aware of the continuing debate and to ensure that, if there is an opportunity to rectify the problem—if there is a problem—that can be done sooner rather than later in the bill.

The issue relates to orders and, in particular, to community service orders—there may be a gap in provision in orders other than community service orders. If an offender appears in the sheriff court and denies an allegation of failure to comply with the requirement of a community service order, can they competently be remanded in custody using common law powers?

I emphasise that I am speaking only about cases in which an offender denies that there has been a breach. If they agree that there has been a breach, there will be no difficulty, as provisions are set out for that. There is an issue about whether a sheriff who wishes to remand an offender can do so when a breach has been denied.

Sheriff Mitchell, who was the sheriff at Glasgow sheriff court, took the view that there is a gap in the statutory procedure in section 239 of the Criminal Procedure (Scotland) Act 1995 and that the statutory procedure should lay out what can and cannot be done.

The issue is whether the procedure that should apply in respect of an offender's appearance in court should be fully set out. There does not seem to be anything in the statute in that respect. If there is a gap in the provisions relating to community orders, there might also be a gap in other orders, such as probation orders and restriction of liberty orders. I want to ensure that the Executive is aware of the matter. If it is, there is an opportunity to do something at stage 3.

I move amendment 71.

Bill Aitken: Amendment 71 raises an interesting point of law. It is not clear from the existing legislation whether powers are available; if they are not, they should be. Unfortunately, there appears to be a fairly relaxed attitude towards compliance with community service orders—I have referred to that matter in the past and I know that the minister shares my concerns to some extent. If there is not an immediate sanction or the ability to remand in custody pending determination of such a breach, it is highly unlikely that the respect for such orders will be increased. I await what the minister has to say with considerable interest.

The Convener: As no other member wishes to speak, I call the minister.

The Deputy Minister for Justice (Dr Richard Simpson): Amendment 71 appears to be intended to give courts the power to remand an offender in custody, pending the date of a hearing to determine whether there has been a breach of a non-custodial order. The orders that would be affected by the amendment are probation orders, drug treatment and testing orders, supervised attendance orders, restriction of liberty orders and community service orders.

We see what the member is driving at and agree that it is desirable that the courts should have the power to remand offenders in such circumstances where appropriate. I understand that it has been common practice for a considerable number of years for courts to remand offenders in such situations. The legal powers of the court seem well established and we are not aware that there have been any rulings on the matter by the High Court or the appeal court. However, I am aware of concerns that a sheriff in Glasgow recently expressed about a case and understand that the sheriff principal is to give further consideration to the matter.

The facts of the case, of which I have been made aware, are, of course, sub judice, so the committee is not in a position to consider the particular circumstances of the case. It is not precluded from debating the legal issues the amendment raises, but I am concerned that its consideration of these issues at this stage could prejudice the outcome of that case and any similar ones.

In the circumstances, I propose—if the convener and the committee agree—that the matter be kept

under review. It should also be noted that, in the event that statutory provision is to be made, it ought to take account of the procedure to be followed on matters such as the maximum period of remand and the offender's right of appeal. In general, we are sympathetic and we understand. It may not be necessary, but we will keep the matter under review and come back at stage 3 if it seems appropriate to take those powers.

10:15

The amendment also deals with supervised attendance orders and, specifically, with how an offender who has failed to comply with the conditions of his or her order might be dealt with. That is in the new subsection (6C) proposed by amendment 71. The rest of what is proposed is similar to other non-custodial orders. Schedule 7 to the Criminal Procedure (Scotland) Act 1995 sets out the current maximum penalties available to courts in dealing with an order where the breach of a supervised attendance order has been proved. Section 42 of the Criminal Justice (Scotland) Bill would amend those maximum penalties.

We should be mindful that, when the courts impose a supervised attendance order, they are providing the offender with an opportunity to avoid custody. Should the offender fail to take advantage of that opportunity, it is only proper that the courts should be able to impose the appropriate penalties for failure to comply with a second order made by them. That is why the maximum periods of custody set out in schedule 7 will be greater than at the stage when the original supervised attendance order was imposed.

I have some sympathy for Pauline McNeill's intention but, if an order is not working, it should be possible for the court to make a variation on that order rather than simply move straight to custody. If Pauline McNeill is prepared to withdraw amendment 71, I propose that we keep the section on remand under review—because it is a power that courts should have—and that we propose powers at stage 3. I also propose that we come back to the SAO and its variation at stage 3.

Bill Aitken: I was interested in what you had to say, minister. I am somewhat intrigued as to why the sheriff principal has got involved. If the recent judgment of Sheriff Mitchell, who has said that he feels that the practice of the courts over the years has been wrong, is disputed, that should be dealt with by Lord Advocate's reference. Similarly, if someone had been remanded in custody and felt that they should appeal against that, that should have been done by means of bill of suspension. What is the sheriff principal's role?

Dr Simpson: I cannot answer that. I am advised simply that the sheriff principal is involved in discussions with the sheriffs and that we will keep the matter under review. I am sure that the other procedures would be being followed if they were appropriate, but we do not yet have an outcome for the situation. Once we get a clear outcome, we will take the powers if any dubiety is left.

Stewart Stevenson: I may have misunderstood the minister, in which case I apologise in advance, but he appeared to suggest that because the amendment arises from a member of the committee observing a specific case that is still in course and to which it is improper for us to refer in any detail, difficulties would be created even if we addressed the issue in law. I would like to pursue that by asking whether, if any case to which reference has been made—albeit without details being given—were still to be in course when we come to stage 3, that ruling would still apply.

I have heard the minister say that he is minded to come back at stage 3, and I very much support his doing that, but I want to be sure that I understand the situation. My understanding may be incomplete and incorrect, but he appeared to suggest that we should not be legislating in response to an on-going case. Is that the advice that the minister is giving us?

Dr Simpson: The advice that I am getting on the issue is that we must be very careful about the discussion that we undertake, as it could prejudice the outcome of similar cases. However, I do not believe that that should prevent us from ensuring that the bill is dealt with appropriately at stage 3. Even at stage 3 we would have to be careful and circumspect about how we discuss the matter.

Stewart Stevenson: So, for clarity, there is no particular issue with dealing with the proposal now—I am not proposing that we do—any more than there would be at stage 3. We would not be prejudicing a current case if we were to legislate on a matter that appears not to be covered by the present law, but which has arisen in that case, provided that we in no sense referred to, described, named or made any reference to the contents of that case, or even referred to what case it is. Is that the legal position?

Dr Simpson: Yes.

Stewart Stevenson: Thank you. That is helpful.

Mr Duncan Hamilton (Highlands and Islands) (SNP): On the point about remand, I wish to press the minister on the potential for returning at stage 3 with an appropriate amendment. He has said different things at different stages—even over the past couple of minutes. When he says that he will

"come back at stage 3 if it seems appropriate to take those powers",

does he mean that he will do so if the sheriff principal recommends that the powers in amendment 71 be included in the bill?

Is it the case that if, in the on-going case, there is not felt to be a problem in connection with the powers outlined in the amendment, the potential for a problem in the future is not removed? Could the minister be very precise about what he means when he says that he will keep the matter under review and when he says "if it seems appropriate"?

Dr Simpson: I will try to be a little more precise. If there is any dubiety about the absence of powers in respect of remand, we would—as the committee clearly wishes if it is supporting amendment 71—seek to take those powers. We would want absolute clarity about that before stage 3. If that clarity does not exist—in other words, if there is not a court decision that says that the situation is well established and that there are no further legal requirements—we will lodge an amendment at stage 3.

The Convener: The MacLean committee report draws to our attention the need to look at the existing statute. Are we content that a lay person, in considering the statute, could easily see that there is no provision for a proper proof hearing for the accused to argue his or her case that the alleged breach had not taken place? I think that, without even referring to the MacLean report, it is unclear from the existing statute what the procedure is.

I emphasise the point of amendment 71: it is about giving options. Presumably, if the Executive has a stated policy of alternatives to custody, it is right that the committee presses for something in that regard. If there is to be more use of supervised attendance orders, we want to ensure that the corresponding statute is absolutely correct.

Amendment 71 is a probing amendment, so I seek the committee's agreement to withdraw it.

Amendment 71, by agreement, withdrawn.

Section 42—Amendments in relation to certain non-custodial sentences

The Convener: Amendment 72 is in a group on its own.

Bill Aitken: Amendment 72 deals with the vexed question of unpaid fines. The minister and I have crossed swords on this in the past, particularly when I raised with him the 25,961 means warrants lying unexecuted in the Strathclyde police area.

Too many fines are not being paid. Not only does that result in a loss of money to the Exchequer, it results in people going to prison unnecessarily. In a response to me, the minister once highlighted the fact that there were some 7,000 prison admissions last year in respect of unpaid fines. The period that persons spend in prison for non-payment can, in some cases, be as little as two days. When one bears in mind the fact that the custodial alternative to a £200 fine is seven days in prison, which is reduced on remission to three days, which can result in the prisoner being released after two days—given the administrative arrangements in prisons—it is hardly surprising that many people do not see the necessity to part with money rather than serve the custodial alternative.

It is clearly socially undesirable for people to go to prison if they need not do so. If the offender had committed a crime or an offence that had merited a custodial sentence, the court would have imposed such a sentence. It is clear from the fact that it imposed a fine that the court did not consider such a measure to be appropriate.

I regret to say that the fact of the matter is that many people have greater priorities than the paying of fines. Sometimes those priorities are genuine and pressing. People who have lost their job subsequent to the imposition of the fine and who are short of money might feel that their priority is to pay their fuel bill—to a greater extent, that is understandable. Others, however, regard drinking, smoking, gambling and the use of illicit substances as a greater priority than paying fines that are imposed by the courts. I have lodged amendment 72 to enable us to deal with those sorts of people.

As members will be aware, if a fine is imposed on someone who is of limited means, the court will order that the fine be paid in instalments. It is not uncommon in cases in which the accused's sole income is based on benefit for that to be in instalments of £3 per week. However, it is regrettable that that money is not forthcoming in many, many cases. If that happens, the accused will be summonsed to attend a means inquiry court, but the summons is usually ignored, which results in a means warrant being issued.

I lodged amendment 72 to seek to make fines count—to make the penalty that is imposed by the courts bite. At the same time, I am seeking to stop people going to jail unnecessarily. I was interested to hear in the Queen's speech last week that the United Kingdom Government is seeking to introduce into English jurisdiction the measures that I am proposing today. It is arguable that the UK Government already has those powers under existing law, as English law gives scope to obtain fines by civil diligence. I understand that that is frequently done.

I am seeking to rescue the minister from a potentially difficult political position. I do not wish to see him singing from a different hymn sheet from the Home Secretary down south. It is clear that the English recognise the problem. In fairness

to the minister, I believe that he, too, recognises it. I know that he is far from happy about the number of people who go to jail for unpaid fines. I share his unhappiness.

The proposal in amendment 72 would give the minister the ideal opportunity to avoid dispute with England and to ease the problem of overcrowded prisons.

I move amendment 72.

Stewart Stevenson: I have to say to Bill Aitken that lifebelts are in short supply after the recent disastrous flooding in the north-east of Scotland. However, I do not think that Bill Aitken was fashioning a lifebelt for the minister so much as a noose for those who are most affected by poverty. Although the teetotal, non-smoking, non-betting Bill Aitken might feel that those things are not essentials of life—I see that he disagrees with me. So, you are allowed to drink, smoke and bet, Bill.

The point of benefits is that they are in place to meet the needs of people. I will vigorously defend any amendment that seeks to extend the scope of recovery to benefits, as will my colleague Duncan Hamilton. I suspect that others will also resist it.

Dr Simpson: I lean more towards the noose metaphor than the lifebelt.

The Executive supports measures to enhance the effectiveness of fine collection and enforcement. Bill Aitken was quite right to say that I have a personal dismay, which I think is shared by the Executive, about the number of people who go to prison on fine default. I am thinking of those who end up in prison for one night because of the particular circumstances of their presenting on a Thursday morning. That means that they come out on a Friday morning having expunged their fine of up to £200—but, by that point, the process has cost society £400 to £500. That does not seem to serve the interests of the offender or of the community. I want to put on record that we will seek to address that.

We will use the 1995 act to do two things. We will introduce pilots next year. With the help of the powers in the Criminal Justice (Scotland) Bill, we will also allow supervised attendance orders to be a first disposal for those who cannot pay. The courts will be required to determine those who cannot pay. In that respect, the bill will resemble the Debt Arrangement and Attachment (Scotland) Bill. Supervised attendance orders, rather than custodial sentences, will become a first required disposal for those who can pay but fail to pay. We will assess the progression of the pilots.

10:30

At present, there are some 7,000 fine defaulters in Scottish prisons. The number of women defaulters is very high—600 out of 2,200 receptions relate to fine default. Although we want to address the problem for everyone, we are particularly concerned to address the problem for women.

There are two powerful reasons why we cannot accept the lifebelt—"noose" might be a more appropriate description—that Bill Aitken has proffered. First, we believe that, because amendment 72 deals with reserved matters, agreement to it would render the bill liable to challenge. I will explain that.

At present, under the Fines (Deductions from Income Support) Regulations 2002, Scottish courts may apply to the Secretary of State for Work and Pensions for a deduction from benefit. An adjudication officer, who will have regard to the financial situation of the person concerned and to any other deductions that are being made—Stewart Stevenson made a point about that—will consider such an application. Therefore, the subject matter of amendment 72 is explicitly reserved under paragraph F of schedule 5 to the Scotland Act 1998, which deals with social security. The illustrations of reserved matters in that paragraph include

"deductions from benefits for the purpose of meeting an individual's debts".

Secondly, we want to adopt a coherent and fully considered approach to fine enforcement. Sheriff Principal John McInnes chairs an independent review committee that has a wide remit to make recommendations to improve the efficiency and effectiveness of the summary justice system. The imposition and enforcement of financial penalties falls within the remit of that committee and we understand that the committee will make recommendations in that area. The committee's report is due in the summer of 2003.

In light of the two reasons that I have outlined, I invite Bill Aitken to withdraw amendment 72.

The Convener: I want to clarify why the subject of amendment 72 is a reserved matter.

Dr Simpson: It is a reserved matter because it involves deductions from social security benefits. Unless there is some other process that would be within our administrative remit, the proposed power would be a reserved matter. The list of reserved matters in schedule 5 to the Scotland Act 1998 includes deductions from benefits.

The Convener: So the deduction from benefit element is what is reserved, not the social security aspect.

Dr Simpson: Yes. Amendment 72 would remove the adjudication officer from the process, which would not be a good thing. We should have the adjudication officer to help the court decide whether it would be appropriate to deduct an

amount from an individual's income. The Department for Work and Pensions, not the Scottish Administration, appoints the adjudication officer. As I understand it, the removal of the adjudication officer is where the problem lies, because we do not have the power to do that.

The Convener: I will not support amendment 72, but I want to be clear why the Executive considers it deals with a reserved matter. Does that mean that no court can deduct benefit? I understand that courts have the power to deduct benefit.

Dr Simpson: It does not mean that; it means that we cannot dispense with the person whom the DWP appoints to adjudicate on the matter. That officer is appointed under reserved powers, not by the Scottish Administration. In this instance, it is that part of the process that cannot be dealt with. However, that certainly does not mean that a Scottish court cannot order deduction from benefit.

The Convener: I am sure that you have asked the same questions, minister. It is the arrestment of benefits that is within the competence of the Parliament, not the benefits. The power of arrestment is the important aspect.

Dr Simpson: Yes, but amendment 72 would dismiss the adjudication officer's role. That may be possible, but it could interfere with—

The Convener: The position of the adjudication officer is specifically protected in the Scotland Act 1998.

Dr Simpson: It is not specifically protected. However, the adjudication officer is appointed by the DWP and not by the Scottish Administration. Although the Parliament might be able to dispense with the adjudication officer's powers, that could lead to complications under the Scotland Act 1998.

Mr Hamilton: You said that you would return to the issue in a more considered way and look at the spectrum of measures to get round the problem that Bill Aitken has identified. Is this an area in which you would seek to gain the power that you say you do not have at the moment?

Dr Simpson: Not specifically. I shall seek to have systems of diligence and debt collection in place, including the enforcement of fines, to establish a more coherent approach. If there are powers that we can use that do not require an amendment to the Scotland Act 1998, we will use them. However, this is not the time to examine the issue in a one-off way. We should examine it as part of our overall approach to fine collection. The answer to your question is no, we are not seeking an amendment to the Scotland Act 1998. I presume that that is what you were suggesting.

Mr Hamilton: You say that with a smile. However, I presume that the Scotland Act 1998 will be amended at some stage, in relation to various powers. Irrespective of the constitutional argument, part of the reason for amending the act—which Donald Dewar and everybody else accepted would happen—is that various areas require to be tidied up and simplified to make it more beneficial for all concerned. I was simply asking whether you would, in approaching the issue in a wide-ranging and considered way, regard that as an option.

The Convener: I have to stop you there, Duncan. The committee should not be examining what the minister intends to do in that regard. However, it would be appropriate for us to press the minister on the issue before us, which is whether the amendment deals with a reserved matter.

Dr Simpson: Perhaps I can clarify the matter. The power to deduct from benefits is a reserved power at the moment—the process is administered by a reserved power. Therefore, although we could seek to take the power as a Scottish power, we could not use it as it is used presently. We would have to establish a separate power that arrested the money as an income rather than as a benefit. Moreover, the arrestment could not be made at source, as we would be required to order a Westminster department to act on behalf of the Scottish Executive, which is not possible.

The Convener: An arrestment would be different from a deduction from benefit, which a court would have the power to order.

Dr Simpson: Absolutely. An arrestment can be made only by the department that provides the benefit, which is a Westminster department. I do not know whether that makes the matter clearer.

Bill Aitken: There were some interesting exchanges in that debate. Stewart Stevenson attributed to me a degree of virtue that I do not possess, although I do not smoke. If the logic of his arguments were to be pursued, anyone who was on benefits would not be fined at all. It is important to stress that, when a court imposes a fine, it takes into consideration the means of the accused person. After doing so, it fixes appropriately the instalments by which the fine may be paid.

I am not a believer in imposing big fines on someone who is on benefits. Indeed, the High Court has taken the view that an individual should not have imposed on them a fine that they could not be reasonably expected to repay over the period of a year or so. That is fairly sensible. However, from experience I know that many people who have fines imposed on them will not

pay. Some people cannot pay and, of course, the appropriate means inquiry court might, after consideration, reduce the instalment or, as I have done on occasion, remit a fine in its entirety if the hardship that the fine would cause would be disproportionate to the offence committed.

Stewart Stevenson has failed to recognise the safeguards in the bill. Moreover, if we followed his logic, no one whose sole income was Government benefit would be fined at all, which would be ludicrous.

I know that the minister is concerned about the number of people who go to prison and I note what he said about the number of women who go to prison because of non-payment of fines. The reason for that relates to the number of women who are fined for prostitution and who regard doing the time as a way out. Perhaps we should examine those cases to see whether there is a constructive way in which we can prevent such people from going to jail.

The technical aspects of the argument have been interesting. The minister and I clearly disagree about whether it would be competent to ask what used to be known as the Benefits Agency, as a UK agency, to deduct the fines at source. My view is that it might be competent. However, many of the things that the minister said have raised doubts in my mind and I believe that the matter is worthy of further research. I therefore seek to withdraw my amendment, with the committee's approval.

Amendment 72, by agreement, withdrawn.

Section 42 agreed to.

Section 1—Risk assessment and order for lifelong restriction

The Convener: Amendment 88 is grouped with amendment 89.

Mr Hamilton: Amendment 88 deals with the three offences that would trigger the risk assessment order, the third of which is an offence that endangers life. I am worried that offences would be caught that should not be—to wit, negligent acts. As the bill stands, an act of negligence, perhaps involving health and safety, could be caught even though that would be quite inappropriate and I am sure is not the Executive's intention.

After investigating the matter slightly, I discovered that there is a question about what might happen in relation to culpable homicide. McCall, Smith and Sheldon's "Scots Criminal Law" says:

"The *mens rea* of involuntary culpable homicide in this context is negligence of a particularly high degree."

A range of examples is given, one of which might be of interest to the committee:

"Practical jokes or pranks which go wrong may amount to culpable homicide if the victim is killed and if the conduct of the accused is considered to be so risky as to amount to gross negligence."

That demonstrates that offences involving negligence might be included in the scope of the bill, which I am sure is not the intention of the Executive. By inserting the words "committed wilfully or recklessly" after the word "offence", amendment 88 would avoid that confusion.

The principle behind amendment 89 will be well known to members, because it builds on the committee's stage 1 report, as do many of the amendments that I am proposing today. It is an attempt to give discretion to the court as to whether it should apply the risk assessment order. Paragraph 37 of the report says:

"the Committee is concerned that section 210B(6) precludes appeal against a risk assessment order and are not clear whether this also extends to any right to challenge the motion of the prosecutor. **We recommend that the defence should have a clear right at this stage in the procedure to challenge any prosecution motion for a risk assessment order.**"

Amendment 89 would follow that recommendation and would allow the accused to have representations made on his or her behalf.

Bill Aitken: Duncan Hamilton has a point. The wording in the bill could include health and safety breaches and the Scottish equivalent of corporate manslaughter. I do not think that that could possibly have been the Executive's intention. Clearly, the Executive intends—we would all support it—that the orders may be made where mens rea or dole are present, but the wording goes much wider than that. For example,

"an offence which endangers life"

could be a motoring offence, where the culpability was such that a custodial sentence might not be imposed. The phrase could also apply to issues involving health and safety at work, which would be quite wrong. The wording clearly has to be amended.

I agree that amendment 89 reflects what our stage 1 report says.

10:45

The Convener: I support the spirit behind amendment 89. We have drawn to the Executive's attention our general agreement with what it is trying to achieve in part 1 of the bill, which is protection of the public at large. However, as the minister will be aware, we felt that it was our duty in the stage 1 report to point out issues that might fail the human rights test, for example, or where the rights of the accused needed to be properly balanced.

Amendment 89 addresses an issue that we raised in our stage 1 report. It would ensure that, when a risk assessment is made at the beginning of the process to impose an order for lifelong restriction, the right balance is struck and the accused has a right to reply.

Dr Simpson: Amendments 88 and 89 seek to amend new section 210B of the Criminal Procedure (Scotland) Act 1995 as inserted by section 1 of the bill. Amendment 88 seeks to qualify the definition in new section 210B of

"an offence which endangers life"

so that the offence is one that is "committed wilfully or recklessly". With the committee's permission, I will explain why we do not think that that qualification is required.

The range of offences in new section 210B is entirely consistent with the recommendation of the MacLean committee, which stated that the new order for lifelong restriction sentence should be available where the offender is convicted of a violent, sexual or other offence that is closely related to, or reflects the offender's propensity for, violent, sexual or life-endangering offending. When we consider the range of offences, it is important to bear in mind the fact that it is not the conviction of one or more of those offences that of itself triggers the risk assessment process. The offender first must be convicted of such an offence, but before the court can make a risk assessment order, or an interim hospital order under new section 210D, it must be satisfied that the offender may—I stress that word—meet the risk criteria. If the court is not satisfied that the risk criteria may be met, it will proceed to sentence the offender using any other appropriate disposal available to it for the violent, sexual or life-endangering offence. Therefore, it is the combination of the offence and the risk criteria—which the committee quite rightly drew attention to and asked to be examined carefully—that is important, not the single issue of the offence.

As members have indicated, the committee recognised in its stage 1 report that the range of offences that could potentially qualify an offender for a risk assessment is broad. It was accepted that it may be appropriate to have such a relatively broad entry point into the risk assessment process so long as the risk assessment process is as robust as possible. I stress again that the Executive is confident that the provisions in part 1 of the bill provide such a robust process.

On the point of amendment 88, as the MacLean report indicated, the primary concern is the risk that the offender may pose to the public, rather than the specific offence of which they have been convicted. The Executive's intention has never been that all offenders with whom the High Court deals will be the subject of a risk assessment order. Similarly, the process is designed to ensure that not all those who get a risk assessment order will meet the criteria for an order for lifelong restriction. That is exactly as it should be.

The requirement is that the offender must first be convicted of a specified offence, which would include an offence that endangers life wilfully or recklessly. The court must then consider, before making a risk assessment order, whether the offender may meet the risk criteria.

I will deal with the non-wilful and reckless example that Duncan Hamilton gave of a practical joke. If someone endangered life by practical joking and made a habit of it, it may be appropriate for a risk assessment to be undertaken. However—in response to Bill Aitken's point—a risk assessment would certainly not arise out of a health and safety issue. That just would not occur. Both those points can be satisfied. I stress again that both requirements—in relation to the offence and the risk criteria—must be satisfied before the court can make a risk assessment order.

Amendment 89 would do two things. First, it seeks to give the court discretion as to whether to make an order for a risk assessment even where it considers that the risk criteria may be met. Secondly, it seeks to give the offender the right to make representations against a motion by the Crown for a risk assessment order. The second point was dealt with in the Executive's response to the committee's stage 1 report. During the stage 1 debate, the Deputy First Minister said:

"I also confirm that the defence has a right to challenge any motion made by the Crown during criminal proceedings and that that will include in the future any motion made by the Crown for a risk assessment order. There is therefore no need to make express provision for that in the bill."—[*Official Report*, 18 September 2002; c 13794.]

I hope that that deals with that aspect of amendment 89.

The process that the first aspect of amendment 89 seeks to alter is a direct reflection of the arrangements that the MacLean report envisaged would support the OLR sentence. The risk assessment order is therefore part of the process from conviction for a relevant offence to the imposition of an OLR. Throughout the stages of the process, checks require to be made and protection is built in so that only the highest-risk serious violent and sexual offenders are sentenced to what is a lifetime sentence.

Where the court considers that the statutory risk criteria may be met and following a motion from the Crown—taking account of any representations from the defence—or of its own accord, the court shall make a risk assessment order. Once the order is made, the offender will be subject to a

formal risk assessment carried out in accordance with statutory processes. The court will consider the risk assessment report that is prepared under the order, along with other relevant material available to it, and will conclude whether the offender is high risk when measured against the statutory criteria for the OLR. If the offender is considered high risk against those criteria, the court must sentence that offender to an OLR.

The effect of amendment 89 would be that, even if the court were satisfied that the risk criteria may be met, it would not be required to make a risk assessment order. If the court did not make a risk assessment order, the rest of the process would fall and a potentially high-risk offender could not be given an OLR. The objective of enhancing the protection of the public from such dangerous offenders would be lost.

The committee may wish to note that, when consulted on the proposals, the judiciary raised no objections to the mandatory requirements of the RAO provisions. Of equal importance is the fact that we have ensured that the rights of the offender are safeguarded in the new provisions.

I am sorry that I have gone on at such length, but the committee was clearly concerned about that point in its stage 1 report. In light of what I have said, I ask Duncan Hamilton to withdraw amendment 88.

The Convener: I have a point of clarification. From what you have said, I do not think that there is any difference of opinion about the procedure in court in relation to the accused or his solicitor being allowed an opportunity to speak on a motion for a risk assessment. You say that there is no need for an express provision. However, in relation to my amendment 71, there was no express provision in the 1995 act and we found ourselves having to examine whether we should introduce one. I lay that for consideration. Do you think that the debate in Parliament is enough to ensure that we do not need to include any specific provision? Before you answer that, I ask Duncan Hamilton to wind up.

Mr Hamilton: Part of what the minister says is convincing. On amendment 88, he picked up on the example of potential negligence and, in particular, practical jokes. He said that, if someone had a history of practical joking, it might be appropriate for the offence to be caught by the provision. As it stands, the provision might mean that someone who committed a practical joke that went wrong and who was then subject to a range of allegations—regardless of whether the person's behaviour had resulted in prosecution or acquittal—would be under severe suspicion. I am not sure whether that is much of a safeguard.

The minister said that the provisions should be read in conjunction with the risk criteria. I take that point, although we will come to a range of amendments on those criteria later. He appears to be saying that, irrespective of what amendments are agreed to, proposed new section 210E will include paragraph (a), which states of the convicted person:

> "there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public".

If no risk assessment order can be made without that criterion being satisfied, I am happy to withdraw my amendment 88. The minister's point about negligence did not convince me one iota, but I will not press amendment 88.

Amendment 89 concerns a position in which someone cannot appeal against an order. It tries to build in the maximum safeguards. I agree with the convener. The minister says that there is no need to make it an express provision for the court to hear representations from the convicted person, but I suspect that there is every need. The minister says that to agree to the amendment would be to remove the requirement on the court to make an OLR. That is true, but it would mean that the court had every discretion to impose an order if it wished to and thought that that was appropriate considering all the circumstances. For the minister to suggest that the amendment would mean that we were in imminent danger of seeing high-risk offenders of a violent or sexual nature let out is wrong. The amendment would catch them all, as well as building in safeguards in relation to the court's discretion. I am still partially tempted to press amendment 89.

Dr Simpson: I want to clarify two points. First, unproven allegations can be considered not in relation to the entry to the process, but only once the process has begun.

Mr Hamilton: My point was that if that process were kick-started by an act of negligence, the process would be under way. Is that not true?

Dr Simpson: No, you are mistaken. Once the risk assessment order is made, unproven allegations can be taken into account in examining the risk. However, such unproven allegations cannot be taken into account in making the order for a risk assessment to be undertaken. I hope that that clarifies that point.

Mr Hamilton: I understand.

Dr Simpson: As for my second point, I understand what Duncan Hamilton is saying with amendment 89. However, as the risk criteria are statutory, the court would be prejudging the issue if it did not make the order to have an assessment done. The amendment would, by substituting the word "shall" with the word "may", allow the court to ignore the risk criteria if it wanted to, which would give it an inappropriate discretionary power. If the

criteria may be met, it is in the public interest for the court to be required to proceed to a risk assessment. The assessment may determine that there is not a high risk, in which case the court could not impose an order for lifelong restriction. However, to allow the court to decide, without having the full facts in front of it, to ignore the statutory criteria would seriously damage part 1 of the bill. I urge Duncan Hamilton not to press the amendment.

The Convener: I am sympathetic to some of what Duncan Hamilton has said. Amendment 89 would do two things and I am concerned about the words

"after hearing representations from the convicted person".

I think that you agree with the committee on the issue, but that you do not think that an express provision is necessary.

Dr Simpson: We believe that the bill covers that issue. However, my officials and I will examine that to ensure that there is no omission that could be subsequently challenged.

Mr Hamilton: Before I make a decision on whether to press amendment 89, I need to hear from the minister why he thinks that giving the courts discretion would lead to people being missed in the system, if you like. I do not understand that point. I fail to see why, on the basis of the evidence before the court and the nature of the offence that had been committed, the court would be any less able to decide on an RAO than it would if it were under a compulsion.

11:00

Dr Simpson: I come back to the convener's point. It is our understanding that, if a motion is made for an RAO, the defence has an absolute right in law to challenge it. I am advised that that is a fact. To make that explicit in the bill could create doubt about whether that course of action was available in other circumstances. The bill already provides for it. That is our understanding of the position and I am happy for that to be put on the record.

The Convener: You are saying that the rules of court would allow a motion against an RAO.

Dr Simpson: If a motion for an RAO were laid, the defence would have an automatic right to challenge it.

Mr Hamilton: That raises the question why the Executive did not give the committee that evidence at stage 1. If that point had been made, I presume that we would not have made our recommendation.

Dr Simpson: We gave evidence on that point during the stage 1 debate.

Mr Hamilton: You mean the stage 1 debate in the Parliament.

Dr Simpson: Yes.

The Convener: We are a bit clearer now. I ask Duncan Hamilton whether he wants to move amendment 89.

Mr Hamilton: I will not move amendment 89, but I would like the minister to read the *Official Report* of today's debate and think carefully about whether there is any reason to revisit the issue.

Amendment 88, by agreement, withdrawn.

Amendment 89 not moved.

The Convener: Amendment 90 is grouped with amendments 91 and 92.

Mr Hamilton: Amendment 90 seeks to get back to the vexed question whether it is appropriate to take allegations into consideration. The committee will remember that this issue was discussed at great length in the stage 1 report. I will perhaps refresh memories by reading from the report. The key reference points are paragraphs 46 and 47, which say:

"46. The Scottish Consortium on Crime and Criminal Justice were concerned that an assessor should not be able to attend to alleged conduct for which a person had been tried and acquitted. They also noted that the accuracy of records of previous convictions is regularly questioned in court and were therefore concerned about how likely it was that softer unproven information would be accurate. The Parole Board had similar concerns about the accuracy of past convictions' information and the human rights implications of relying on allegations.

47. The Faculty of Advocates noted that allegations 'may involve some [matters] that are accepted by the accused person as matters of fact. It may involve others that are not accepted and that could be said to be more or less gossip or possibly even malicious and unfounded.'"

That is the basis for amendment 90, which would simply remove the possibility of using allegations. A letter from the Minister for Justice, Mr Jim Wallace, dated October 2002, is relevant in this regard, but it did not clarify for me points that the committee raised in the report. For example, the minister repeated in the letter what he had already told us, which is that the detail would be a matter for the RMA to resolve and that to a certain extent we had to trust that no undue weight would be given to allegations. That does not particularly give me any solace.

The minister also stated that this will not be the first time that such allegations will have been used and that they are often used by the police for information gathering. He stated that the guidelines that are currently put forward by the Association of Chief Police Officers in Scotland

"state clearly that the information supplied should be based on fact and be capable of proof."

I would be interested to know precisely what that means. If information is fact or capable of proof, it is quite separate from an allegation. Is it the understanding that unless the information is a proven fact it should not be put forward? I would welcome clarification of that point. The amendment goes back to our stage 1 report. It reflects the serious concerns that we heard from four or five witnesses and asks the Executive to clarify further where it stands on the issue.

I move amendment 90.

Bill Aitken: The issue that surrounds the matter is whether the presumption of innocence should apply to someone who has, of course, already been convicted.

I had serious concerns about the matter at stage 1. The orders are rightly fairly draconian by nature. I have no difficulty with that, but I want to be satisfied that the basis on which orders are made is in accordance with the evidential rules that normally apply.

A concern is that malicious or spurious allegations may be made; they may be tittle-tattle and gossip. It is appropriate for the police in the course of an inquiry, in line with the principle of information gathering, to have regard to such allegations. That is fair enough as it might lead them to information and facts that are much firmer than the original gossip. An order for lifelong restriction could be made under this section on the basis of flimsy evidence that might be unfair and could be challengeable under article 6 of the European convention on human rights.

Mr Hamilton: It has struck me that I only spoke to and moved amendment 90. Did the convener want me to speak to amendments 91 and 92 at the same time?

The Convener: That is what I asked you to do.

Mr Hamilton: I beg your pardon. That is my mistake.

The Convener: I am willing to let you back in to speak on those amendments if no other member wants to speak.

Mr Hamilton: I apologise. Amendment 91 is an attempt to reflect some of the concerns raised at stage 1 about the requirement in the bill that a single assessor be responsible for bringing forward the report. Evidence that we received at stage 1 from the British Psychological Society and the Association of Directors of Social Work highlighted the need for a multidisciplinary model of assessment. The reason for lodging amendment 91 is to enable us to be clear that that is the minister's understanding of what will happen and that any guidelines that are introduced will reflect that. If the minister can say that today, I will not feel the need to press amendment 91.

Amendment 92 is an alternative to amendment 90. If amendment 90 were passed, it would mean that allegations would not be relevant considerations for the report. If amendment 90 were not passed, amendment 92 would come into play. It says that if those allegations were to be taken into consideration, they would be listed, any additional evidence to support the allegation would be listed and any weight that was given to the allegation would be clearly enunciated. That is precisely the purpose of what the committee tried to achieve at stage 1. Amendments 90 and 92 are alternatives.

The Convener: As the minister knows, this is a very important matter for the committee. We have spent quite a lot of time on this aspect of the bill. It is important that we debate the matter and I hope that the Parliament will debate the matter at stage 3. A trend is appearing in legislation—this is not the first time that it has happened—that we will rely on non-conviction information to apply sentences or restrictions.

As the minister knows, part V of the Police Act 1997 represents probably the first and certainly the most notable occasion in which, for good reason, the use of non-conviction information has been allowed. However, it would be worth examining how people have been treated under part V of the 1997 act. It raises a test of human rights not simply in relation to the European convention on human rights but in relation to the presumption of innocence—even as proven in a court of law—which is a principle that we would all sign up to.

If we depart from that principle, we must be absolutely clear and transparent about the reasons for doing so. Our stage 1 report highlights our view that if we go down that road, everything should be made absolutely clear. Although we realise that if the Executive's figures are correct, only a small number of people will be caught out by the order for lifelong restriction, we want to ensure that there is some consistency of approach in every case. At the moment, I am not clear about how we can determine such a consistency of approach without having some mechanism. If we are to attach weight to non-conviction information, it is legitimate to ask what weight will be given in an assessment to such information or to allegations.

As a result, this is one of the most important of the many debates that we will have on the bill. I know that other disagreements or debates will come up; however, I think that we can work with the Executive on this issue, because its views do not differ vastly from our own. We are trying to take a belt-and-braces approach because, given that we are at stage 2, we feel a heavy duty when considering this part of the bill. When even Bill

Aitken is worried that the provision is draconian, I feel a bit nervous. The committee has the greatest of intentions, and I have outlined its position. As a result, I welcome Duncan Hamilton's amendments.

Dr Simpson: I do not want to reiterate how the process will work, because the committee is fairly clear on that. However, I should stress that we are talking about an individual who has been convicted and has met the statutory criteria for a risk assessment order to be sought. The provision allows the assessor to take into account all the available information. That said, it is inappropriate to suggest that such information would include tittle-tattle, because it would be provided by the police in the same way as part V of the Police Act 1997 allows information to be used in an extended Scottish Criminal Record Office check.

As a result, amendments 90, 91 and 92 are essentially about the use of non-conviction information by the risk assessor when preparing the risk assessment report. The risk management authority will lay out the way in which the report is prepared, and its main consideration will be the central cardinal offence for which a risk assessment order is being sought. Under section 210G, any previous conviction with a sexual, violent or life-endangering element will come with a sentencer's note outlining the circumstances surrounding the conviction. We expect that, as time goes by, the information that will be made available from previous convictions will be of much better quality. I think that that addresses Duncan Hamilton's pertinent point that the Parole Board for Scotland and the prisons complain that they currently receive inadequate information with which to determine a parole decision or to manage a prisoner. We are taking care of that matter.

The bill gives effect to MacLean recommendation 15 that non-conviction information can be used in the risk assessment report. I should add that the other important element of the report is the psychological assessment. If you like, non-conviction information merely creates an holistic approach to ensure that we have a true picture.

Amendment 90 seeks to exclude such information being taken into account by the risk assessor for the purposes of the risk assessment report. Amendment 92 then seeks to reinstate the terms and conditions under which that information could be included.

Amendment 91 inserts two new statutory requirements. First, it requires the risk management authority to produce and lay before the Parliament guidance about the factors to be covered in the risk assessment report. Secondly, it requires that, in preparing an RAR, a risk assessor is to have regard to the guidance produced under the first of those requirements. As a result, it appears therefore that the amendments seek to make specific provision for the issues raised in the committee's stage 1 report.

11:15

The committee has been understandably and rightly cautious about the use of non-conviction information as, although it is not unprecedented, it is uncommon. However, for public protection, non-conviction information is released as part of the criminal record disclosure arrangements provided under part V of the 1997 act. During its evidence sessions, the committee has, therefore, sought the views of others on the proposal and has tested the Executive about it several times. In its stage 1 report, the committee noted that although such information could play a valuable part in the risk assessment process, it required more detail about the quality of the information that would be made available and how the information would be used. The committee also said that to allow the offender to challenge the information, the weight put on it must be transparent.

In responding to the committee at stage 1, the Deputy First Minister assured members that the information would come only from reliable sources such as the police force, which maintains force intelligence systems using the information.

As with the entire risk assessment process, the information will be governed by detailed guidance produced by the RMA, and offenders can challenge every aspect of the risk assessment report. The Deputy First Minister also stressed that the information would be only one factor in a wide range of relevant risk assessment issues.

The practical example that the Deputy First Minister promised of how the information would be accessed and used was sent to the convener in a letter dated 29 October 2002. The letter confirmed that, as the bill provides, the risk assessment would only be carried out by an accredited risk assessor, following procedures accredited by the RMA, which will include guidance on the use of non-conviction information. The letter also explained that it would be for the RMA to establish access arrangements with the holders of non-conviction information, such as the police and the Crown Office.

It has always been clear that the new sentence of the order for lifelong restriction and the reporting of the risk assessment process will not be activated until the risk management agency is up and running and all standards, guidelines and agreements are drafted and in place. As we have also made clear, and provide for in the bill, the offender can bring forward his or her risk assessment and can challenge all, or any aspect, of the court ordered risk assessment report.

The effect of amendments 91 and 92 is achieved already by section 5 of the bill, which requires the risk management authority to produce, by means of guidelines, a common framework, including standards, within which those involved in the assessment and management of risk are to operate. Those standards will be published.

Section 5 provides also that those involved in the assessment and minimisation of risk must have regard to the risk management authority's guidelines and standards, and, of course, the practitioners involved in those fields must be accredited before they can undertake any of those functions. That will ensure that the guidance on the preparation, scope and processes supporting the production of risk assessment reports can be as comprehensive as is required. It means also that the guidance can be revised as required and not restricted to the aspects that would be specified by amendments 91 and 92.

There is no specific requirement in the bill for the risk management authority to lay its guidelines before Parliament. We consider that the statutory requirements that section 5 places on the risk management authority form the appropriate level of control.

As I have stressed, the guidelines will be prepared in consultation with a wide variety of interests that are involved in risk assessment and management, which include the medical professions, the Scottish Prison Service, local authorities and the police. If the guidelines and standards satisfy those practitioners, there seems little to be gained by laying such working documents before the Scottish Parliament. I ask Duncan Hamilton to withdraw amendment 90 and not to move amendments 91 and 92.

Stewart Stevenson: Given that the deputy minister has urged Mr Hamilton not to move amendment 92, will he assure us that the specifics that would be required under that amendment—to list each allegation, to lay out additional evidence and to say what weight has been given to the allegation—will form part of the published standards? Will he give that commitment?

Dr Simpson: Yes.

The Convener: That is helpful. The minister listed a range of people who will be consulted on the guidelines. Has he considered whether the guidelines should come before Parliament or a parliamentary committee?

Dr Simpson: We do not think that requiring the guidelines to be laid before Parliament is appropriate, partly because of the nature and structure of the risk management authority, which will be an independent agency. If, when the RMA has published its guidelines and standards, the committee feels that they are not appropriate or wishes to question them, it will have every right to call the authority or its chief executive. The committee has done so on other occasions with other agencies. The committee will have the opportunity to question the RMA, but it is not our intention that the guidelines should be laid before the Parliament.

The Convener: Your comments are helpful and you have put all the provisions together. I am a bit uncomfortable about the fact that, when the bill is passed, the risk management authority will determine the guidelines, which will not come back to the committee unless we request that. You said that section 5 makes it clear that certain people must have regard to the guidelines. Will you clarify why the bill states "have regard to" rather than placing a duty on those people?

Dr Simpson: Our understanding is that the wording in section 5 places a duty on those who have functions in relation to the assessment and minimisation of risk to follow the guidelines and standards in the exercise of those functions. The RMA will have the right to say that a risk management plan that has been prepared, for example, by a local authority, is unsatisfactory simply because it does not follow the guidelines and standards. The RMA will judge whether the guidelines and standards are followed; if they have not been followed, the RMA will have a right—indeed a duty—to intervene.

The Convener: Section 5 states only that those people will have to "have regard to" the RMA guidelines.

Dr Simpson: That means that there is a duty.

The Convener: I am not sure whether I agree.

Mr Hamilton: Will the minister consider changing the wording in section 5 so that it states, "is required to have regard to such guidelines"? That might toughen up the section a little. I agree 100 per cent with the convener that, if there is a duty, the bill should say so.

Dr Simpson: We will check again with the draftsmen, but our understanding is that, in legal terms, the wording means that there is a duty. We do not have to require a duty, because a duty is already a duty. However, I shall ensure that that is checked again.

Mr Hamilton: I appreciate that. I also appreciate the minister's comments on the amendments before us.

The minister has done enough to convince me that I should not move amendment 91. However, the recommendation in the MacLean report for a multidisciplinary assessment was repeated in the committee's stage 1 report. The minister said that all the relevant agencies will have an opportunity

to feed into the formation of the guidelines. However, I am not sure that that is the same as feeding into a multidisciplinary assessment in each case. If he can clarify that, I shall be happy not to move amendment 91.

In relation to amendment 92, I acknowledge what the minister says about some of the allegations being covered by the same guidelines that are used by ACPOS. However, the letter from the Minister for Justice to the convener did not say that. It said that, under current regulations, the ACPOS guidelines require an allegation to be "based on fact" and more than simply malicious gossip. We are not told that that will be part of the new authority's guidelines. The bill says that an allegation may be useful as a tool, but it does not require an allegation to meet the same standard of proof. I am still slightly doubtful about that.

I am minded to move amendment 92 on the basis that the committee wants to see the weighting that an allegation will get. However, if the minister gave the cast-iron guarantee—in answer to Stewart Stevenson's question—that the evidence that amendment 92 seeks will be required by the guidelines, I will not move amendment 92.

Dr Simpson: In answer to Duncan Hamilton's first question, I assure him that the agencies and groups that I mentioned will feed into a multidisciplinary assessment process.

The guidelines that the risk management authority will draw up will have regard to the guidelines that are used by ACPOS. I know that that is not going quite as far as Mr Hamilton is asking me to go. If ACPOS chose to change those guidelines, that would be a matter for discussion. However, the ACPOS guidelines will provide a good starting point for the risk management authority in dealing with allegations. If the authority wanted to deviate from those guidelines, it would have to cite good grounds for doing so.

Mr Hamilton: The Minister for Justice's letter says:

"The ACPOS guidelines will provide a useful working model for the RMA."

The key statement is that the ACPOS guidelines

"state clearly that the information supplied should be based on fact and be capable of proof if presented in evidence."

Will the same standard test be applied under the new RMA guidelines?

Dr Simpson: This is a slightly circular argument. Because of the way in which we have written things, the authority will be independent and we will not be able to instruct it in the way that you suggest. I cannot give a guarantee on behalf of an authority that will be independent. However, my expectation is that the RMA will follow the ACPOS guidelines closely. It would need to have very good grounds for deviating from those guidelines.

The Convener: I am not happy to leave the matter there. We have examined the question of the relationship between the RMA and the Executive. Duncan Hamilton has pressed ministers on the point, but we have made no comment on the fact that the RMA will be an independent authority. I am now concerned that Parliament will lose grip on an important issue if we are at arm's length from the guidelines and processes that we have concerns about. All that we are looking for are assurances that, after the bill is passed, we are not going to lose control of the situation to an authority whose presence we will have to demand before we can see what it is doing with its guidelines.

I make no comment on the drafting of amendment 92, but Duncan Hamilton is correct to say that that is the sort of information that I would like the risk management authority to use in its framework. I do not see how, otherwise, a consistent approach could be taken to all offenders.

Mr Hamilton: The minister may want to consider whether he might bring the guidelines back to the committee. I am curious as to how he can guarantee that the items in amendment 92 will be included in the standards for the risk management authority, yet over other aspects there is no control. How does that work?

Dr Simpson: The amendment is all about the relationship between the Executive and its agencies or non-departmental public bodies. Those bodies have to come to the Executive with a statement of their management approach. The Executive and the RMA would have to agree on how to proceed. They would produce the risk assessment reports as part of that so that the Executive would have an opportunity to indicate whether we were not happy about anything. In addition, the committee would have the right to call the authority in for questioning. So there are two measures of control, but the RMA retains its essential independence. That independence is important and positive, not negative.

11:30

Mr Hamilton: In that case, could you just answer my question about the guarantee that you gave Stewart Stevenson that those areas would be included in the guidance? Either you can control the RMA or you cannot. Are you saying that it would have to be at arm's length and that the Parliament would not have any control over it? If that were the case, would you consider bringing the guidelines to the Parliament?

Dr Simpson: It would not be our desire to bring the RMA guidelines to the Parliament for approval.

We intend to publish them so that everyone will be able to see what they are. As a parliamentary committee, the committee has the authority to call the individual authority in for questioning.

The Convener: We seem to be losing sight of the issue: amendment 92 attempts to set up a framework for approaching each case by requiring the assessor to list the allegations and to set out any additional evidence.

Dr Simpson: That is correct.

The Convener: The RMA would be required to incorporate that information in any risk management report. Without that requirement, you cannot give us the assurances that we are looking for because the RMA would be an arm's-length organisation.

Unless the committee disagrees, the best way forward would be to consider what information the statute should require the RMA to publish. If the bill does not give the RMA a framework, it could do what it liked. As the minister said, we could question the authority, but we could create a short cut by being absolutely sure that the statutory provisions require the RMA to set out that information.

Dr Simpson: I will try to explain our dilemma while we are taking the time to discuss the question.

We are not keen to change the nature of the RMA. It is difficult to instruct an NDPB in the way the committee seeks. If the committee were to agree to amendment 92, we would have to change the entire structure of the RMA, and we are not keen to do that. We understand what the committee is trying to get at and I will have another look at the situation to see whether we can tighten up how the RMA would deal with those issues by including them in its guidelines and standards. I undertake to write to the committee about that. We can reconsider at stage 3 whether such a provision should be included.

The Convener: That is helpful.

George Lyon (Argyll and Bute) (LD): I hear what the minister says, but I am still unclear about how amendment 92 would change the relationship between the Executive and an independent agency. I accept the minister's argument that the RMA must be seen to be independent. That is essential and is why it must be at arm's length from the Executive. However, the requirements about what a report should contain and what must be published should have no impact on the relationship between the Executive and the NDPB. I am confused about the minister's last argument.

Stewart Stevenson: It is useful to return to the bill, which would establish the RMA. The bill says that the authority's purpose would be to ensure

"the effective assessment and minimisation of risk."

Under "Policy and research", the bill says that

"the Risk Management Authority is to"

undertake a list of tasks. The bill also contains an enabling provision that says that "the Authority may" undertake other functions—that is, the authority would not be required to undertake them.

On that basis, I am somewhat at a loss to understand why directing the RMA to

"compile and keep under review information about the provision of services in Scotland",

for example, would create no difficulty, whereas amendment 92 might create a difficulty. If politicians were to interfere in the authority's operation in relation to individual cases—however benevolent the Executive might be—that would be a different matter that would raise European convention on human rights issues.

I am also at a loss to understand why the provisions in amendment 92 are different in character from sections 3, 4 and 5, which would establish the authority. Section 6 talks about risk management plans and section 7 talks about how those plans might be prepared. The minister was right to recognise that he is struggling with a matter of principle. I am not sure whether we ought not to consider agreeing to amendment 92, simply to send a signal that the committee wants to do something about the matter. I have no doubt that we will hear what we should do.

Mr Hamilton: Amendment 92 disappeared off the agenda but is now firmly back on it. Amendment 91 started the issue. If the minister's response to that amendment was that he does not have the authority, and that it would not be right for him, to direct guidelines, how can he give a guarantee in response to amendment 92? On reflection, what does that guarantee count for? Does it remain valid?

Dr Simpson: I will return to the policy intention behind the RMA. It is intended to be a centre of excellence that will take into account important elements in the risk assessment process. The matter is fast developing—it is not static. The way in which legislation works means that if the bill were to lay down what should be included, that would imply other matters that might not be included. In a sense, by defining what we want to be included, we imply what should not be included. That is why, as a general principle, the draftsmen and the legislative group in the Executive are not keen on specifying matters in that detailed way.

However, I have listened carefully to the arguments. I understand the committee's concern that the authority's independence from the political and parliamentary process—which we want—

might create difficulties with non-conviction evidence, or allegations. I undertake to examine the helpful and useful debate that we have had. I will probably write to the convener with our conclusions before we reach stage 3, so that the committee can consider whether it wishes to return to the issue at stage 3 if the Executive continues to hold its current line.

The Convener: Duncan Hamilton gets the final say, as the amendments are in his name. My sense of what members have said this morning is that they are minded to support the intention behind amendment 92. My strongly felt concern is that the Parliament should be allowed a say in the framework—which is not to say that we should interfere in the arrangements. The minister said that we can call the Executive to account. I accept that, but the situation is not ideal. I also note that, under section 13(3),

"The Scottish Ministers are to lay a copy of the report before the Parliament".

If the minister makes that commitment, I am happy to support him.

However, I repeat my remaining small but important bone of contention: the Parliament must have a say in the framework for dealing with non-conviction information, but, as the bill stands, it does not.

Dr Simpson: I understand your point, convener. I have undertaken to write to the committee, although I cannot give a specific commitment on precisely what that letter will say. However, it will address the issue and will lay out the arguments and the conclusions that the Executive wishes to come to. It will allow the committee to judge whether it wishes to lodge another amendment at stage 3.

Mr Hamilton: This has been a useful debate in the sense that it has opened up the problem. We have uncovered something that is quite important in that the guidelines need to be controllable. I listened to the point that Stewart Stevenson made about the fact that we would be able to direct the guidelines in some ways but I do not understand the minister's argument about why we could not do so in others. I am sure that the minister would concede that the Executive is confused on the issue.

I am minded to press amendment 92 for the simple reason that, just as the minister can return with an explanation, clarification or amendment, we can revisit the matter at stage 3. The Executive is in a bit of a mess over the issue. It is right that the committee seeks an amendment on an issue of this importance, because that will safeguard the rights of the individuals about whom we are concerned. I will press amendment 92.

Amendment 90, by agreement, withdrawn.

Amendment 91 not moved.

Amendment 92 moved—[Duncan Hamilton]—and agreed to.

The Convener: Amendment 25 is grouped with amendments 27, 28, 31 and 32.

Dr Simpson: Amendments 25 and 28 would clarify the court's powers in certain circumstances. Amendment 28 would remove an unnecessary provision from the bill. Amendments 31 and 32 are technical amendments to ensure consistency of wording in the Prisoners and Criminal Proceedings (Scotland) Act 1993. Amendment 27 is a consequential amendment. It would remove a provision that would become unnecessary as a consequence of the removal of the provision that is referred to in amendment 28.

Amendment 28 is the key amendment in the group and, with the committee's permission, I will explain it first. Amendment 28 clarifies the court's power in three circumstances. First, when the MacLean committee made recommendations about when the court should impose the new order for lifelong restriction, it considered the situation in which the court, following a risk assessment, is not satisfied that the statutory risk criteria are met and that, as a consequence, the offender is not high risk. It concluded that, since the offenders who receive a discretionary life sentence at present are the most likely future candidates for an order for lifelong restriction, a discretionary life sentence would not be an appropriate disposal in the event that the statutory risk test under OLR arrangements is not met. The MacLean committee therefore recommended that where the court is not satisfied that the statutory criteria for the imposition of an OLR are met, it should be able to impose any competent disposal other than a discretionary life sentence. That would be achieved by new section 210FF(2).

11:45

Secondly, we want to ensure that the powers of the court are clear in a situation in which the court does not make a risk assessment order, or an interim hospital order and assessment of risk, because it does not consider that the risk criteria might be met or where the risk criteria might be met but an OLR has already been imposed on the offender. In those circumstances the court should have the power to dispose of the case as it considers appropriate. That would be achieved by new section 210FF(1)(a).

Thirdly, we want to ensure that the powers of the court are clear in a situation in which an offender with an OLR commits a further serious sexual, violent or life-endangering offence—a section

210B offence—and the court considers that the risk criteria might be met. In those circumstances, the offender's risk would have been established, so there would be no point in the court's ordering another risk assessment. That would be provided for by new section 210B(2). It would be possible to revise the offender's risk management plan to take account of further offending, and where the offender is already subject to an OLR, the court would have the power to dispose of the case as it considers appropriate. That would be achieved by section 210FF(1)(b).

I come to amendment 25. Section 210D would provide that where a person is convicted of a serious violent or sexual offence—a section 210B offence—and the court considers that the criteria for an interim hospital order and the risk criteria are met, it would make an interim hospital order. An assessment of risk would be carried out under an interim hospital order. However, as I have explained, there is no point in the court's ordering another assessment of risk where an offender is already subject to an OLR. Amendment 25 provides that where a court would otherwise make an interim hospital order and assessment of risk but the offender is already subject to an OLR, it would not make such an order.

Amendment 27 is a consequential amendment and would remove a reference to section 210F(4). That reference is unnecessary, because section 210F(4) would be removed by amendment 28. As drafted, section 1 would insert a new section 210F(4) into the 1995 act, which would provide that an OLR cannot be made where the convicted person already has such an order. However, where a person already has such an order, the court would be prevented from making a risk assessment order by virtue of new section 210B(2). Given that the court could not proceed to consider whether a person should be sentenced to an OLR without a risk assessment report being made under the risk assessment order, it would never get to the stage that new section 210F(4) is intended to deal with. Section 210F(4) is therefore unnecessary.

Amendments 31 and 32 are technical amendments to schedule 1. Paragraph 1 of schedule 1 provides for the consequential amendments to the Prisoners and Criminal Proceedings (Scotland) Act 1993 concerning the release on licence of offenders who are sentenced to an OLR. The amendments ensure that the wording of the new OLR provision in section 2 of the 1993 act is consistent with the rest of that section and with other sections in that act.

I move amendment 25.

Amendment 25 agreed to.

The Convener: Amendment 26 is grouped with amendments 26A, 26B, 61 and 62. If amendment 26 is agreed to, I cannot call amendments 61 or 62, because of pre-emption.

Dr Simpson: Amendment 26 amends the risk criteria prescribed by new section 210E, which is inserted into the Criminal Procedures (Scotland) Act 1995 by section 1 of the bill.

The purpose of the amendment is to put beyond doubt our policy intention that only offenders who pose a serious risk to members of the public will be subject to the order for lifelong restriction.

The amendment reflects the concerns raised during the pre-stage 1 evidence sessions and in the committee's stage 1 report. The concerns were that new section 210E, as drafted, would draw offenders who are not high-risk down the route of a risk assessment order, made under new section 210B, or an interim hospital order, made under new section 210D, and potentially thereafter into a new order for lifelong restriction sentence. The core of those concerns was new section 210E(b). Amendment 26 in essence removes that provision, and redrafts the criteria in a way that meets our policy intention and, we believe, meets the committee's concerns.

The provisions in section 1 are intended to be a new and innovative way of identifying and measuring the risk that offenders who have been convicted of serious violent and sexual crimes may pose to the public. It is crucial that we get that right from the outset. We are therefore grateful to the committee for the thorough scrutiny that it has given to these proposals, and its observations and recommendations drawn from extensive stage 1 evidence sessions.

One MacLean committee recommendation proposed that statutory criteria should be used in the risk assessment process and in determining whether an offender should be sentenced to an order for lifelong restriction. MacLean committee recommendation 17 said:

"An OLR would be available only in cases where the High Court was satisfied that there are reasonable grounds for believing that the offender presents a substantial and continuing risk to the safety of the public such as requires his lifelong restriction. If the Court is so satisfied, it must make the Order."

It has always been our policy that the order for lifelong restriction should be imposed only where an offender presents as a danger to the public. That was the basis upon which we drafted the criteria that currently appear in section 210E. However, as I said, we are breaking new ground. As the Deputy First Minister explained to the committee on 18 June, our intention when drafting the criteria was to devise a measure that has meaning in law, is not so tightly drawn that it is

rendered unworkable in practice, yet at the same time is not so wide-ranging that offenders who are not high-risk could be caught in the OLR net.

The concerns expressed in evidence and in the stage 1 report related to the breadth of the criteria. It was suggested that section 210E(b), in particular, could potentially catch a wider range of offenders than the serious violent and sexual offenders, who pose a likelihood of serious danger to members of the public, that the OLR is intended to target. In light of the committee's helpful feedback, the Deputy First Minister undertook during the stage 1 debate to revisit the risk criteria. As he explained in his letter to the convener of 29 October, based on further consideration, we too have concluded that the criteria, as currently drafted, may range too widely.

I want to stress again that it is not, and has never been, our intention that the order for lifelong restriction should apply to any but the highest risk offender. We therefore agree with the committee's view that our criteria in section 210E(b) may dilute the degree of risk that it should be necessary to show for the court to impose an order for lifelong restriction. The effect of our amendment is, therefore, to remove criterion (b). The result will be a set of robust criteria, the terms of which are understandable and workable in law and which, in practice, will limit the scope of this application to identify only the potentially highest risk offenders with which both the Executive and the committee seek to deal.

Amendments 26A and 26B replace the wording in what will be the new core risk criteria, should the committee accept amendment 26. They substitute the existing wording for phrases taken from the MacLean committee's recommendation 17, which dealt with the issues that should be covered in the risk criteria. The report does not suggest that the exact wording of the recommendation should be enshrined in legislation. We believe that what we have provided for in the bill is an accurate legislative interpretation of the relevant MacLean recommendation.

As I have said, we consider that the criteria that we propose will be understandable and workable in law. We have no indication from the judiciary that the wording is oblique or would give rise to difficulties in comprehending its purpose. I do not therefore consider that it would be appropriate to accept the exact wording of the MacLean recommendation.

Amendments 61 and 62 would have the same effect as amendments 26A and 26B.

I move amendment 26.

Mr Hamilton: I welcome the Executive's decision to drop subsection (b) from proposed new section 210E in response to the concern that the committee expressed. That is a wise decision.

The reason that I lodged amendments 26A and 26B, despite the fact that, as the minister said, they mirror amendments 61 and 62, is that that was the only way of amending amendment 26, which the minister had lodged. Whether Bill Aitken feels the need to press amendments 61 and 62 is a matter for Bill Aitken.

The minister is right to say that the amendments would provide the wording that was suggested by the MacLean committee. I notice that, earlier on, the minister was happy to accept MacLean as a basis. In a previous argument, he said that it was correct to quote the exact wording of the MacLean committee but, all of a sudden, that is no longer the case. The reason that I have lodged amendments 26A and 26B is that the committee noted in paragraphs 53 and 55 of our stage 1 report that the word "likelihood" was too imprecise, as it could mean that people were anything between 50 per cent and 95 per cent certain. Amendment 26A would simply remove

"is a likelihood that he"

and insert

"are reasonable grounds for believing that the offender".

Amendment 26B would remove "seriously endanger" and insert

"present a substantial and continuing risk to".

That is precisely the wording of the MacLean recommendation. The minister said that there is no problem with the interpretation or understanding of amendment 26 as it stands, but I suggest that that is not the case. At stage 1, we received representations from the Law Society of Scotland that the test that is now proposed in amendment 26 would be a lesser test than that which was proposed by the MacLean committee. Therefore, there is some dispute about the interpretation.

I support the minister's decision to drop subsection (b) from proposed new section 210E, but I commend amendments 26A and 26B to the committee.

I move amendment 26A.

Bill Aitken: The minister might feel that he has had better mornings. He might also feel that some hostility is being directed against the principle of OLRs, but that is not the case. There is a genuine appreciation of what the Executive is attempting to do. I welcome the fact that the Executive has sought to amend something that caused the committee serious difficulties at stage 1.

As Duncan Hamilton mentioned, amendments 61 and 62 attempt to amend the basis on which a risk assessment is made. As the matters are

comfortably dealt with in amendments 26A and 26B, I propose not to move amendments 61 and 62 at the appropriate stage.

Dr Simpson: We believe that the wording in amendment 26 is in fact stronger than that which Duncan Hamilton has proposed. That is important. Amendment 26 would catch the top-of-the-tree offenders, whereas amendments 26A and 26B run the risk of a trickle-down effect into lesser offenders. In that respect, I would completely contradict what Duncan Hamilton has said.

If I may add one other thing, we have looked at the research from other countries, which supports our proposal. I urge Duncan Hamilton to withdraw amendment 26A and not to move amendment 26B.

Mr Hamilton: The minister said that he has taken advice from other countries and read research to that effect, but he did not tell us what that research was. I do not quite know why the minister thinks that amendment 26 is tougher than it would be were it amended by amendments 26A and 26B. There is not an enormous amount between the two positions, but as the MacLean committee got to the point where it reached the definition that is proposed in my amendments, I am still minded to press amendments 26A and 26B on the basis that they would provide clarity and would give consistency with the rest of the MacLean committee's recommendations.

The Convener: Are you pressing amendment 26A?

Mr Hamilton: Yes.

The Convener: The question is, that amendment 26A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Lyon, George (Argyll and Bute) (LD)
McNeill, Pauline (Glasgow Kelvin) (Lab)

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

I believe that that is the first tie that we have ever had, so I have to use my casting vote. I understand that the convention is that I should cast my vote in favour of the status quo and therefore against the amendment.

Amendment 26A disagreed to.

Amendment 26B moved—[Mr Duncan Hamilton].

The Convener: The question is, that amendment 26B be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Lyon, George (Argyll and Bute) (LD)
McNeill, Pauline (Glasgow Kelvin) (Lab)

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

Once again, the result is a tie. As is the convention, I shall use my casting vote against the amendment.

Amendment 26B disagreed to.

The Convener: I invite the minister to wind up on amendment 26.

Dr Simpson: As I have indicated, we are in general agreement, and there is not a great deal of difference between us. It is simply a question of precisely what form of wording is most appropriate to achieve the joint objective that we share: that only those at the top end of the offending tree should be captured. It is genuinely the Executive's belief that our interpretation of the MacLean report is a stronger one and prevents the trickle-down effect that the committee had indicated it did not want to occur. That is why we proposed amendment 26.

Amendment 26 agreed to.

12:02

Meeting suspended.

12:12

On resuming—

The Convener: At the beginning of the meeting, I apologised for the venue. I realise that members are cold in here, although the acoustics are not bad. We have to do our turn in the Hub, but I believe that we will be back in the chamber tomorrow. I propose that the meeting go until about 12.45 pm, if that suits members.

Amendment 93 is grouped with amendment 94.

Mr Hamilton: It is somewhat disconcerting that, before I open my mouth, my colleague Stewart Stevenson, who is sitting next to me, says, "There's no point." I am not entirely sure what he is referring to.

In amendments 93 and 94, the committee will recognise from the stage 1 report our concerns on the compulsory nature of the OLR and the need for a different standard of proof. The amendments represent alternatives to each other.

The Scottish Consortium on Crime and Criminal Justice gave evidence suggesting that, before the court imposed an OLR, it should be satisfied beyond reasonable doubt that the person was dangerous. The consortium said:

"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."—[*Official Report*, *Justice 2 Committee*, 15 May 2002; c 1311.]

In the stage 1 report, the committee stated:

"The Executive position is that an OLR will only be imposed after guilt is proven and the person has been convicted of a serious offence. They do not consider it reasonable to impose the criminal standard of proof at sentencing stage."

The committee did not accept that position, but said that it

"might accept this argument if the imposition of an OLR was discretionary".

If ORLs were to be mandatory, we suggested that

"the Executive should consider introducing the higher standard of proof, beyond reasonable doubt … or if it wishes to retain the balance of probabilities as the standard of proof, it should consider introducing an element of discretion for the court in imposing an ORL."

That is precisely what amendments 93 and 94 try to achieve, either by moving from a balance of probabilities to a test of reasonable doubt or by leaving out "shall" in section 1, page 4, line 19 and inserting "may". That is entirely in keeping with the stage 1 report.

I move amendment 93.

12:15

The Convener: Duncan Hamilton is correct. We had quite a debate at stage 1 about the test. In the report, we opted for the test of beyond reasonable doubt. I supported that position. I would have opted for a standard of proof in between, but there is none.

I am keen to hear what the minister says about the matter. I think that he understands where we are coming from. The measure is important—it will be mandatory to apply it if the risk criteria are met. I would not be surprised if the minister says that we have set too high a test. However, it is worth stating in the *Official Report* the committee's position at stage 1.

Bill Aitken: I underline that what has been described was the committee's view at stage 1. The committee considered the matter carefully—indeed, it has considered everything relating to OLRs carefully. I reiterate that we are in favour of OLRs, but we require to be clear that they are used in a manner that is compatible with the principles of Scots law and basic justice. The wording that Duncan Hamilton has suggested is preferable to what is in the bill. We must be seen to be fair and acting in a reasonable manner to ensure that people are subject to OLRs only on the basis of a reasonable and reasoned balance of proof.

Dr Simpson: Amendments 93 and 94 would change the standard of proof required to prove that the risk criteria are met from "a balance of probabilities" to "beyond any reasonable doubt". They would also provide the court with discretion as to whether to impose an OLR where the risk criteria are met.

The cumulative effect of the amendments is that the court, when considering whether the offender who has been convicted of a serious offence is high risk, must be satisfied beyond reasonable doubt that the risk criteria are met. It will then have discretion as to whether to impose the OLR. I submit that the amendments would defeat the entire purpose of the new arrangements for risk assessment, sentencing and risk management. However, Duncan Hamilton indicated that the amendments are alternatives to each other—that is an important starting point.

We must start from the basis of Scots law. In post-conviction situations in Scots law, the balance of probabilities test is generally applied to information in reports. Within those parameters, the court decides and considers what weight to apply to that information. During the consultation process, the judiciary raised no concerns about applying the same well-tested principles to risk assessment reports. The Deputy First Minister explained that in the stage 1 debate. I simply repeat what he said.

The relevant provisions in the bill that deal with the stage at which an accredited risk assessment that has been carried out by an accredited risk assessor indicates that an offender is a potential high risk to the public reflect the MacLean committee's recommendations. Recommendation 23 states:

"It will be for the Crown to establish, on a balance of probability, that the statutory criteria for the imposition of an OLR are met."

The MacLean committee was, of course, aware that, by that point, the offender would have been found guilty of a serious offence and would have been through a thorough risk assessment process that indicated a high risk to the public. The committee would also presumably have recognised that the balance of probabilities test is the one that courts use to assess post-conviction, pre-sentence reports. It was also satisfied that,

having established that the offender was a high risk to the public, the court should impose an OLR.

We consider that that is reasonable and necessary if the key objective of the proposals—which is to give the public greater protection from that group of high-risk offenders—is to be met. We consider that it is justified to require the court to impose the OLR if all the conditions imposed by the bill are met, because that is the only way of ensuring that a high-risk offender gets the appropriate sentence. However, that will happen only after there has been a thorough and transparent risk assessment, during which time the offender can commission his or her own risk assessment, which will be considered along with the risk assessment prepared for the fiscal or the court, whichever asked for the assessment to be undertaken. The assessments will be considered together.

As I said, that is all as the MacLean committee recommended. Clearly, the Executive believes that the MacLean committee got it right and, as I said, the judiciary found no difficulty with it. Equally important, as I hope I have illustrated, the measure does not jeopardise the rights of the offender. I ask Duncan Hamilton to withdraw amendment 93.

Mr Hamilton: I was interested in the minister's response. First, for clarification, there is absolutely no prospect of the amendments being taken together—there is no cumulative effect—so we can ignore that.

The minister predicated his rebuttal of amendments 93 and 94 on the fact that the risk assessment process is thorough and transparent. I refer him to this morning's events to show the dangers of trying to establish whether that is true. We have seen already today that there are a number of potential problems.

The principle behind amendment 93 is basic fairness, as Bill Aitken said. It was the committee's view at stage 1 that the mandatory nature of orders for lifelong restriction made it essential to examine the issue of the standard of proof. I hear what the minister says about the post-sentencing position under Scots law and the balance of probabilities. If what he says is the case, I am happy to accede to his point and seek to withdraw amendment 93. However, the flip-side is that it is all the more important that I push amendment 94, so that the court has discretion.

For the second time this morning, I disagree with the minister's view that giving the courts discretion will make it less likely that the bill will catch the people whom we are trying to catch. I think that we can trust the courts in that regard—we have to show faith in the court process. Giving discretion by changing "shall" to "may" is a good way of balancing the rights of the individual with the public's right to be protected. I will push amendment 94.

Amendment 93, by agreement, withdrawn.

Amendment 94 moved—[Mr Duncan Hamilton.]

The Convener: The question is, that amendment 94 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Lyon, George (Argyll and Bute) (LD)
McNeill, Pauline (Glasgow Kelvin) (Lab)

The Convener: The result of the division is: For 3, Against 3, Abstentions 0. I use my casting vote against amendment 94.

Amendment 94 disagreed to.

Amendments 27 and 28 moved—[Dr Richard Simpson]—and agreed to.

The Convener: Amendment 63 is in a group on its own.

Bill Aitken: Amendment 63 is a probing amendment. I lodged it because I am a little uncertain about the Executive's intentions. New section 210G in the 1995 act will require a judge presiding over an indictment case to prepare a report on the circumstances of the case, which will contain such information as is considered appropriate. The problem is that, although I have read the explanatory notes to the bill in some depth, I am still not clear how such reports will be used. The suggestion is that they will assist the assessor in the preparation of risk assessment reports.

It is understandable why such a report on the circumstances of the case would be used to that end, but there is clearly a difficulty if the prosecutor and the convicted person do not have the opportunity to see, and possibly dispute, the terms of the report. The minister will be aware that, under the 1995 act, a draft stated case is drawn up by the judge in respect of all criminal appeals. It is then sent to both the Crown and the defence, and a hearing into adjustments will be carried out in chambers if any are sought by either party. That process is carried out before the High Court of Justiciary receives the judge's signed stated case.

Given the possible consequences of the assessor's report, it would seem that, if that report is predicated in part by the report of the presiding

judge, both parties to the action should have the opportunity of seeing what the judge has to report to the assessor and of disputing any aspects of it. The procedure could be similar to what is carried out under the 1995 act whereby, as I said, if any comments in the judge's report are disputed, a hearing into the report can be carried out in chambers. That is what amendment 63 would provide for in the interests of fairness. I assume that I am operating on a correct assumption that the judge's report will be used by the assessor in the formulation of their report.

I move amendment 63.

Dr Simpson: Amendment 63 would require a draft of the reports that are required to be prepared by judges or sheriffs under new section 210G of the Criminal Procedure (Scotland) Act 1995 to be submitted to the defence and prosecution for comment before being finalised. One of the key concerns that emerged from the MacLean committee's review was the lack of adequate information about an offender's previous offending. The MacLean committee concluded that access to accurate and detailed information about that offender was a key component in assessing the level of risk that the offender may pose to the public. The committee's recommendation 13 was:

"In all cases of a violent or sexual nature (including, where appropriate, breach of the peace) prosecuted on indictment, the judge should prepare promptly a report setting out the circumstances of the offence as narrated in court, which report should be preserved with the case papers for later use if required."

That is the purpose of new section 210G of the 1995 act. The report of the expert panel on sex offending, chaired by Lady Cosgrove, made a similar recommendation as regards sex offenders. That recommendation now appears as section 20(4) of the bill. To avoid duplication, new section 210G of the 1995 act provides that the judge does not have to prepare a report under that section where one has been prepared under section 20(4) of the bill.

Amendment 63 would create an inconsistency by giving the defence and the Crown the opportunity to comment on reports provided under new section 210G of the 1995 act, but not in cases where a report had been prepared under section 20(4) of the bill. The real issue is whether there would be any benefit in adopting the practice that the amendment suggests. We do not believe that there would be. If, for instance, there were a conflict between the comments received from the prosecutor and those received from the defence, there would have to be a proof hearing before the post-sentence report could be finalised.

The purpose of the judge's report is to provide background that may be used in a future risk assessment. If the report is used as part of the risk assessment report that is prepared under new section 210G, the judge's report, or any aspect of its contents, could be challenged. I suggest that the arrangements that we have proposed make adequate provision for the rights of offenders to be safeguarded. I ask Bill Aitken to withdraw amendment 63.

Bill Aitken: I am always attracted by approaches that might save time. I accept the minister's point that there would be the facility for a proof hearing at which the facts could be disputed. However, if there were an opportunity for the two parties to view the judge's report and comment on it before matters went any further, that would avoid a number of proof hearings and make the process much more expeditious. There is nothing in the amendment that is inconsistent with the approaches suggested by either Lord MacLean or Lady Cosgrove. The amendment would basically cut the amount of administrative work and court time for proof hearings. I will press the amendment.

12:30

The Convener: The question is, that amendment 63 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Lyon, George (Argyll and Bute) (LD)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 2, Against 4, Abstentions 0.

Amendment 63 disagreed to.

Section 1, as amended, agreed to.

Schedule 1

ORDER FOR LIFELONG RESTRICTION: MODIFICATION OF ENACTMENTS

Amendments 31 and 32 moved—[Dr Richard Simpson]—and agreed to.

The Convener: Amendment 29 is grouped with amendment 30.

Dr Simpson: Amendments 29 and 30 are intended to require the Parole Board to have regard to a risk management plan on each occasion that it considers the case of an offender who is required to have such a plan.

The MacLean committee logically assumed in its report that the Parole Board should have the

information about how an offender with a risk management plan had measured up against the plan. The committee also considered that it would be useful for the Parole Board to have information about how the offender would be managed in the community on completion of the punishment part of his or her sentence. It was concluded that the Parole Board should be placed under a duty to have regard to the risk management plan.

In the bill as introduced, schedule 1, which amends the Prisoners and Criminal Proceedings (Scotland) Act 1993, requires the Parole Board, when considering the case of an offender with an order for lifelong restriction, to have regard to that offender's risk management plan. It is required to do so only when considering whether it is satisfied that it is no longer necessary for the protection of the public that the offender should be confined.

That was intended to achieve our policy, but it is inadequate in two respects. First, it does not reflect fully our intention that the Parole Board must have regard to an offender's risk management plan on each occasion that it considers the offender's case. For instance, schedule 1 does not require the Parole Board to have regard to an offender's risk management plan when considering the offender's release from a determinate sentence or whether to vary the licence conditions.

Secondly, we also want the requirement to apply to all offenders in respect of whom a risk management plan has been required to be prepared. At present, the bill provides that an RMP must be prepared only for those offenders who receive an OLR. However, should Scottish ministers decide at some point in the future to extend the categories of offenders who may get an RMP—as the bill will allow—the amendments are necessary to ensure that the Parole Board will have regard to those plans when considering the cases of the extended categories of offender.

Amendment 30 will insert a new comprehensive provision after section 35 and amendment 29 is the consequent change to remove the existing provision in schedule 1. We identified another consequential change, regrettably too late to lodge an amendment, but we will lodge the appropriate amendment, also to schedule 1, at stage 3.

I move amendment 29.

Amendment 29 agreed to.

Schedule 1, as amended, agreed to.

The Convener: I propose to end the meeting now. I remind members that our next meeting will be tomorrow at 9.45 am, when we will continue our consideration of the bill. Tomorrow's venue will be the chamber.

Meeting closed at 12:34.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

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Friday 29 November 2002

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