JUSTICE 2 COMMITTEE

Tuesday 2 December 2003
(*Afternoon*)

Session 2

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JUSTICE 2 COMMITTEE
16th Meeting 2003, Session 2

CONVENER

*Miss Annabel Goldie (West of Scotland) (Con)

DEPUTY CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)
Colin Fox (Lothians) (SSP)
*Maureen Macmillan (Highlands and Islands) (Lab)
Mike Pringle (Edinburgh South) (LD)
*Nicola Sturgeon (Glasgow) (SNP)

COMMITTEE SUBSTITUTES

Ms Rosemary Byrne (South of Scotland) (SSP)
Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
Michael Matheson (Central Scotland) (SNP)
Margaret Mitchell (Central Scotland) (Con)
*Margaret Smith (Edinburgh West) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Patrick Harvie (Glasgow) (Green)
Hugh Henry (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Gillian Baxendine
Lynn Tullis

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 4

Scottish Parliament

Justice 2 Committee

Tuesday 2 December 2003

(*Afternoon*)

[THE CONVENER *opened the meeting at 14:00*]

The Convener (Miss Annabel Goldie): Good afternoon and welcome to the 16th meeting in this session of the Justice 2 Committee.

Irene Fleming, who has been a very supportive senior assistant clerk to the committee, has moved on to higher, if not greater, things in the Education Committee. In her place, I welcome to the meeting Anne Peat, who will take over Irene Fleming's role.

In the course of the afternoon, we shall be joined by Margaret Smith, who will attend as a Liberal Democrat substitute for Mike Pringle. I have received apologies from Mike Pringle and from Colin Fox, who is away. His substitute, Rosemary Byrne, cannot be with us and has tendered an apology.

We are also joined by Patrick Harvie, who is here as an attender. That means that he can participate in the committee's discussions, but not vote in the proceedings. We welcome him to the meeting.

Subordinate Legislation

14:01

Act of Sederunt (Fees of Sheriff Officers) 2003 (SSI 2003/538)

The Convener: The first item on the agenda is consideration of a negative instrument, the Act of Sederunt (Fees of Sheriff Officers) 2003 (SSI 2003/538). Members should have received a copy of the instrument and a note from the clerk. The Subordinate Legislation Committee considered the instrument at its meeting on 11 November and had no comment to make on it. As members have no comments to make on the instrument, I propose that we simply note it.

Members *indicated agreement*.

Vulnerable Witnesses (Scotland) Bill: Stage 2

14:02

The Convener: Item 2 on our agenda is stage 2 consideration of the Vulnerable Witnesses (Scotland) Bill. Members should have copies of the bill, the marshalled list of amendments and the suggested groupings of amendments. I welcome to the meeting Mr Hugh Henry, the Deputy Minister for Justice, who is accompanied by officials from the Scottish Executive: Lesley Napier, Barbara Brown, Willie Ferrie and John St Clair.

We intend to try to complete stage 2 consideration of the bill today, but there is much work before us and we have a margin, which is next Tuesday's meeting. If we are moving forward swiftly and it looks as if we can conclude at around 5 o'clock or half past 5, I propose that we keep going. However, if it seems that we will take a little longer, we should probably break off at about 4 or 4.30 and allow a carryover of business to the Tuesday meeting. It all depends on how we get on.

This is the first time that the committee in its present form has approached stage 2 procedure for a bill. I remind members that amendments have been grouped to facilitate debate and that the order in which they are called and moved is dictated by the marshalled list. All amendments will be called in turn from that list and will be taken in that order—in other words, we cannot go backwards. There will be one debate on each group of amendments. Members can speak to their amendment if it is in that group, but there will be only one debate on the group.

If members will bear with me, I will remind them of the procedure. I will call the proposer of the first amendment in the group, who should speak to and move that amendment. I will then call the other speakers, including the proposers of all the other amendments in the group, but they should not move their amendments at that stage; I will invite them to move their amendments at the appropriate time. Members should indicate their wish to speak in the usual way. The Deputy Minister for Justice will be called to speak at the conclusion of the debate on each group. Once we have had a debate on a group, I will clarify whether the member who moved the amendment wishes to press it to a decision. If he or she does not wish to do so, he or she can seek the committee's agreement to withdraw the amendment. If the amendment is not withdrawn, I will simply put the question on it. If any member disagrees with that proposal at the time, we will proceed to a division by a show of hands.

We have quite a lot to get through and I have no idea whether any of it will be contentious. If we move to a vote, I ask members to keep their hands up, because the clerks have to note the result of the vote and—for the *Official Report*—I have to read it out. If members keep their hands up until the votes have been counted, they will assist with ensuring that the process is accurate.

After we have debated the amendments, the committee has to decide whether to agree to each section or schedule of the bill as a whole. Before I put the question on a section or a schedule, I will be happy to allow a short general debate, which might be useful in allowing discussion of matters that have not been raised in the amendments. Members might want to be aware that, at that stage in the proceedings, the only way in which it is permitted to oppose agreement to a section is by lodging an amendment to leave out the section. If members want to delete an entire section, they must have lodged an amendment that says that; a section cannot be opposed if such an amendment has not been lodged. If any member wants to oppose the question that a section or schedule be agreed to, he or she has the option of proposing a manuscript amendment. If that happens, I have to decide whether to allow that amendment.

We will now proceed. We will see how we get on and, during the afternoon, we can make decisions on how we are faring and whether to call a halt and continue next Tuesday.

Section 1—Evidence of children and other vulnerable witnesses: special measures

The Convener: Amendment 24, in the name of Jackie Baillie, is grouped with amendments 25, 26, 39, 41, 44 and 45.

Jackie Baillie (Dumbarton) (Lab): There has been much discussion in the Justice 2 Committee and in the Parliament as a whole about adding further categories to the definition of a vulnerable witness. It is fair to say that, although we understand the Executive's intention in framing the scope of the definition as widely as possible, the definition lacks clarity when it comes to non-visible disabilities. We were much taken by the arguments of the Law Society of Scotland, Enable and others, which suggested that automatic entitlement to special measures should be available to those with a learning disability or a mental disorder.

I understand the Executive's argument, which is that it is opposed to further listing of categories, because that might end up excluding people. However, the committee felt that, because non-visible disabilities are the most difficult to identify and assess, witnesses with a mental health disorder or a learning disability should have an automatic entitlement to be treated as a vulnerable witness. That would have the effect of ensuring that no one falls through the net.

We were sympathetic to the concerns that Rape Crisis Scotland raised and we recognised that victims of alleged sexual offences and alleged domestic abuse would benefit in similar terms. The amendments in this group seek to give effect to the view that the committee has expressed on widening the definition of a vulnerable witness to cover those additional categories and to enable the Executive to prescribe, in practical terms, the information that would require to be submitted in an application to be treated as a vulnerable witness.

I move amendment 24.

Maureen Macmillan (Highlands and Islands) (Lab): I support amendment 24. In particular, I want to talk about the need for a presumption of access to special measures for victims of alleged sexual offences or domestic abuse. The bill's intention is to ensure that good evidence is given in court, but the problem is that victims of rape or domestic abuse often do not come forward at all because of the nature of the offence and because of their unwillingness to face the person who is alleged to have inflicted the abuse or committed the sexual offence. Therefore, it is very important that such victims be considered automatically for special measures. That would make women, in particular, much more confident about coming forward.

The Deputy Minister for Justice (Hugh Henry): I understand the concerns that have been expressed by Jackie Baillie and Maureen Macmillan and I am aware of the committee's discussion on this issue. However, it is important to keep in mind what the bill will achieve. It will bring about a huge change in the way in which we deliver justice for vulnerable people in Scotland. The committee heard from representatives of Victim Support Scotland, who said:

> "The bill proposes a major change that is … big enough for the time being."—[*Official Report, Justice 2 Committee*, 2 September 2003; c 34.]

It is worth reflecting on that comment. Last year, there were fewer than 250 instances in Scotland of special measures being used. Our proposals will significantly increase that number and will help thousands of children and vulnerable adults.

This is not only about legislative change. We also need to change the way in which various agencies work—I have no doubt that we will come back to that point later this afternoon. We need to learn from experience and find ways of identifying vulnerability so that we can enhance legislation.

I do not accept that changing definitions in the way that has been suggested will lead to more protection. Changing the definitions could,

unintentionally, put pressure on various parties—including prosecutors—to seek special measures when people do not necessarily need them, and it could divert time and resources away from other things.

However, although we were not persuaded when the amendment was lodged, Jackie Baillie's arguments have sufficient merit for us to consider the issue more closely. I do not know what conclusion we will reach. We will have to take further advice and receive further evidence before considering very carefully what the impact of the measures would be. If it means that people will accept and endorse the bill, it will be worth our going that extra mile to reflect on the issue and, if necessary, having a further discussion at stage 3. If Jackie Baillie is prepared to withdraw amendment 24 and not to move her other amendments in the group, we will undertake to consider the issue further. We can have another debate at stage 3.

Jackie Baillie: I am happy with the minister's assurances that the Executive will consider the issue again before stage 3.

Amendment 24, by agreement, withdrawn.

Amendments 25 and 26 not moved.

14:15

The Convener: Amendment 51, in the name of Maureen Macmillan, is grouped with amendments 52, 1, 53, 2, 3, 27, 4, 54, 81, 82, 13 to 15, 46 and 16. Amendments 3 and 27 are alternatives; there is not a pre-emption. That is, the question may be put on both amendments. If amendment 3 is agreed to, amendment 27 will become an amendment to leave out words. The same applies to amendments 15 and 46.

Maureen Macmillan: I intend to speak only to the amendments in my name, rather than to all the amendments in the group. My amendments are fairly simple, but important. Amendments 51 and 52 relate to proposed new section 271(2)(a) of the Criminal Procedure (Scotland) Act 1995. They concern the position of the word "alleged" in the phrase:

"the nature and alleged circumstances of the offence to which the proceedings relate".

To be good law, that should read, "the nature and circumstances of the alleged offence to which the proceedings relate".

Amendments 81 and 82, which are similar to amendments 51 and 52, concern section 7(2)(a); again they would transpose the word "alleged" in the reference to

"the nature and alleged circumstances of the matter".

Although section 7 relates to civil proceedings, the same point applies.

I move amendment 51.

Hugh Henry: Amendment 1 is a simple drafting amendment that takes account of the fact that the accused may give evidence in his or her own trial and that, if they intend to do so, an application for special measures may be made on their behalf. The amendment will not change the way in which the bill operates. An accused who gives evidence in his or her trial is not "called upon" to do so, so having those words in the bill could give rise to ambiguity as to whether the provision applied to an accused who was applying for special measures. Removing the words "be called upon to" will remove any ambiguity and make it clear that the provision applies to all witnesses who are being considered for special measures.

Amendments 2, 4, 14 and 16 clarify that the court may take into account any factor that it considers relevant when determining whether a person is vulnerable. As currently drafted, the bill could be interpreted to mean that the court is limited to considering only those factors that are explicitly named in new section 271(2) of the 1995 act for criminal proceedings and in section 7 of the bill for civil proceedings. We understand that a number of issues that are not explicitly stated in the bill could still contribute to a witness's vulnerability. We would not be able to compile an exhaustive list to cover every possible eventuality. It is not our intention to prevent the court from considering such factors, and those four amendments seek to make that absolutely clear.

I turn to Executive amendments 3 and 15. Proposed new section 271(2) of the Criminal Procedure (Scotland) Act 1995 lists the factors that the court will be able to take into account in determining vulnerability, one of which is any disability that the person giving evidence has. As members will be aware, the Disability Rights Commission Scotland requested that the bill be amended to refer to the definition of physical disability that is used in the Disability Discrimination Act 1995. One of the DRC's concerns was that non-visible disabilities, for instance a heart condition, could contribute to vulnerability but might not be picked up by the court or might not be regarded as severe enough to amount to a disability.

Members will recall that, at stage 1, I undertook to consider the matter again. We have done so, but feel that the definition in the Disability Discrimination Act 1995 would be too restrictive. That definition requires a person to have an impairment that has a substantial and long-term adverse effect on their ability to carry out day-to-day activities, which is a high test to pass. We want the court to be able to help people with short-

term or temporary physical impairments if that is appropriate, as well as those with long-term impairments.

To keep the definitions of vulnerability as flexible as possible, amendments 3 and 15 will change the bill to refer to physical impairment rather than physical disability. In our view, the term "impairment", which is consistent with the Disability Discrimination Act 1995, has a broader meaning than the term "disability" has, which will mean that a broader range of people will be covered. That use of the term "physical impairment" is wholly in line with recent Scottish legislation. In section 3 of the Dog Fouling (Scotland) Act 2003, an exception to an offence was made for

"a disabled person with a physical impairment which affects the person's mobility, manual dexterity"

and so on. It is clear from the use of the expression "physical impairment" that it covers the disabled and the much wider group that we want to cover who would not be classed as disabled. Amendments 3 and 15 should meet the DRC's concerns. Our intention is that the amendments will allow the court to take into account non-visible physical impairments where relevant, in addition to more obvious visible physical disabilities.

Amendment 13 is a simple drafting amendment that will ensure consistent terminology throughout the bill. It does not alter the effect of the provisions.

Other than that, I have comments only on other members' amendments, including Maureen Macmillan's. Do you want me to hold back until the end of the discussion, convener?

The Convener: Given that Maureen Macmillan has spoken to her amendments in the group, perhaps you would comment on them.

Hugh Henry: Okay.

I accept what Maureen Macmillan is trying to do with amendments 51, 52, 81 and 82. I do not think that there is much to choose from between the wording of the bill and what she proposed—the intent is the same, although we could argue about semantics and where certain words should be placed. The important point is what is achieved. Whatever form of wording is preferred, I do not think that the intention could be misunderstood. In those circumstances, I am happy to accept Maureen Macmillan's amendments.

Nicola Sturgeon (Glasgow) (SNP): Amendment 53 would allow a court, in deciding whether a witness was vulnerable, to take into account a relationship between a witness and any other witness who is to give evidence in the same case, as well as to take into account a relationship between the witness and the accused person. The proposal arises from the recognition that, at least in some trials, the reason for a witness's inability to give evidence in court or a witness's fear of doing so might relate not to the relationship that the witness has with the accused person, but to a relationship that he or she has with another witness in the trial. Another witness in the trial is just as able to exert undue influence on a witness as the accused person is. Given that the court will be able to take into account the behaviour of another witness in the trial, it is reasonable that the court should also be able to take into account a relationship with another witness.

Amendment 54 would provide for slightly more judicial discretion in determining whether a witness was vulnerable. It would be a mistake to be too prescriptive in laying down in proposed new section 271 of the Criminal Procedure (Scotland) Act 1995 what the court can and cannot take into account. In each case, individual circumstances will be different, and the court should have discretion to take different circumstances into account. Amendment 54 would allow the court to take into account any matters that it thought relevant, in addition to the various factors that are listed in proposed new section 271.

Jackie Baillie: Amendments 27 and 46 seek to include "mental disability or impairment" in the bill. As the minister has outlined, the Disability Rights Commission raised its concerns about definition at stage 1, and the minister is right that impairment, as defined in the Disability Discrimination Act 1995, is quite wide. Unfortunately, however, there is no explicit link between the bill and the definition in the Disability Discrimination Act 1995. The minister's comments, which are welcome indeed, made it clear that the bill is intended to include people with a mental disability or impairment, but if such people can be taken into account, why should we not say so in the bill, given the fact that there is no direct link with the Disability Discrimination Act 1995 and the much wider definition of impairment? Amendments 27 and 46 seek to do that and to ensure that, under the bill, vulnerable witnesses with non-visible disabilities will be entitled to the same support and assistance as other vulnerable witnesses are, which I know is the Executive's aim.

Maureen Macmillan: I thank the minister for accepting my amendments, which will make the language in the bill tighter. I will press amendment 51.

Amendment 51 agreed to.

Amendment 52 moved—[Maureen Macmillan]—and agreed to.

Amendment 1 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 53, in the name of Nicola Sturgeon, was debated with amendment 51.

Nicola Sturgeon: Is there an opportunity to hear the minister's views on amendment 53 before I decide whether to move it?

The Convener: There is, of course, and it was remiss of me not to have offered it.

Minister, do you have any other views that you wish to express?

Hugh Henry: I addressed my comments to what I thought we were discussing at the time, rather than try to anticipate what Nicola Sturgeon or Jackie Baillie might say.

I fully sympathise with the views that Nicola Sturgeon expressed and I understand what she is trying to achieve with amendment 53, but I do not think that the amendment is necessary, as, under proposed new section 271(2)(f), the court is allowed to consider "any behaviour towards" the vulnerable witness on the part of

"any other person who is likely to be … a witness".

We have lodged other amendments, in particular amendments 2 and 4, under which the court will be allowed to take into account any other factors that it considers to be relevant. The provision would allow the court to take into account the kind of thing that Nicola Sturgeon specified, even if the current section does not do that. I hope that Nicola Sturgeon is reassured by the Executive amendments and that she will not move amendment 53.

14:30

Similarly, with regard to amendment 54, I agree that the court should be able to take into account any factor that it considers to be relevant in its determination of whether a person is vulnerable. We have lodged amendments to achieve that provision in criminal and civil proceedings. Our amendments 2, 4, 14 and 16 will achieve that aim. I hope that that is enough to reassure Nicola Sturgeon and I ask her, again, not to move amendment 54.

I turn to what Jackie Baillie said. There is continuing disagreement between the Executive and the DRC on definition. Although we believe that we have properly taken into account everything that we are required to take account of, and that our proposals will have the desired effect, we want to persuade people on that. Again, we will hold further discussions so that no one is inadvertently missed out.

We do not think that we should include unnecessary definitions, but we also do not think that we should include definitions that could exclude people. If further discussion is required on the subject, it would be worth while having that discussion. We will go back and discuss the subject. I hope that we can come up with something that satisfies the committee and the Parliament at stage 3.

Amendment 53 not moved.

Amendment 2 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 3 is in the name of the minister.

Hugh Henry: It might be useful if, instead of moving amendment 3 at this stage, I give the same commitment on amendment 3 that I gave in my response to Jackie Baillie. I do not want us inadvertently to agree to an amendment only to discover that we are considering the provision elsewhere in the bill.

Amendment 3 not moved.

Amendment 27 not moved.

Amendment 4 moved—[Hugh Henry]—and agreed to.

Amendment 54 not moved.

The Convener: Amendment 28, in the name of Maureen Macmillan, is grouped with amendments 29, 30, 40, 47 and 48.

Maureen Macmillan: This group of probing amendments seeks to find out how the Executive intends to prevent delays when identifying vulnerable witnesses and whether such identification can be made right at the start of any proceedings or process. The meat of the issue is contained in amendment 29, which deals with criminal proceedings, and in amendment 48, which deals with civil proceedings. The amendments that deal with criminal proceedings seek to place a duty on the police to ensure that, when an offence is reported to the procurator fiscal, a police constable specifies at the start of proceedings that he thinks that a vulnerable witness might be involved. Thereafter, parties to proceedings such as the procurator fiscal and the defence solicitor should at the start of proceedings and as soon as they are aware of the circumstances indicate that there is a possibility that a vulnerable witness is involved. Of course, in civil proceedings, the solicitors on either side would be involved.

The minister must tell us how the Executive proposes to ensure that vulnerable witnesses are identified as soon as possible, to avoid the trauma caused by excessive delays when a trial is stopped because of the identification of a vulnerable witness who should have been identified a couple of months beforehand.

I move amendment 28.

Hugh Henry: I fully understand the intention behind Maureen Macmillan's amendments, because we all want vulnerable witnesses to be identified at the earliest possible stage. In fact, we need to have such early identification if the legislation is to be effective. That said, I am not convinced that imposing a statutory duty in the way that Maureen Macmillan proposes would have the desired effect. After all, the court already must check whether any vulnerable witnesses are involved in a case before it starts and consider whether appropriate arrangements have been made for them. I hope that that will ensure that parties do their job before arriving at court.

As I have said, I remain unconvinced that imposing a statutory duty on the police would be in the interests of vulnerable witnesses. Such an approach could be fraught with difficulties. For example, given that the police are required only to report their opinion on whether a witness is vulnerable, how would we know whether they had fulfilled their duties? What sanctions would there be if the police failed in their duty? If it meant that a witness could not be called, cases could be lost or there could be further delays.

I acknowledge that Maureen Macmillan has highlighted the fact that more needs to be done on this matter. For early identification to take place, people must be properly aware and we need more effective training in procedures. We will certainly seek to provide that, because we are committed to raising awareness to ensure that vulnerability is recognised. The new victims and witnesses unit which we are setting up will take forward that work as a priority. As members know, we also intend to pilot the use of vulnerable witness officers, because we think that they will play a key role in promoting good practice. We want to ensure that good communication exists. Proper training to improve awareness and on attitudes and procedures will mean that all agencies, not just the police, are better informed about early identification.

Of course, we will wish to consider how effective the legislation is—we will come to that matter later. We do not want legislation simply to be passed and then left. We must ensure that it has the desired effect. We will closely consider the guidelines that are issued, how they are interpreted and put into effect, what training is taking place and how awareness has been raised. By changing the culture and attitudes of all the agencies that are involved, we can be sure that there will be early identification of witnesses. I am not sure that the imposition of a statutory requirement that cannot be backed by sanctions is necessarily the best approach.

The Convener: Do you want to speak to the other amendments in the group or are you relaxed about them? This is the only opportunity that you will have to speak to them.

Hugh Henry: The comments that I have made apply equally to amendments 47 and 48, which seek to place a duty on parties to civil proceedings to identify any vulnerable adult witnesses.

Maureen Macmillan: I am grateful for the minister's response. I recognise that my amendments would create a difficulty in that it would not be easy to police the duty that would be imposed. I hoped for a strong commitment from the minister to deal with the early identification of vulnerable witnesses and am content with what he said about training and guidance for the police, the Crown Office, solicitors and any others who may be involved. I am particularly pleased that he has undertaken to monitor how the legislation works in practice and I hope that monitoring will start at an early stage after the bill has been enacted so that we can quickly find out whether there are problems that must be addressed.

Amendment 28, by agreement, withdrawn.

Amendment 29 not moved.

The Convener: Amendment 55, in the name of Patrick Harvie, is grouped with amendments 56, 83 and 84.

Patrick Harvie (Glasgow) (Green): Much in the bill is intended to enable child witnesses to give their best evidence, which is in keeping with the need for a fair trial for the accused and for a positive experience for the child witness. I have lodged amendments that would protect the right of the accused to a fair trial and ensure certainty and consistency for children who give evidence in civil and criminal courts.

My amendments seek to simplify what could become a lengthy and complicated process to determine the special measures to which a child is entitled. The guiding principle is that children should have an enforceable right to a special measure that will enable them to give their best evidence.

Amendments 55 and 56, on criminal proceedings, and amendments 83 and 84, on civil proceedings, are intended to give child witnesses the right to give evidence on commission. Justice for Children suggested the amendments to me and I was persuaded by its arguments for focusing on evidence on commission as the best way of taking children's evidence.

Children and young people who have shared their experiences of court supplied many comments that were used in the debate in the chamber. I will briefly quote one of them:

"there were screens up as well but you could still hear him being there, and laughing and going 'Yeah, right' and all that stuff. That's just agony. That's mental torture."

That came from a 14-year-old girl who had been sexually abused by a family member. Of course, other family members are often witnesses in such cases.

The principle behind the amendments is that all children under 16 should have the right to have their evidence taken on commission away from court, possibly by video link, so that they can give their best evidence without having to come into contact with other witnesses who might intimidate them. Such a right would be varied only if that was in the child's best interests, for example, if the child specifically wanted to have their day in court.

The inclusion of an automatic default entitlement to have evidence taken on commission would simplify the bill, as other special measures would be brought in only when there was to be a court appearance. During the debate at stage 1, the Executive acknowledged that there was a need to simplify the child witness notice procedure. To make automatic the right to have evidence taken on commission would be an effective way of meeting the bill's objectives, by facilitating the participation of children and young people and acknowledging their requirements. The Justice for Children group and I believe that there are no circumstances in which children should be required to give evidence in an adult court on the same terms as adults, and the purpose of the amendments is to ensure that that does not happen. I hope that the committee will agree to the amendments.

I move amendment 55.

14:45

Hugh Henry: Members of the committee reflected on this issue, both in evidence-taking sessions and during the debate at stage 1. Some organisations would like it to be the case that no child witness should ever have to attend court and that all children should have their evidence taken on commission. I understand perfectly the sentiments behind that, but I am not sure that it is necessary to take Patrick Harvie's approach.

I accept that children under 12 are especially vulnerable in cases involving crimes of a sexual or violent nature; that is why we must give those children extra help. However, in the case of the young girl that Patrick Harvie described, special measures could be exercised, so I am not sure that additional statutory protection would change the situation for witnesses in that kind of case. There is a huge difference between that type of witness, who would be protected under the bill, and the type of witness who would not necessarily need that protection, but who would receive it if amendment 55 were agreed to. For example, the provisions that Patrick Harvie proposes would apply to a 15-year-old who witnessed an act of petty vandalism and was called to give evidence in court. I am not sure that that is necessary.

The taking of evidence on commission would mark a significant departure from the way in which court business is done and we believe that we are already addressing the concerns that have been widely articulated. The bill provides that a party who calls a child witness must apply for the special measure that is "most appropriate" for the child, taking into account the child's views and best interests, so evidence could be taken on commission for any child if that was appropriate. It is better to have such a facility than a blanket rule that would catch some young people inappropriately. I hope that Patrick Harvie will be reassured that the bill gives sufficient protection to young people and I ask him to withdraw amendment 55.

Patrick Harvie: I press amendment 55.

The Convener: The question is, that amendment 55 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

AGAINST

Baillie, Jackie (Dumbarton) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Macmillan, Maureen (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow) (SNP)
Smith, Mrs Margaret (Edinburgh West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)

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

Amendment 55 disagreed to.

Amendments 56 and 30 not moved.

The Convener: Amendment 57, in the name of Patrick Harvie, is grouped with amendments 58, 85 and 86.

Patrick Harvie: This group of amendments was also suggested by the Justice for Children group in an attempt to modify the way in which children's rights to special measures are administered. Under amendments 58 and 85, the "feelings and informed views" of child witnesses would be taken into account when their right to special measures is considered, in criminal and civil proceedings respectively. The amendments would mean that a child witness notice would have to contain a summary of the feelings and informed views that the child witness had expressed. Amendments 57 and 86 would require there to be an explanation of why any special measures that are proposed are thought to be in the child's best interests, which

would simply reinforce the idea that the decision whether to allow special measures should be made on the basis of the child's best interests.

Because of a drafting error, amendments 58 and 85 include consideration of the views expressed by the child's parents. I ask the committee to endorse the principle of the amendments—I would bring them back with the drafting error corrected.

I move amendment 57.

The Convener: We have to deal with the amendments as drafted, for the purposes of these proceedings. We will deal with them when we come to them and you can decide whether to move them at that point.

Hugh Henry: The child's interests are a central consideration and must be foremost in the mind of parties who call child witnesses. I am not sure that Patrick Harvie's proposals would enhance the system in working for the child's best interests. It is important that child witness notices state clearly the child's views and that the notices contain enough information to allow the court to grant the most appropriate special measures. However, we do not think that it is necessary to have the proposed requirement in the bill.

Amendment 58 would require notices to contain the parents' views, but that is already provided for under proposed new section 271A(3)(a). In addition, proposed new section 271E(2)(b) makes it clear that the views of a parent should not be included where the parent is also the accused, but amendment 58 does not contain that safeguard and it would be unfortunate if it were not there.

Similarly, amendment 85, which relates to civil proceedings, is unnecessary because, by virtue of section 11(2), the views of the child have to be taken into account. The intention is that much of the procedure relating to orders and notices in civil proceedings will be regulated by rules made by act of sederunt; otherwise, the bill would have been overloaded with procedural detail. We are confident that the rules will be drafted so as to follow through the policy of the bill, so that child witness notices for civil proceedings will have to contain the child's views, as is the case for criminal proceedings.

Amendments 58 and 85 refer to the child's feelings, but it is not clear how the court or a party is supposed to relay those feelings. I am not sure how that would be done. Given that the feelings will be expressed and contained in the statement of the child's views, I am not sure that the references are necessary.

I hope that Patrick Harvie will withdraw amendment 57 and not move the other amendments in the group because much of what he seeks to do has already been achieved.

Amendment 57, by agreement, withdrawn.

The Convener: The next group of amendments is a large one. Amendment 31, in the name of Karen Whitefield, is grouped with amendments 59, 32 to 35, 60, 36, 61, 37, 38, 67, 68, 5, 69 to 71, 42, 43, 49 and 50. I point out that, if amendment 59 is agreed to, amendment 32 will be pre-empted.

Karen Whitefield (Airdrie and Shotts) (Lab): Although my amendments 31 to 36, 38, 43, 49 and 50 are numerous, their intention is simple: they have been designed to introduce into criminal and civil proceedings a simplified child witness notice procedure and the concept of standard special measures—namely, the use of screens and closed-circuit television links in conjunction with a supporter for the child witness. If those special measures were applied for, the court would have no discretion to refuse them, which would offer the child witness some stability.

It has been recognised that children are especially vulnerable in the court setting and the amendments seek to shift the present presumption that children will give evidence by conventional means to a state of certainty that they need not. They would strengthen the bill's provisions by recognising the court's discretion on the use of CCTV and screens and, from an early stage in proceedings, would provide the child and his or her guardians with the certainty that the child will not have to give evidence in front of the accused. Victim information and advice officers and procurators fiscal would be able to assure young witnesses of the protection that the measures would offer them at an early stage rather than allowing them to worry about the prospect of going to court and having to confront the accused. The prosecutor would also advise the court of the means by which a child will give evidence in the child witness notice, which would allow the court to be prepared.

Amendments 31 to 36, 38, 43, 49 and 50 would make a significant difference to children giving the best possible evidence in court.

I move amendment 31 and hope that my other amendments will be supported.

Nicola Sturgeon: I will take a wee bit of time to speak to amendments 59 to 61 and 67 to 71, which are in my name. They relate specifically to criminal proceedings, in which it is important to balance the rights of witnesses with the rights of the accused, and arise from concerns that a number of witnesses expressed to the committee at stage 1 and which are reflected in the committee's stage 1 report. Under the bill as introduced, the court will order a hearing to determine whether special measures should be used in a particular case only if it is not satisfied

that an order should be made on the basis of the child witness notice or the vulnerable witness application. In making its determination, the court will no doubt seek to balance the interests of the witness with those of the accused, but at that initial stage, when considering the notice or application, the court will be in possession of only limited information from one of the parties to the proceedings.

It is worth while to point out that that represents a departure from current procedure. Under the Act of Adjournal (Criminal Procedure Rules) 1996—a document with which, no doubt, everybody is familiar—the court will not determine an application for use of a television link without first hearing the parties, and I would be interested to hear why the decision has been taken to depart from that procedure in the bill. If the court is to be in possession of all relevant information when it assesses whether to make an order for special measures, it is important that the parties to the case should have an opportunity to make written or oral representations to the court to ensure that a balanced approach is taken.

Amendments 59, 60 and 61 seek to achieve that result in respect of child witnesses. Amendment 59 would provide that, when a child witness notice has been lodged, the court shall appoint a hearing at which the court can determine whether special measures will be used. That hearing would provide an opportunity for all parties to address the court in that regard.

Amendment 60 would ensure that hearings would proceed only when there is an issue that requires to be resolved. I understand the reluctance to build delays into the system if there are no issues to be resolved. If the party other than the one that lodges the notice has no objections, the court would have the power to dispense with the hearing. Amendment 61 is consequential.

I turn to amendments 67 to 71, which deal with vulnerable witnesses who are not child witnesses. Between them, the amendments would provide two different options that could be adopted to deal with the concerns that I have expressed.

Amendments 67 and 69 go together. Amendment 67 would allow for the party other than the party that lodges the vulnerable witness application to lodge objections in writing when such an application is made, thereby providing the court with both sides of the case. If the decision of the court was to agree to the application and to make an order, it would then be open to the other party to request a hearing, thereby ensuring that both parties have the right to be heard.

Amendments 68, 70 and 71 would provide the other option, which is similar to the approach that I outlined in relation to child witnesses, so I will not rehearse that.

If, for whatever reason, the minister is not persuaded that the amendments would provide a solution to the concerns that I have outlined, I ask him to take a fresh look at the area before stage 3, because legitimate concerns have been raised about the subject. Although there is a need to balance speed in the process with the rights of all parties, the area merits amendment of some nature.

15:00

Maureen Macmillan: Amendments 37 and 42 also deal with primary hearings that decide whether special measures would be put in place for a vulnerable witness, and what kind of special measures would be put in place for a child witness.

When we took evidence in committee, concern was expressed that the primary hearing could become an ordeal for children or vulnerable witnesses if they had to be present in open court to hear their vulnerability discussed. Amendment 37 deals with child witnesses and amendment 42 deals with vulnerable adult witnesses. Both amendments would allow the possibility for such hearings to be held in chambers, either on application by the party citing, or intending to cite, the witness, or by a motion of the court.

Hugh Henry: Executive amendment 5 is intended to ensure consistency between the procedures for hearing vulnerable adult witness applications and child witness notices. If a hearing needs to be held to discuss a special measures application, it might mean that the trial has to be postponed; the bill currently enables that to happen in child witness cases. Amendment 5 will provide a similar provision for vulnerable adult witness applications, which is entirely sensible.

I agree absolutely with Karen Whitefield's amendments on the need to simplify and streamline the process for child witnesses. Anything that can make such a contribution is to be welcomed. I know that the committee took evidence from various organisations that said that automatic entitlement was not always truly automatic. We think that it was, but I hope that Karen Whitefield's amendments 31 to 36, 38, 43, 49 and 50 will give additional reassurance without compromising the policy that the special measures that are applied for in a notice must always be in the interests of what is best for the child.

I understand and accept that amendments 31 to 36, 38, 43, 49 and 50 also resolve an unintended ambiguity in the bill, so that it is clear that a party calling a child witness, having regard to the best interests of the child, can ask the court to order

that the child give evidence with the benefit of special measures, even if that child does not wish the benefit of special measures. I agree that the bill at present might suggest that the child has the final word on the issue.

I acknowledge the additional protection that Karen Whitefield's amendments 31 to 36, 38, 43, 49 and 50 would give children. Of course, the court will still have the power to review special measures if, for whatever reason, the special measures that are agreed to turn out not to be the most appropriate for the child witness. On the basis that the amendments further support child witnesses without compromising the court's overall power to act as a safeguard, I am happy to support them.

However, I cannot support Nicola Sturgeon's amendments 59 to 61 and 67 to 71. She asked whether we would be prepared to review the situation ahead of stage 3: we will reflect on her comments and on others that have been made, but it is fair to say that we have not heard anything so far that persuades us to change our minds. However, that is not to say that we will not re-examine the issue prior to stage 3.

We intend to ensure that the right of an accused person to a fair trial is not compromised, but we also want to ensure that the interests of justice are not compromised. We believe that what we propose will achieve that. The use of the special measures that we propose does not prevent the other party from adequately questioning and testing the evidence of the vulnerable witness. We believe that the measures will help that to happen properly and fairly, instead of witnesses—as is so often the case at the moment—being distressed and unable to communicate adequately or effectively in open court because of their distress.

We have real concerns about an automatic right to object, not only because it is unnecessary, but because it could create delays in proceedings' commencing, and because it could cause great uncertainty for witnesses. I am sure that it is not inconceivable to committee members that there might be people who would seek to cause delay by exploiting the procedural opportunity that would be provided by an automatic right to object. That could add another layer of bureaucracy, with parties' having to intimate to the court whether they object to the use of special measures. It could also have an adverse impact on court programming, with hearings' being assigned then having to be dispensed with at the last minute.

The bill intends to support development of a culture—we emphasise the need to change the culture within the justice system in order to enable children and other vulnerable witnesses to participate fully. We want to get away from a culture and a system in which every opportunity is taken by some parties to exploit procedural technicalities and to raise objections to arrangements. They do so simply to further their own interests, although sometimes the arrangements are designed to bring the best evidence to court.

In our view, allowing routine objections would be a backward step, which we do not wish to consider. Do we really want objections to special measures to become commonplace, with all the delays that that could bring? I hope that the bill will send out to all those who are involved in the justice system an important signal that vulnerable witnesses have a place in that system, and that they should be able to give their best evidence without their being subjected to endless and sometimes mindless objections for no real reasons.

I fully understand Nicola Sturgeon's commitment to requiring that trials be fair and that the rights of accused persons be protected, but I worry that what she proposes could lead to unending and unnecessary delays. Although I have concerns, I will reflect on what she said, although I have to be honest and say that we have not so far heard anything that has persuaded us.

I am happy to support Maureen Macmillan's amendments—I share her concerns about protecting the privacy of vulnerable witnesses. We want to ensure that sensitive information about them on which the court might need to make a decision is not unnecessarily made public. I can imagine the anguish and fear that it might cause someone to think that such information was going to be made public. There will be occasions when it would not be appropriate for sensitive background information that accompanies a child witness notice or a vulnerable witness application to be discussed in open court. I accept therefore that the court should have the power to hold hearings in private in such cases; Maureen Macmillan's amendments 37 and 42 make a useful contribution to the debate.

Nicola Sturgeon: The minister and I obviously have very different views of the issue. He has not been persuaded by my comments; equally, I have not, I am afraid, been persuaded by his. I understand the balance that the minister and the bill are trying to strike between the rights of accused persons and witnesses' rights. I also understand the concerns about building potential delays into the system.

My most profound concern is one that the committee also expressed at stage 1 of the bill. At the initial stage of an application or a notice, there is no opportunity for the other party to express opinions about whether the right to a fair trial has been prejudiced. That will always be for a court to determine, but due process of law requires that

both parties at that stage should be able to make their opinions known in some way.

I am not sure that it is ever good to argue that rights should be removed from all because of the fear that some people might exploit those rights. Although I understand the concerns about delay, and I do not want to build in unnecessary delay in court cases, not providing any right for the other party to be heard makes proceedings vulnerable to challenges under the European convention on human rights, even if we cannot know whether such a challenge would be upheld, which would also build in delays.

For all those reasons, I believe that the issue requires to be reconsidered. With a bit of effort, I am sure that a reasonable compromise could be struck.

The Convener: Thank you for that. Karen Whitefield will wind up and say whether she wants to press amendment 31.

Karen Whitefield: I am grateful to the Executive for its support for my amendments. The inclusion of the amendments in the bill will ensure that established special measures are truly automatic for children. The amendments address some of the widely-expressed concerns of defence agents that the use of special measures in a court would give a jury the impression that the witness needs to be protected from the accused. By ensuring that all children automatically use special measures—unless they choose not to—the provision will end that problem and address concerns that have been voiced over several years by defence agents.

Most important, the amendments will ensure that the use of special measures in child witness cases is normal, and they will contribute to the cultural and attitudinal change in our courts that the bill seeks to achieve.

Amendment 31 agreed to.

Amendment 58 not moved.

Amendment 59 moved—[Nicola Sturgeon].

15:15

The Convener: The question is, that amendment 59 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Sturgeon, Nicola (Glasgow) (SNP)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Smith, Margaret (Edinburgh West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)

ABSTENTIONS

Goldie, Miss Annabel (West of Scotland) (Con)

The Convener: The result of the division is: For 1, Against 4, Abstentions 1.

Amendment 59 disagreed to.

Amendments 32 to 35 moved—[Karen Whitefield]—and agreed to.

Amendment 60 not moved.

Amendment 36 moved—[Karen Whitefield]—and agreed to.

Amendment 61 not moved.

The Convener: Amendment 62, in the name of Patrick Harvie, is grouped with amendments 63, 64 and 87.

Patrick Harvie: The amendments are intended to ensure that provision of special measures is guaranteed by removing courts' ability to deny child witnesses special measures, unless the child wishes it. The policy memorandum that accompanies the bill states:

"This Bill will give children (aged under 16) an automatic entitlement to use special measures when they give evidence. This means that children will now have a right to use a special measure although they can express a wish to waive their entitlement. The main benefit of automatic entitlement is that it enables the witness to know what to expect from the trial experience at an early stage."

However, the bill fails to deliver that objective by allowing courts to make orders that child witnesses are to give evidence without the benefit of special measures. It would be in the court's power, not in the witness's power, to decide whether and when special measures are allowed or disallowed. Surely that cannot be the bill's intention. I ask the committee to consider the amendments.

I move amendment 62.

Hugh Henry: I realise that some children's organisations have expressed concerns about that provision on the ground that it would allow the court, by the back door, to deny a child's right to use special measures. We do not agree that the amendment to the Criminal Procedure (Scotland) Act 1995 does that. The test is a high test, and the risk would have to be significantly higher than the risk of prejudice to the witness for a court not to allow the use of a special measure. The provision is likely to be applied only in special circumstances.

Courts always have a duty to protect the interests of justice and the fairness of trials or proof. That means that if a court is genuinely concerned that the use or continued use of special measures in a case could prejudice the trial, it will always be able to withdraw those special

measures. It is to some extent a matter of balance, as Nicola Sturgeon said early on.

We consider it to be unlikely that what Patrick Harvie described would happen, because none of the special measures would prevent a party from adequately questioning a child. However, the provision would give extra protection to child witnesses if such a rare case were to occur. If the court were to consider denying special measures to a child witness for fear of prejudicing the trial, at least it would be directed to consider the interests of the child witness, too. The balance does not fall simply in one direction. I argue that if we were to remove that provision, contrary to what Patrick Harvie intends to achieve, we would remove that extra protection.

We are not saying that the test would be used very often; we acknowledge that that is not the case. The provision will merely allow for the possibility that there may be circumstances in which the use of a special measure could affect the fairness of a trial. If that is ever the case, the provision will mean at least that the court cannot easily refuse special measures to a child witness.

What we are doing is sensible. We are trying to protect both the right to a fair trial and the special measures for child witnesses. The provision does not move away from the special protection measures for child witnesses. I think that the bill achieves a proper balance but I worry that Patrick Harvie's amendment might unintentionally undermine that.

Patrick Harvie: I want to press amendment 62. I reply to the minister simply by reminding members that, during the stage 1 debate, we heard many references to questionable decisions that had been made in individual cases involving vulnerable witnesses. Leaving it in the power of the courts to deny special measures will not serve the interests either of justice or of child witnesses.

The Convener: The question is, that amendment 62 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

AGAINST

Baillie, Jackie (Dumbarton) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Macmillan, Maureen (Highlands and Islands) (Lab)
Smith, Margaret (Edinburgh West) (LD)
Sturgeon, Nicola (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)

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

Amendment 62 disagreed to.

Amendments 63 and 64 not moved.

Amendment 37 moved—[Maureen Macmillan]—and agreed to.

Amendment 38 moved—[Karen Whitefield]—and agreed to.

The Convener: Amendment 65, in the name of Nicola Sturgeon, is grouped with amendments 66 and 88.

Nicola Sturgeon: Amendments 65, 66 and 88 are very simple and deal with the option of self-referral of vulnerable witnesses. The effect of the amendments would be that witnesses would be entitled—as will be the parties who cite witnesses—to lodge vulnerable witness applications. Among other things, that change would take into account circumstances—albeit rare—in which a witness and the party citing the witness do not agree about the vulnerability of the witness. The inclusion of such a provision attracted many positive comments at stage 1; many people who gave evidence to the committee said that a provision on self-referral would be important.

I move amendment 65.

The Convener: As no other members wish to speak, I call the minister.

Hugh Henry: I appreciate fully the intention behind Nicola Sturgeon's amendments 65, 66 and 88. The amendments are well-intended and reflect widespread concern that witnesses are sometimes not fully supported and protected. However, I emphasise again that it is the responsibility of parties calling witnesses to identify vulnerable witnesses, to take their views into account and to make the appropriate applications to the courts. We believe that there are sufficient safeguards in the bill to ensure as far as possible that vulnerable witnesses are identified. For example, the bill imposes a duty on the court to consider at a hearing whether there are any vulnerable witnesses in a case. There is also provision in the bill to enable the courts to review the arrangements for taking vulnerable witnesses' evidence.

I am concerned that self-referrals could seriously undermine the duties that are being placed on the parties and the courts. Self-referrals could have the unfortunate result that parties in the proceedings do not take seriously their own duties, which could result in vulnerable witnesses going undetected in the system. More worryingly, a system of self-referral could also be open to abuse: it would not only be people who were genuinely in need of help who could submit applications. The Crown and others have sometimes to deal with reluctant and deliberately obstructive witnesses. Such witnesses could use the power to self-refer as a way of creating delays in the case—delays that could have a negative impact on the genuinely vulnerable witnesses whom we are trying to help. Even witnesses who

were not maliciously intent on delaying and upsetting proceedings could inadvertently end up causing that.

The provisions in the bill are about helping those who are most in need—genuinely vulnerable people who would be seriously hindered in giving their best evidence without that help. We need to stay focused on that aim.

At stage 1, the committee asked the Executive to do all that is in its power to minimise delays. We will indeed do all that we can to ensure that the justice system runs smoothly and efficiently and I argue that self-referrals go against that intention. We accept the need for added safeguards and we understand the importance of ensuring that vulnerable witnesses be identified. That will be a key priority of the implementation group. I believe that if all agencies work together, and if people communicate adequately and properly, that will be the best way forward.

I worry that what Nicola Sturgeon proposes would increase bureaucracy and delays. It could raise expectations unnecessarily, which would lead to applications that have little or no chance of being granted, and it could clog up the courts with vulnerable witness application hearings that have little or no merit. I think that it would undermine much of what we are trying to do in the bill to help vulnerable witnesses.

Nicola Sturgeon: I hear what the minister says, but I think that amendments 65, 66 and 88 would provide an important safeguard. Rather than cause delays and clog up the system, they would, I hope, prevent any vulnerable witness from falling through the net.

There will be occasions when there are disagreements between the witness and the party who has cited them about the witness's vulnerability. It will not always be the case—although it will be sometimes—that the person who is wrong will be the witness. In some cases, the party who has cited the witness will have got things wrong. The amendments would provide a safeguard. Ultimately, it is the function of the court to determine whether applications are malicious—to use the minister's word—or ill-founded.

With those comments, I press amendment 65.

The Convener: The question is, that amendment 65 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Sturgeon, Nicola (Glasgow) (SNP)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Macmillan, Maureen (Highlands and Islands) (Lab)
Smith, Margaret (Edinburgh West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)

The Convener: The result of the division is: For 1, Against 5, Abstentions 0.

Amendment 65 disagreed to.

15:30

Amendments 39, 66, 40, 41, 67 and 68 not moved.

Amendment 5 moved—[Hugh Henry]—and agreed to.

Amendments 69 to 71 not moved.

Amendment 42 moved—[Maureen Macmillan]—and agreed to.

The Convener: Amendment 72, in the name of Patrick Harvie, is grouped with amendments 73, 89 and 90.

Patrick Harvie: This group of amendments is intended to provide certainty about the provision of special measures for child witnesses once they have been decided for a trial. If agreed to, the amendments would mean that courts cannot remove special measures that have previously been granted, thus removing the possibility of trauma and uncertainty for the child concerned.

I move amendment 72.

Hugh Henry: We cannot always predict how the courts will apply the law, but we believe that the bill makes it clear that the best interests of the child are fundamental and should be a central consideration in any decisions that are made about which special measures should be provided for a child.

We do not see any basis for the fear that after special measures have been granted, the court is likely to change its mind about the order that it made and arbitrarily revoke those special measures. I put it on the record that there would have to be an exceptionally cogent reason for such a revocation to happen. I re-emphasise that no decision would be taken except with full regard paid to the best interests of the child witness.

It is important to retain flexibility, as circumstances can change. Children develop, and they might change their minds about what would help them most when they give evidence. The views of child witnesses should be listened to, at the very least, and should form part of any consideration of special measures. That is not just my view, but is enshrined in the United Nations Convention on the Rights of the Child, which states that children should have the right to express their views and have them taken into account in all matters that affect them. We take

that seriously. Amendments 72 and 73 could interfere with that right, which is at the heart of the bill, so I oppose them and I hope that Patrick Harvie will withdraw amendment 72 and not move the remaining amendments in the group.

Patrick Harvie: I appreciate the minister's strong words on the situation that I described, but I do not believe that the amendments I propose are in conflict with the UN Convention on the Rights of the Child, which I certainly endorse, as I am sure other members do. The granting of special measures should be interpreted as a promise to a child witness, and that promise should not be broken. I press amendment 72.

The Convener: The question is, that amendment 72 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

AGAINST

Baillie, Jackie (Dumbarton) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Macmillan, Maureen (Highlands and Islands) (Lab)
Smith, Margaret (Edinburgh West) (LD)
Sturgeon, Nicola (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)

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

Amendment 72 disagreed to.

Amendment 73 not moved.

Amendment 43 moved—[Karen Whitefield]—and agreed to.

The Convener: We are making reasonably good progress with our timetable so I suggest that we adjourn for a five-minute comfort break.

15:37

Meeting suspended.

15:45

On resuming—

The Convener: Amendment 74, in the name of Jackie Baillie, is grouped with amendments 75, 77, 91 and 93.

Jackie Baillie: I will be brief. The five amendments in the group would introduce the option of using intermediaries as a special measure. The Deputy Minister for Justice and the Minister for Justice are aware of the positive role that intermediaries have played. They have been used effectively in South African courts for about a decade. As members know, the South African system is similar to ours, as it is adversarial.

The use of intermediaries would prevent children from being subjected to hostile cross-examination. Some questioning can be very stressful for children. I acknowledge that that is a consequence of our adversarial system and that all evidence should be properly tested, but the use of an intermediary would ensure that the substance of a question was preserved while any inappropriate language was removed, which would mean that the child could better understand and respond.

I have outlined the nature of a special measure that could be employed, but that is a matter for the judge. My aim with the amendments is to expand the categories that are available to include the use of an intermediary.

I move amendment 74.

Hugh Henry: How long do I have to speak on the amendments? I have a substantial speaking note.

Jackie Baillie: Do not let him wind you up, convener.

The Convener: It would not be the first time. We would all be universally grateful if Hugh Henry took the brevity of his colleague Jackie Baillie as a model.

Hugh Henry: I understand what Jackie Baillie said about the amendments. The Executive does not oppose the use of intermediaries in principle. However, more work needs to be done before we can produce a firm proposal that suits the needs of witnesses in Scotland. Intermediaries will be piloted shortly in England and Wales. We are in regular contact with the Home Office and we will monitor progress on that pilot.

The bill contains a power to add special measures by way of statutory instrument, so intermediaries or other measures could be added once further work has been undertaken on the matter.

I am happy to put it on record that we do not rule out the introduction of intermediaries as a special measure in future, but we want to see what is happening elsewhere. If we go down that route, we will introduce the measure by affirmative instrument, which would mean full parliamentary scrutiny and the opportunity for debate. It is better to wait and learn how others adopt the practice before we rush in, so that we get it right. We support the principle and the intention behind what Jackie Baillie said. I hope that those assurances will be sufficient to persuade her not to press amendment 74.

Jackie Baillie: I am delighted to await the outcome of the pilots in England and Wales. The minister's response was positive, so I will not press amendment 74.

Amendment 74, by agreement, withdrawn.

Amendment 75 not moved.

The Convener: Amendment 76, in the name of Karen Whitefield, is grouped with amendment 94.

Karen Whitefield: Both amendments in the group were inspired by a conversation that I had with representatives of Children 1st. Children's organisations believe that the measures contained in the bill are very positive. However, there needs to be monitoring of proposals to ensure that special measures are used and that account is taken of the experiences of children who have had an opportunity to use the measures in court.

Amendment 76 would require the Executive to review the operation of special measures and, in so doing, to take into consideration the views of young people and vulnerable witnesses on the effect of the legislation, whether their experiences have been positive and whether there is a need for further review of the operation of special measures.

Amendment 94 would require ministers to prepare a report and to present it to Parliament following the full implementation of the bill. Over a number of years, special measures have been available to courts, but they have not always been used. Airdrie sheriff court in my constituency is well equipped with CCTV cameras, but voluntary organisations that operate in the constituency and victims of domestic abuse say that they are often not given access to that facility when they are asked to give evidence. The intent of the legislation is to ensure that vulnerable witnesses are always able to give the best possible evidence. That is why amendment 94 calls for a report to be made on the effectiveness of the legislation.

I seek the minister's views on my proposals.

I move amendment 76.

Hugh Henry: I give a commitment to Karen Whitefield and the committee to keep the operation of the legislation under review. We are as determined as anyone to ensure that the legislation works, and works well. Karen Whitefield's amendments give me the opportunity to put that commitment on record.

However, I argue that the amendments are unnecessary. As members know, the Executive recently announced the establishment of a victims and witnesses unit in the Justice Department. The new unit will plan the implementation of the bill. It will also develop proposals to pilot the concept of vulnerable witness officers, who will provide on-going support to agencies and help to ensure that the needs of all vulnerable witnesses are met.

Part of that on-going work will be to keep under review the effectiveness of special measures, so that the aim of meeting witnesses' needs is achieved. The unit will seek the views of witnesses as well as pursuing formal research into the effectiveness of the measures. I am not convinced that a new section is required to make that happen. I hope that there are already sufficient mechanisms under which the Parliament can hold the Executive to account and scrutinise the implementation of legislation.

I am happy to give Karen Whitefield the assurance that she seeks. We are as concerned as she is that the bill should have the desired effect. We will monitor and evaluate the implementation of the legislation, but I am not persuaded that the proposed amendments are necessarily the best way of doing that.

Karen Whitefield: I am grateful to the minister for his comments. It is important that members of the committee and organisations that are working to protect the rights of children should receive assurances that there will be full evaluation and monitoring of the legislation once it is enacted. As those assurances have been given, I seek permission to withdraw my amendment.

Amendment 76, by agreement, withdrawn.

The Convener: Amendment 6, in the name of Mike Pringle, is grouped with amendments 7, 8, 92, 21 and 22. If amendment 6 is agreed to, I cannot call amendment 7, and if amendment 92 is agreed to, I cannot call amendment 21, because of pre-emptions. Mr Pringle is not with us, but Margaret Smith is here as a committee substitute. As she is appearing as a substitute for the first time, I invite her to declare any relevant interests.

Margaret Smith (Edinburgh West) (LD): I am not aware of any interests, convener.

The Convener: In that case, I ask you to move amendment 6 and speak to the other amendments in the group.

Margaret Smith: On Mike Pringle's behalf, I am happy to speak to amendment 6. It mirrors some of the views that were expressed in the committee's stage 1 report. The bill introduced the possibility of evidence being taken from a vulnerable witness by a commissioner and recorded by video link, to protect those deemed vulnerable in giving evidence.

The Executive proposes to allow the accused to be present in the room if the commissioner agrees, although there are Executive amendments before us that would change that rule so that the court would have to agree, which would be a welcome move. However, it is entirely possible that the accused and the victim could be in the same small room—if anything, the presence of the accused could be more unsettling than it would be in a large courtroom.

The court can allow the accused to watch and hear proceedings through a video link, and that

should be adequate to allow the accused a fair trial. That view is supported by Rape Crisis Scotland, which stated in its evidence that to allow the accused to be in the same room

"defeats the entire purpose of the measure … the witness is likely to be even more intimidated if they are required to give evidence to the Commissioner in a room with the accused sitting in closer proximity than they would be if in the courtroom".

That is echoed in the evidence taken at stage 1 from Scottish Women's Aid, the Equality Network and the Commission for Racial Equality in Scotland and, as I said, it is the view that the committee took in its stage 1 report.

Amendment 92, which is also in Mike Pringle's name, covers civil cases. If the amendments are not agreed to, we would still welcome the fact that Executive has listened to the committee's concern about the decision being taken by the court rather than by the commissioner.

I move amendment 6.

Hugh Henry: We have listened to the views that were expressed at stage 1 on who should make the decision about whether an accused is allowed to be present at a commission and how the accused should see and hear the evidence being taken if he or she is not present. I take on board the concern that has been expressed that leaving the decision to the commissioner could result in inconsistency between the court and the commissioner. I agree that it would be better for the court to make the decision about whether the accused should be present and, if not, the means by which the accused may see and hear the proceedings, so I hope that we have reflected some of the concerns that were expressed by the committee at stage 1. I argue that that approach will ensure that the court retains control over the major decisions in the case and will, therefore, prevent any inconsistencies. The court will also be aware of the reasons for the vulnerability of the witness, which will ensure that the use of the special measure is not undermined by the accused's presence. Amendments 7 and 8 apply to criminal proceedings, and amendments 21 and 22 apply to civil proceedings.

Margaret Smith moved amendment 6, which is in the name of Mike Pringle. I understand the sentiment behind amendment 6 and amendment 92, which aim to prevent an accused or a party in a civil case from ever being present when a vulnerable witness is giving evidence on commission. However, we are worried that trying to exclude exceptions does not necessarily make good law. The bill sets out the general rule that the accused parties should not be present at a commission. To pick up on a point that Margaret Smith made, the accused should not be in the room; they would be in the room only by exception. It is important to stress that there would have to be good reasons for the accused to be allowed in.

I understand members' concern that there could be problems, but amendment 6 goes a bit too far, as it would mean that there would be no possibility of there ever being an exception to the rule that an accused should not be present. There could be circumstances in which the presence of an accused would not have a negative impact on the witness. For example, the witness could be a defence witness whose vulnerability has nothing at all to do with his or her relationship to the accused. He or she might even prefer the accused to be there. Would it be right that, when a witness has no objection to the accused being present, he or she still could not attend?

16:00

As I said, amendment 92, on civil proceedings, would also have the effect of excluding a party from being present when evidence on commission was being taken. Again, I can understand the sentiment behind the amendment, but it could have an unfortunate effect on civil proceedings. For example, what would happen when a party needs to call a vulnerable witness for his own case when he is conducting the case himself? The amendment would rule out the use of evidence on commission in such a case, even where that is best for the witness and the witness has no difficulty with the party being there.

I understand what is driving Mike Pringle, but I am not sure that his amendments would have the required impact. They could lead to unforeseen and unfortunate circumstances, and I hope that Margaret Smith will withdraw amendment 6.

Margaret Smith: Although I think that there is a lot to be said for the principle behind Mike Pringle's amendments, in the light of the minister's comments on their unforeseen consequences, I shall seek leave to withdraw amendment 6 today and leave Mr Pringle to fight again another day if he decides to do so.

Amendment 6, by agreement, withdrawn.

Amendments 7 and 8 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 9, in the name of the minister, is grouped with amendment 23.

Hugh Henry: Proposed new section 271L of the 1995 act, on criminal proceedings, and section 17 of the bill, on civil proceedings, provide that supporters are to be a statutory measure. The only statutory exception on who may act as a supporter is that it should not be a witness in the proceedings. We recognise that that exception was the subject of criticism at stage 1 on the basis

that it could exclude the most obvious candidate in some cases—for example, the mother of a young child abuse victim.

In its stage 1 report, the Justice 2 Committee was of the view that a witness who has given evidence should be able to act as a supporter. We have given some thought to the matter and have been persuaded by the committee's arguments that a general rule excluding a witness from acting as a supporter is not appropriate. We are obliged to members of the committee and others for raising the matter. Accordingly, amendments 9 and 23 will allow a person who is nominated by the vulnerable witness and who is to give evidence at the trial to act as a supporter once he or she has given evidence.

I move amendment 9.

Maureen Macmillan: Rape Crisis Scotland has said that there is talk that a supporter could not give support at all before the trial and that, if they gave support to a potential witness before the trial, that could in some way disqualify them. I do not think that that concern has any basis in fact, but I wonder whether the minister could clear up that misconception about the use of a supporter.

Hugh Henry: I am not aware of that concern and I do not know where it has come from. Sometimes, stories and rumours start and have legs. If Maureen Macmillan wishes to write to me with further details about those concerns, I shall check what the situation is, but I have no knowledge or information on the specific point that she has raised.

Maureen Macmillan: Thank you very much, minister. That is helpful.

The Convener: I thank Maureen Macmillan for that contribution. Minister, I ask you to wind up. You might want to allude to the phrasing of amendment 9, which could be considered again at stage 3. The amendment states that

"that person may not act as the supporter at any time before"

the trial, but it does not specifically define what that means. That seems to be what is causing the doubt in Maureen Macmillan's mind. However, I am perfectly happy that you should wind up so that we can take a decision on the amendment.

Hugh Henry: Thank you, convener. We will certainly consider the wording, because we would be concerned if it precluded an important suggestion about the role of supporters. It would be unfortunate, to say the least, if supporters were prevented from acting in the way that members intended. I do not know whether that would be the case, but we will consider the matter carefully.

The Convener: That is helpful.

Amendment 9 agreed to.

Amendment 77 not moved.

Section 1, as amended, agreed to.

Section 2—Consideration before the trial of matters relating to vulnerable witnesses

The Convener: Amendment 10, in the name of the minister, is grouped with amendment 11.

Hugh Henry: Amendment 10 is purely technical and clarifies where words in the bill should be inserted into the 1995 act.

Amendment 11 will close a loophole in relation to appeals. The bill makes no provision for appeals against decisions of the court relating to vulnerable witnesses. We consider that an appeals process is unnecessary and we are concerned that it could be exploited to introduce delays and increase uncertainty for vulnerable witnesses. However, we have identified a potential loophole whereby it might be possible under current legislation to appeal a decision on special measures if the decision has been made by the court at a preliminary diet in the High Court or first diet in the sheriff court. Amendment 11 will close that potential loophole and ensure that no appeal can be taken against the decision made by the court at a hearing on the use of a special measure.

I move amendment 10.

Amendment 10 agreed to.

Amendment 11 moved—[Hugh Henry]—and agreed to.

Section 2, as amended, agreed to.

Sections 3, 4 and 5 agreed to.

Section 6—Power to prohibit personal conduct of defence in cases involving vulnerable witnesses

The Convener: Amendment 78, in the name of Karen Whitefield, is grouped with amendments 79 and 80.

Karen Whitefield: All three amendments relate to the personal conduct of defence. Amendment 78 is the substantial amendment and amendments 79 are 80 are consequential.

Amendment 78 seeks to introduce a rule prohibiting the accused from conducting his or her defence in person in violent crime cases that involve child witnesses under the age of 12. The accused must by law be present in such cases.

Amendment 78 is linked to the rule that a child witness who is under 12 should give evidence from outwith the court. It also places a duty on the Crown to serve a notice on the accused at the same time as it submits a child witness notice in

cases to which proposed new section 271E of the 1995 act applies.

A child under 12 who is to give evidence in a case involving violence would be considered vulnerable. It is important to offer such children increased security and comfort. Knowing for definite that the accused would not be allowed to cross-examine them would reassure such witnesses when facing the fear of going to court.

I hope that the Executive will support amendment 78. The ban would further strengthen the protection that the bill gives to the most vulnerable child witnesses. Children in such cases are already considered especially vulnerable, as the bill creates a presumption that they will give evidence from outwith the court. Amendments 78 to 80 would make a positive contribution to the bill and I hope that the Executive will consider supporting them.

I move amendment 78.

Nicola Sturgeon: I disagree with amendment 78. The bill rightly gives the court discretion to prohibit the personal conduct of defence in some cases. A blanket prohibition would tip the balance too far in the wrong direction. Practical problems are involved in stipulating in a bill that the accused must be legally represented. An accused person may refuse to instruct a solicitor. In those circumstances, a lawyer would not act for the accused person. The situation raises problems in practice and in principle.

The precedent has been set in some sex offence cases—that is water under the bridge. I supported the motivation behind that, but I was not convinced that a blanket prohibition in such cases was right. I am certainly not persuaded that we should extend the blanket ban. The bill adequately covers the matter by giving the court discretion.

Hugh Henry: I understand the direction from which Nicola Sturgeon is coming, but we must acknowledge some of the difficulties that occur when someone attempts to conduct his or her own defence. Karen Whitefield has identified an important issue. Even if special measures are used, a young child witness might be distressed if they could see or identify the accused conducting his or her defence.

As Nicola Sturgeon said, the bill provides for a discretionary ban, but I accept Karen Whitefield's argument that the further protection that an automatic ban would provide would be an additional reassurance in serious cases for young child witnesses and for their parents or guardians.

Nicola Sturgeon is right to suggest that any extension of the automatic ban needs to be considered carefully. However, as the provision proposed by Karen Whitefield's amendment 78 is limited to special cases, we believe that the response is proportionate to a potentially damaging situation.

I accept that Karen Whitefield faced a difficulty. She raised the issue at stage 1, but she did not have a great deal of time to consider what would be fairly complicated amendments. I am happy to accept her amendments and I give the commitment that, if any further amendments are necessary to tidy up the bill, we will lodge them at stage 3.

Karen Whitefield: Before I lodged amendments 78 to 80, I thought long and hard about their consequences. It has been established in the justice system that people should not be allowed to conduct their own defence in crimes of a sexual nature. I do not think that extending the measure to cover children under the age of 12 who are witnesses in cases of violent crime would undermine the justice system. We seek to improve the justice system and I believe that my amendments would allow a balanced and proportionate extension to the existing rights of child witnesses. The amendments would allow children to participate in the justice system in a way that recognises the unique and special vulnerability of people who are so young.

16:15

The Convener: The question is, that amendment 78 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Baillie, Jackie (Dumbarton) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Macmillan, Maureen (Highlands and Islands) (Lab)
Smith, Margaret (Edinburgh West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)

AGAINST

Sturgeon, Nicola (Glasgow) (SNP)

The Convener: The result of the division is: For 5, Against 1, Abstentions 0.

Amendment 78 agreed to.

Amendments 79 and 80 moved—[Karen Whitefield]—and agreed to.

Section 6, as amended, agreed to.

Section 7—Interpretation of this Part

The Convener: Amendment 12, in the name of the minister, is grouped with amendments 17 to 20.

Hugh Henry: Amendment 20 inserts a new section after section 11. The new section clarifies that a party to civil proceedings can apply for the

use of special measures should they wish to give evidence in the case. The current wording in the bill does not make it entirely clear that a party to proceedings, if considered vulnerable, should be eligible to use special measures. That has always been the intention and amendment 20 now puts the matter beyond doubt.

Amendment 18 is consequential to amendment 20. Amendment 19 is a drafting amendment to ensure consistency between comparable provisions in the criminal and civil proceedings parts of the bill. Similarly, amendments 12 and 17 are drafting amendments to make the wording in the bill consistent between civil and criminal proceedings.

I move amendment 12.

Amendment 12 agreed to.

Amendments 44 and 45 not moved.

Amendments 81 and 82 moved—[Maureen Macmillan]—and agreed to.

Amendments 13 and 14 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 15, in the name of the minister, has already been debated.

Hugh Henry: I will not move the amendment. We will re-examine it in the light of comments that have been made.

Amendment 15 not moved.

Amendment 46 not moved.

Amendment 16 moved—[Hugh Henry]—and agreed to.

Amendment 47 not moved.

Section 7, as amended, agreed to.

After section 7

Amendment 48 not moved.

Section 8—Orders authorising the use of special measures for vulnerable witnesses

Amendment 83 not moved.

Amendment 17 moved—[Hugh Henry]—and agreed to.

Amendments 84 to 86 not moved.

Amendments 49 and 50 moved—[Karen Whitefield]—and agreed to.

Amendment 87 not moved.

Amendments 18 and 19 moved—[Hugh Henry] and agreed to.

Amendment 88 not moved.

Section 8, as amended, agreed to.

Section 9—Review of arrangements for vulnerable witnesses

Amendments 89 and 90 not moved.

Section 9 agreed to.

Sections 10 and 11 agreed to.

After section 11

Amendment 20 moved—[Hugh Henry]—and agreed to.

Section 12 agreed to.

Section 13—The special measures

Amendment 91 not moved.

Section 13 agreed to.

Section 14—Taking of evidence by a commissioner

Amendment 92 not moved.

Amendments 21 and 22 moved—[Hugh Henry]—and agreed to.

Section 14, as amended, agreed to.

Sections 15 and 16 agreed to.

Section 17—Supporters

Amendment 23 moved—[Hugh Henry]—and agreed to.

Section 17, as amended, agreed to.

After section 17

Amendment 93 not moved.

Sections 18 and 19 agreed to.

After section 19

Amendment 94 not moved.

Section 20 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank all members of the committee and the substitute for their contribution to the proceedings and I thank the minister and his colleagues from the Justice Department for their presence.

Hugh Henry: You are welcome.

Meeting closed at 16:28.

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