JUSTICE 2 COMMITTEE

Tuesday 13 January 2004
(*Afternoon*)

Session 2

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CONTENTS

Tuesday 13 January 2004

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ANTISOCIAL BEHAVIOUR ETC (SCOTLAND) BILL: STAGE 1 443

JUSTICE 2 COMMITTEE
2nd Meeting 2004, 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 GAVE EVIDENCE:

Michael Clancy (Law Society of Scotland)
Hugh Henry (Deputy Minister for Justice)
Anne Keenan (Law Society of Scotland)

CLERK TO THE COMMITTEE

Gillian Baxendine
Lynn Tullis

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 2

Scottish Parliament

Justice 2 Committee

Tuesday 13 January 2004

(*Afternoon*)

[THE CONVENER *opened the meeting at 14:01*]

Antisocial Behaviour etc (Scotland) Bill: Stage 1

The Convener (Miss Annabel Goldie): Good afternoon, everyone. I welcome you all to this second meeting of the Justice 2 Committee in 2004. We propose to continue taking evidence on the Antisocial Behaviour etc (Scotland) Bill. I crave the indulgence of the committee: I am struggling slightly under health challenges, which manifest themselves in uncontrolled convulsions of coughing. Does the committee agree that, if I have to depart without notice, Karen Whitefield will take over and convene the meeting?

Members *indicated agreement.*

The Convener: When it happened at my surgery yesterday, my constituents almost had to be removed for medical help by the time I had finished.

On behalf of the committee, I welcome Michael Clancy, director of the law reform department at the Law Society of Scotland; and Anne Keenan, depute director of the same department. Your colleagues, Gerard Brown and Alex Prentice, were initially hoping to join you, but I gather that they are not available.

Michael Clancy (Law Society of Scotland): That is unfortunately true, convener. Thank you for your welcome. I hope that your convulsions are not caused by any evidence that we have submitted, and that you will stay the course. Gerry Brown and Alex Prentice cannot be with us because of court commitments, so we are bereft. That having been said, if there is anything that we cannot answer, but which they, as practitioners, would be more suited to answer, then, if the committee would grant us the indulgence, we will take it back to them and come forward with further written submissions later.

The Convener: That is very helpful, Mr Clancy, thank you. Committee members have seen the Law Society's submission on the bill, and we express our appreciation for it. Without further ado, I invite Nicola Sturgeon to ask about the general issue of resources, as distinct from that of legal powers.

Nicola Sturgeon (Glasgow) (SNP): We are grateful for your comprehensive written submission, which was very useful. I am sure that you will have opportunities to expand on it in the course of the afternoon.

My first question arises from a view that a number of witnesses have put forward. Although there is universal agreement that antisocial behaviour is a problem that must be taken seriously, one view is that it is not an adequate or appropriate legislative framework that is lacking; rather, it is resources that are required in order for the framework to function properly. Would you have any sympathy with that view?

Michael Clancy: We would have sympathy with that view. As we have pointed out, there are examples of existing law in use in relation to a number of provisions in the bill. We have some sympathy with the point of view that how the current law is applied, together with how resources are applied in relation to that law, constitutes a good part of the issue.

The Convener: Is there anything further?

Michael Clancy: I think that that covers it at the moment.

Mike Pringle (Edinburgh South) (LD): I would like to ask about antisocial behaviour. Everybody has a different concept of what antisocial behaviour is. What is your view on the definition in the bill? Is it too wide? Is it too subjective? Does the Law Society have those concerns?

Anne Keenan (Law Society of Scotland): Antisocial behaviour has been highlighted as a problem throughout communities in Scotland, and we sympathise with communities that are experiencing it. If the bill is to operate effectively, there has to be a quite broad definition of antisocial behaviour, as it will have to encapsulate a range of behaviour that we may be dealing with in our communities. The definition in section 110 adequately does that.

Mike Pringle: Let us, then, consider the question of antisocial behaviour orders. At the moment, an ASBO can be issued to somebody who is aged 16 or over. The suggestion is that the age limit should be extended down to 12. You say quite a bit about that in your submission. Like Nicola Sturgeon, I thank you for your submission, which is comprehensive.

Anne Keenan: Section 4(2)(a) will extend the availability of ASBOs to persons under the age of 16. The Law Society's criminal law committee had some concern about the extension of ASBOs to children under the age of 16. Principally, we considered how to address the behaviour of under-16s from the point of view of the welfare principles that are traditionally associated with the

Scottish Children's Reporter Administration. We have also had regard to the Scottish Executive's "Report of Advisory Group on Youth Crime", which was published in 2000. The report quite clearly puts the emphasis on early identification, education and prevention, and we are keen to see those initiatives kick in at an early stage.

I appreciate that the bill is only part of several continuing Executive strategies and that it should be viewed in that light. However, we are keen for youth groups and other organisations that see the stems of the antisocial behaviour coming from young people to work together—perhaps with social work interests and those on the criminal justice side—so that we can develop a comprehensive package of care that will address the antisocial behaviour of each individual in the system. We are looking for a more packaged system of care, and the Scottish Children's Reporter Administration has a key role to play in creating that through working with other organisations. Currently, the children's panel will intervene if compulsion or supervision is required. If its intervention fails, there is also recourse to criminal law, in certain circumstances, if criminal behaviour persists.

On the intention to extend the use of ASBOs to under-16s as a deterrent, the criminal law committee is not sure that an ASBO would be any greater deterrent than criminal law and the sanctions that it could impose. If, on the other hand, the policy intention is to divert that group of people away from criminal action, we feel that the Parliament should be clear that the breach of an ASBO is a criminal offence. In that situation, someone might receive a criminal conviction for what may be regarded as minor criminal conduct. That is our principal concern. Having said that, if the use of ASBOs is to be extended, we welcome the fact that there will be consultation with the principal reporter. In that way, at least a more holistic view will be taken of the situation in which the child finds himself or herself.

Mike Pringle: You have already answered one of my questions on the civil-criminal element. I am interested in whether you think that 12 is the appropriate age. I do not know why 12 was chosen. It was suggested early on in our evidence taking that it was chosen because that is the age at which somebody can legally consult a solicitor in their own right. I am not sure whether that is correct or not. Perhaps you could expand on that. Is 12 too young? Would 13 or 14 be more appropriate?

Anne Keenan: We are concerned about going below 16, but I can understand why 12 was chosen. The Age of Legal Capacity (Scotland) Act 1991 entitles someone to instruct a solicitor at the age of 12—to make a will and that type of thing—so 12 would appear to be an appropriate age at which to draw that line.

Maureen Macmillan (Highlands and Islands) (Lab): I want to press you further on the balance between criminal sanctions and civil sanctions. You are saying that if, at the end of the day, a child is to have a criminal record—because breaking an ASBO is a criminal offence—the offence should be equivalent to the kind of offence that would go to the criminal court in the first place, such as breach of the peace.

Anne Keenan: No. I am saying that we must realise that although we may think that we are putting someone on a civil order and trying to divert them away from the criminal justice system, a breach of that civil order could result in a criminal offence. That would mean that, at the end of the day, that person could have a criminal record, although the intention at the beginning was to put them on a civil order.

Maureen Macmillan: But it is another step that can be taken on the civil side, before the person has a criminal conviction, rather than going straight for a breach of the peace or something like that.

Anne Keenan: Yes, I can see that line of argument.

Maureen Macmillan: It would give one last chance, if you like.

Anne Keenan: Yes, it would.

Nicola Sturgeon: I will address the provisions on the dispersal of groups, which your submission dealt with in some detail, so I apologise if I go over the same ground. You made it clear that you do not support the provisions, and set out reasons why. Do the bill's provisions add anything at all to the current law that might be useful to the police in the execution of their duties?

Michael Clancy: It is a complex area, because so many issues are involved. It can be extremely problematic for communities to live with groups—principally of young people—causing difficulties, so we can see the wellspring of the desire to do something.

In examining the provision we discovered that dealing with antisocial behaviour is one thing, but that a "relevant locality" is determined not only by the fact that members of the public have been alarmed or distressed as a result of the behaviour of people gathered there, but by the presence of people gathered there. The identification of the locality is only one step along the way. That, together with consultation with the local authority, represents some kind of safeguard against the arbitrary identification of localities. There are concerns, however, that the mere presence of a group could result in a police officer issuing a

dispersal order under section 18 and that contravention of that order could result in a criminal conviction—simply because of the presence of people in the locality.

14:15

We have taken a look at the law on this. Surprise, surprise, there is an issue about the presence of people who are busy doing nothing. The "Short Guide to the European Convention on Human Rights", which was published by the Council of Europe, points out that article 11 of the convention protects the right of assembly. The right is subject to some specified definitions of exception such as the need to ensure national security and public safety or for criminal activity or disorder not to happen or for public health and morals to be protected. Article 11 sets out the right of assembly quite clearly.

There is case law on the issue. That is where we find difficulty with the issue of "presence". Considering the case of Ezelin v France in 1991, the "Short Guide to the European Convention on Human Rights" says:

> "Whatever difficulties a State may have in guaranteeing the right to freedom of peaceful assembly, an individual may not be penalised for participating in one in the absence of any improper conduct on his or her part."

I have said in the very recent past that there is a risk—I put it no stronger than that—that this provision could be challenged under article 11.

Every case has to be dealt with on its merits. Although I cannot say, hand on heart, that a contravention would occur in every instance, I can say that some people who would be moved on and who are not engaged in behaviour might say, "I was just there as part of a peaceful assembly. I am protected under the convention." I do not know whether that further elucidates or confuses things.

Nicola Sturgeon: It deals with the point that you made in your submission about the European convention on human rights. You expanded on the point quite well.

I want to look at the issue from another angle. Let us assume for the moment that an amendment is lodged to remove the possibility of groups being moved on, or of an area being designated, simply because of the presence of a group. Let us assume that behaviour, as opposed to mere presence, is the determinant factor and that we thus deal with the ECHR issue.

In that case, is it your view that anything in such a provision would be an improvement on the provisions of the Civic Government (Scotland) Act 1982, which you mentioned in your submission? Would such a provision materially change the situation as far as the police are concerned? Would it give them additional powers that they do not have at present to move groups of people on?

Michael Clancy: I think that it would materially change the position for the police. The committee heard evidence last week from the Association of Chief Police Officers in Scotland and the Scottish Police Federation about how the police would be impacted on. I think that words like "bureaucracy" were heard from some of the witnesses. The position of the police could be changed because of bureaucracy—the additional hoops that they would have to go through. The position of those who want to gather in groups might also change if a warning were made in respect of the identification of a locality.

It is a difficult judgment call as to how the provision would improve things. Certainly, under section 18, one can see the unfortunate police constable who has discovered a group of—let us say—young solicitors who are hanging around in a designated locality in the west end of Edinburgh. The constable will tell them to move on and, as a result, gets involved in an altercation with one of them. It is possible to see how such a situation could escalate quite quickly from the constable saying, "Move along," to the reply, "No I won't. I'm exercising my peaceful rights," or whatever—matters could go further. There could be issues about support and back-up for that policeman, so our approach must be cautious.

One matter that is not in the bill and which we did not mention in our submission, although we have talked and thought about it, is the fact that there is no statistical evidence—at least, I certainly have not found any—that indicates how often the police use powers under the Civic Government (Scotland) Act 1982, or the laws against breach of the peace and mobbing and rioting. Nor is there evidence of the impact on communities of the use of those powers.

We suggest that the committee and the Executive consider running an all-Scotland pilot for a fixed period during the next four years, in order to examine the provisions on the dispersal of groups in the bill that the Parliament eventually approves, and the existing provisions in the common law and in the statute. Some kind of sunset provision should be introduced so that the results of that research can be analysed to see whether the changes have made any difference to communities, the police, court structures, those who administer the law or the gangs that terrorise communities. It would then be possible to adopt a measured approach on the matter.

Nicola Sturgeon: One argument that has been made in support of the provisions in the bill is that they would change the emphasis from reactive to proactive policing. Instead of being called out night after night to move along a group of youngsters

that congregates in a particular area, the police would be able to take proactive steps to designate an area and keep people away from that area. Is there any merit in that argument, or are you concerned that the problem would be displaced and the group would simply move to another area instead of congregating in the designated area?

Michael Clancy: It is difficult for me to comment on that. We might postulate that if people are moved along they will go somewhere else.

Reactive policing depends on the police service's having a certain level of resources that enables it to react. A proactive approach might be preferable in certain circumstances. However, as a resident of central Edinburgh, I have had to call St Leonard's police station a number of times—especially during the festival at 2 am, when someone plays the bagpipes at the intersection of the North Bridge and the Royal Mile. After receiving 10 such calls, the police begin to recognise the ring on the phone and the situation can be quite problematic for them. I know from my own experience that the reactive approach sometimes produces results, but it also sometimes puts the police under pressure.

Jackie Baillie (Dumbarton) (Lab): I am glad that you recognise the reality of what life is like for communities that experience pressure from groups that assemble and behave in a way that causes problems.

The strong—and almost universal—anecdotal evidence from communities is that the existing powers of dispersal that you outlined are not being used. You said yourself that there is no evidence base that indicates how frequently those powers are used. In addition, police constables themselves have asked for extended powers. Why do you think that there is no need for additional powers, given that communities and serving police officers have identified such a need?

Michael Clancy: I was inching towards an answer to that question. We are not in a position to say that police officers do not need additional powers. The committee heard some evidence that suggested that police officers do not want such powers. We are postulating the idea of a pilot for four years to see what changes can be produced on the ground. If, after the results of any pilot, we find that there has been a measurable improvement in the situation in those communities that are under siege, that is great. If, however, we discover that there has been no change, and that the gang issue remains, we might have to think again.

The Convener: I ask you to clarify something. Last week I tried to elicit from a witness whether the pilot concept was of relevance. How do you envisage a pilot? When you talk about a pilot, do you mean that you would specifically select areas—as we have operated the public defence solicitor system by selecting areas for application—or should there be a pilot operation of the act for a short time throughout Scotland?

Michael Clancy: I think I talked about an all-Scotland pilot because it would be difficult to identify one area to be selected for the pilot. There might be competing interests. The problem might be different in different parts of the country.

Jackie Baillie: In essence, the only difference between us is the word "pilot". Any parliament and indeed, any committee, should be looking back to reflect on the efficacy of the laws that it has passed. On balance, however, we could implement the bill, but would you say specifically that it should be a pilot and that we should look at it again in four years' time?

Michael Clancy: Yes, but that should be subject to the comments that I made about compliance with article 11 and the issue of presence, and subject to a sunset provision and a statutorily enforced research programme. If the Executive is prepared to move on those issues, that is a matter for the Executive.

Jackie Baillie: Absolutely, but I wanted to clarify what I was picking up and I am happy to have done so.

Maureen Macmillan: What are the fundamental differences involved in the dispersal of certain groups? Many communities have an order to prohibit the public consumption of alcohol. The background to how certain examples of antisocial behaviour are dealt with would be much the same in that there would be some problems in a town centre with people drinking alcohol and perhaps shouting at passers-by. The local community—it is often a local councillor who would lead the situation—would get the local courts to support an order from the Executive to ban alcohol consumption in public in that particular area. That means that people are just not allowed to drink in public and that they can be moved on or prevented from drinking by the police. Is that not a similar situation, about which people seem to be happy?

Michael Clancy: Drinking in public involves some form of antisocial behaviour and it involves a contravention of the law. I recollect from about seven or eight years ago or longer that Glasgow City Council was one of the first councils in Scotland to have a ban on the consumption of alcohol in public places. At that time, it was viewed in some quarters as an unwanted intrusion on people's rights. However, when drunkenness causes problems on our streets and squares, something must be done. The Civic Government (Scotland) Act 1982 provides for the crime of

being drunk and disorderly in public. You have put your finger on the issue of behaviour and it is right that, if antisocial behaviour is being carried out, we must take measures to address it.

The Convener: I have been considering the definition of public places. The dispersal powers are predicated on activity in public spaces. The interpretation section, section 22, clearly defines public places as including not just areas that are publicly owned but also those that are privately owned. Is that an issue for the Law Society of Scotland and do you have a view on it? Do you see there being a conflict between privately owned property, and what owners elect to do in their own areas, and areas that fall within the definition of a public place under the bill?

14:30

Anne Keenan: A "public place" means

"any place to which the public have access for the time being".

It is my understanding that that is a common definition of "public place", which is used in legislation on road traffic offences and the like. The issue is the fact that the public have access.

The Convener: But a road traffic offence would not take place up a common passage close to your yard.

Anne Keenan: I appreciate that. I am elucidating the definition to show that it includes all those things, but the key feature of the definition is that the public have access to the area in question. That is central to the definition.

Michael Clancy: This could be one of the instances in which I crave the convener's indulgence to take the question back and think hard about it.

The Convener: That might be helpful, if you want to consider that aspect further.

Karen Whitefield (Airdrie and Shotts) (Lab): I read the Law Society's submission on the dispersal of groups with great interest. The issue affects a number of my constituents most nights of the week. In one of my communities, between 50 and 60 young people gather each night, which causes concern to local residents, young and old alike. You say that, under existing legislation, those people can be addressed if they are drunk and disorderly, but often they are not taking alcohol, so the police cannot address the problem in that way.

You say that section 53 of the Civic Government (Scotland) Act 1982 provides for the police to move on young people, or people of any age, if they are not allowing lawful passage. If they stand in a community park on either side of the path, they are not obstructing lawful passage, but they are intimidating people and ensuring that local residents do not feel able to make their way to the local community centre or to other community facilities. Also, they do not always generate so much noise that it would be considered to be something that the police could do anything about.

The local police tell me that they have insufficient powers to deal with the problem. I would like you to tell me and my constituents, who are asking their Government to do something about the problem, how the issue can be addressed.

Michael Clancy: How does the intimidation take place?

Karen Whitefield: The young people's very presence and their numbers are intimidating. I am not suggesting for one minute that they are all there because they want to intimidate, assault or cause any real harm, but their sheer numbers cause concern to people in the local community, who feel that they are under siege, especially as many of the young people do not come from that local community but come by bus from other communities or are even dropped off by their parents each night. They do not hang about in streets that are local to where they live.

Anne Keenan: As we know from case law, the definition of breach of the peace is extremely wide and what constitutes a breach of the peace can vary from circumstance to circumstance. I would suggest that if behaviour is such that there is a level of intimidation, it might be possible to use the charge of breach of the peace.

The issue of what constitutes breach of the peace was recently examined in the case of Smith v Donnelly, which is noted in the 2001 Scottish Criminal Case Reports at page 800. All the decisions were considered and breach of the peace was described as

"conduct which does present as genuinely alarming and disturbing, in its context, to any reasonable person".

That is the most recent definition given by the High Court. If the presence of a number of people is sufficient to be alarming and disturbing to any reasonable person, breach of the peace legislation could be used under criminal law.

Karen Whitefield: So we would take 60 young people and charge them all, and they would all get criminal records, when we could respond to the community's needs by ensuring that young people are not able to congregate in such numbers in an area. That would not mean that young people could not hang out together; it would just mean that they could not do so in one locality in a way that causes concern to the local community. The power to disperse would also mean that young

people would not be set on a road that would mean that they might end up with an inappropriate criminal record.

Anne Keenan: At the moment, we are considering the problem globally. You are talking about moving people on and I do not know what would happen after they had been moved on. Would they come back two days later and go into a continual cycle? I do not know; that might be a possibility.

Perhaps we should be considering why people congregate in a certain place, or whether there is something that we can do to help them. If the problem is truly intimidating, we should get to the root cause of why they are there, try to address that and perhaps use one of the other measures that we have been discussing such as early intervention.

Karen Whitefield: I accept all of that and every member at the table would expect the Executive to tackle antisocial behaviour not just through the bill. That is why the Minister for Justice announced last week a considerable amount of new money to provide other activities for young people. However, the power to disperse might prove to be a valuable tool for some communities in my constituency and others that feel that they are under siege. It is important that the views of those communities are put on record along with the views of others, who have a right to raise legitimate concerns but, in so doing, should take account of the concerns of communities such as those that I represent.

Colin Fox (Lothians) (SSP): In their answers to questions on part 3, the witnesses seem to be suggesting that the problem is not that the powers are not available but that they are not being used. That highlights a resources question. In the examples given by Karen Whitefield and Jackie Baillie, the point is that there are insufficient resources to deal with the problem rather than there being insufficient legal avenues. Is that true?

On dispersal, the witnesses seem to be saying that when there is a need to disperse youngsters or other groups of people, the existing law is more robust than the bill because of the possibility that the bill's provisions might be challenged under the ECHR and because the need to disperse such groups can be dealt with under breach of the peace legislation or the Civic Government (Scotland) Act 1982. Is that fair?

Michael Clancy: I will deal with your second point first. The existing law is probably more robust in the sense that the 1982 act's compliance with the ECHR has not been challenged. I am not aware of any challenge to breach of the peace legislation, except for the recent decision that Anne Keenan cited, which confirmed the law on breach of the peace. There is an issue about robustness. When new law is introduced, it will be subject to interpretation, debate and challenge. Older law that has stood the test of time by its very nature withstands day-in, day-out operation, interpretation in the courts and scrutiny by the Parliament. I hope that that deals with that point.

We cannot answer your first question, because we do not have the statistical information that would allow us to do so and to say that the legislation is or is not being implemented because of resources. Similarly, we cannot tell the committee the number of times that the provisions have been implemented. The committee might be able to ask the Scottish Court Service for that information, but I do not have it.

Colin Fox: I want to press that point a little in the light of Karen Whitefield's comments about the group of youngsters causing alarm and distress in her area. Would existing laws allow those youngsters to be dispersed? If so, why are those laws not being implemented? Presumably, in that case, it is not a legal question.

Michael Clancy: Yes, there are existing laws and no, it is not a legal question.

Nicola Sturgeon: I also want to press this point. The committee's responsibility is to determine whether the bill's provisions enhance the current law and so will make it easier for the police to improve enforcement of the law in communities. We all agree that that is what we want to do.

Returning to the example that Karen Whitefield mentioned, I wonder whether you think that the pictures that I am about to paint of what happens now and what would happen if the bill were enacted without being amended represent a fair assessment of the situation. Right now, in Karen Whitefield's community, if the police consider that a breach of the peace has been committed—and it certainly sounds to me that it has been—they can ask the youngsters to move on. If any or all of the youngsters refuse to do so, they can be arrested and charged and end up with a criminal record. The police do not have to undertake any bureaucratic necessities to trigger that course of events.

If the bill were passed, an area could be designated. However, that designation would not make it an offence to congregate. Instead, it would simply give the police the powers to ask people who were causing alarm or distress to move on. As a result, the police would ask the youngsters to move on and, if any of them refused to do so or came back after they had been moved on, they could be arrested and charged and end up with a criminal record.

It strikes me that there is no difference between the two scenarios, apart from the fact that in the latter one the police first have to go through the

bureaucratic procedure of designating an area. Is that a fair assessment? If so, do you agree that, as far as those provisions are concerned, the bill simply does not enhance the current law at all?

Michael Clancy: The two scenarios perhaps have the same outcome. For example, they both involve breaches of the peace and the police telling a congregation of 50 or 60 youngsters that they are putting the community in a state of fear and alarm and that they should move along. Either the youngsters will say, "No, we're not moving along," or they will say, "Yes, we are." If they say yes, the problem is resolved. On the other hand, if they say no, there will be an altercation and some of them will be arrested.

The bill's provisions will add a layer of bureaucracy to police activity because the senior police officer will have to designate the locality. However, that designation might have some impact on the group of 50 or 60 young people. Indeed, it might have the same impact as when a policeman goes up to a group of youngsters under common law and says, "That's enough of that. You've put all the inhabitants of Smith Street"—or wherever it might be—"in fear and alarm. If you don't move along, we'll charge you."

The notification procedures—putting up a message on lamp posts to say that an area has been designated and that people who congregate there could be arrested the next time round—might be sufficient to move people along. Operationally, I guess that the police would prefer to use the breach of the peace provision. I think that they said that in their evidence.

At the end of the day, if the community is made to feel safer—whether by using a breach of the peace or a measure in the bill or in another statute—that could in itself be considered to be the objective, but I am not convinced that there would be a difference. That is why I suggest that the measure should be tested and piloted and that some formal research should be done.

I am not sure whether that answers Nicola Sturgeon's question.

14:45

The Convener: I am struck by your analogy. In your scenario, the significant thing to the individual is the place rather than the behaviour. If the young person learns from a newspaper or from a notice posted up in a community centre that they are not to go to that place, that will not stop them going to another place, where they might behave as they did in the original place.

Michael Clancy: That is a possibility.

Jackie Baillie: I want to develop that further. My understanding is that the process by which a place is designated requires the presence and behaviour, or likely behaviour, of people in that place. The combination of those two tests can lead to a place being designated. It has been described to us that it is envisaged that designation would be used not for every street corner but for the hot spots that a number of communities have and can quite easily identify. Is that fair?

Michael Clancy: Section 16(1) states that designation can take place

"where a police officer of or above the rank of superintendent … has reasonable grounds for believing … that any members of the public have been alarmed or distressed as a result of the presence or behaviour—

it does not say "likely behaviour"—

"of groups of two or more persons in public places in any locality in the officer's police area (the "relevant locality"); and … that antisocial behaviour is a significant and persistent problem".

Those are the two legs to the provision for designating a place.

The provision in relation to likely behaviour comes in after the locality has been designated. Section 18 provides for situations in which

"a constable has reasonable grounds for believing that the presence or behaviour of a group of two or more persons in any public place in the relevant locality has resulted, or is likely to result, in any members of the public being alarmed or distressed."

A senior police officer who thinks strategically and has information from the locality could make the intersection of, say, Smith Street and Jones Street a designated locality. When, after consultation with the local authority, the senior police officer has identified the locality, he can send out the message about the designation to the police officer on the ground, who can then go to the intersection of Smith Street and Jones Street, where he might decide that, given the reports that he has received, the group of 50 youths—or they could be people of varying ages or there might be only three of them—has resorted, or is likely to resort, to that kind of behaviour.

Jackie Baillie: The key to the police constable's ability to exercise that power would be an earlier designation that is based on both place and behaviour. Are you not reassured by the fact that the gateway to using the new law would be that initial designation?

Michael Clancy: I would like to say yes, but I cannot. Under the current law on breach of the peace, the police officer does not need the locality to be designated. If he finds two or more persons in a public place who are engaging in antisocial behaviour, he can tell them that they must move along, as he has received a report from the people who live in the street. If they say yes, the issue is resolved but, if they say no and indicate that they

will not move along and will persist with their behaviour—that is to put it nicely; they would probably use other words—we get into the criminal position. That is a shortcut to a contravention under the bill, under section 18(2) of which

"the constable may give—

(a) a direction requiring … the group to disperse;

(b) a direction requiring any of those persons whose place of residence is not within the … locality to leave the … locality or …

(c) a direction prohibiting"

them from returning for at least a day.

It is a question of the nature of the problem, the nature of the remedy and what will meet the community's needs. As we all know, there are various ways and means of meeting community needs. The issue is to address the problem and to find a remedy.

Jackie Baillie: Given that you have acknowledged that, in certain circumstances, the existence of a designation order could have the effect of preventing small or, indeed, larger groups of young people from congregating, surely it would be a better use of resources to apply for one designation order than to deal with 50 breaches of the peace.

Michael Clancy: In such a case, there would be 50 breaches of the designation order. I am not sure that Karen Whitefield's constituents would take an awful lot of notice of a procedure whereby a notice that said that the green bit that was shown on the Ordnance Survey map of Edinburgh was the area that the chief constable had designated for the purposes of the legislation—once enacted—even if it was pinned up in the library or the community centre or on a lamppost. We would be leading ourselves into a position that was similar to the reading of the riot act under the Riot Act 1714.

The Convener: That was a very good provision.

Michael Clancy: As a Conservative, you might be expected to support such measures, but it is not for me to comment on the acts of George I.

The Convener: I have been anxious to ensure that committee members should have a full opportunity to examine the witnesses on the provision in question, which is causing a great deal of concern. I know that members want to ask questions on other issues and I am aware that the minister will be joining us in the not-too-distant future, so I ask Nicola Sturgeon and Karen Whitefield to make their final questions on the subject singular and brief.

Nicola Sturgeon: You have articulated what I think is the argument in favour of the provision—if there is one—which is that it could operate preventively by sending a message to people that congregating and causing fear or alarm in a designated area will not be tolerated.

Do you think that that risks creating the implication—I put it no stronger than that—that we are saying that congregating and causing fear or alarm in an area that is not designated is somehow okay and will be tolerated, when we should be saying that it is not acceptable to congregate and cause people alarm or distress anywhere?

Michael Clancy: The people who would draw the inference that the designation of one area means that antisocial behaviour was permitted in another area are sophists of a very high order. I reiterate the fact that members from all sides of the Parliament and the Justice 2 Committee are sending out a clear message that, as a society, we cannot tolerate antisocial behaviour of any description in any place. That is almost a politician's comment rather than a lawyer's comment and, as the committee knows, I am not a politician.

Karen Whitefield: You suggested that, if some solicitors were to gather in Edinburgh, that could be considered antisocial behaviour. Unfortunately, I do not have too many solicitors gathering in my constituency, other than to give out legal advice occasionally. However, if an area is designated, that designation will not only discourage young people from gathering in that area, but will send a signal to the parents and legal guardians of those young people that perhaps they should not drop them off in that area and that they should be more careful about and conscious of where their young people are and what they are up to.

The Convener: What is your question?

Karen Whitefield: Do you accept that not only young people, but their guardians and others should be conscious of any designation in communities?

Michael Clancy: If an area were designated, it would be important for all the people in that area to know that it has been designated. What people do with that information is another issue.

The Convener: I know that members have questions on other areas. Given the fullness of the Law Society of Scotland's submission on the bill, I ask members to restrict those questions to areas in which there may be doubt about the society's emphasis or interpretation.

Maureen Macmillan: I want to ask about parenting orders. The society's submission says that parenting orders would be an unwelcome extension of the doctrine of vicarious liability. You seem to think that there would be only compulsory parenting orders and that they would not be

imposed only at the end of a series of measures that had been taken, perhaps by social workers and children's hearings, to try to get a family to address what children had been doing. I agree that if there were only compulsory parenting orders and there was no input before they were used, the legislation would not be good. Do you accept that a parenting order could be at the end of a process during which people could not get a parent voluntarily to engage in parenting classes, for example, and that it could be a useful sanction?

Anne Keenan: On your first question about vicarious liability, our concern is that the bill and the policy memorandum in particular make it clear that parenting orders require a parent to exercise some degree of control over the child's behaviour. One example of a possible requirement of a parenting order in the policy memorandum is ensuring that the child

"avoids contact with other disruptive children".

We are concerned that if a parenting order was granted and there were criminal sanctions for breaching that order, its terms would have to be very specific. We would not like the doctrine of vicarious liability to be extended. To use the example that the policy memorandum gives, a person might want to ensure that a child avoids contact with disruptive children while they are in the school environment, but that person might not have any control over matters. Technically, there could then be a breach of the parenting order, for which there would be a criminal sanction.

The main thrust of our argument is that if a parenting order is being drafted, its terms should be very specific and it should consider behaviour that a parent can control. It should not go beyond some things and there should be no extension of the principle of vicarious liability, which has traditionally been kept for specific liability offences, such as people in shops breaching licensing law by selling alcohol to under-age kids.

Maureen Macmillan: So if parenting orders were very specific, you would not be against their use as a last resort.

Anne Keenan: No—if they were not seen to extend the principle of vicarious liability.

Michael Clancy: It should be recognised that parenting orders would not be used unless other agencies had been involved at an earlier stage in the process. Anecdotally, I understand that parenting counselling and classes are effective and can be useful in certain circumstances, particularly in sections of the community in which parents do not have a developed idea of how to bring children up. However, it would be potentially problematic if parenting orders were compulsory first off.

Maureen Macmillan: I do not think that that is what is being suggested.

How will parenting orders relate to children's hearings as opposed to the courts? We have heard evidence to suggest that it would be better for the children's hearings system to impose parenting orders.

15:00

Anne Keenan: The difficulty arises because of the distinction between civil and criminal orders. We all appreciate that the children's hearings system is more holistic and that it is appropriate that those hearings should be able to consider the welfare of the child. That will have to include aspects of parenting—the skills that the parent can offer. Placing within the ethos of the children's hearings system orders that have criminal sanctions attached would appear to be contrary to the Kilbrandon recommendations on which the hearings system was set up. If a sanction is imposed, I cannot see how such an order could fit within the current ethos of the children's hearings system. However, if the system is given powers so that a children's hearing can consider holistically how to help a family to address its problem, I agree that that would be good.

Maureen Macmillan: Yes, but there is a difficulty if criminal sanctions are attached. That would also be the case with other orders that we might discuss.

Jackie Baillie: You have dealt with the issue of whether matters should be dealt with in the children's hearings system or the courts, but I have two very brief questions. I want to focus on community reparation orders, which have been widely welcomed. Indeed, the whole principle of restorative justice has been widely accepted by a number of agencies. The Law Society of Scotland's view is that we do not need to create a new type of order. There is no disagreement about the principle; you simply seek to extend supervised attendance orders. As I understand it, those orders are for fine defaulters. Is that accurate?

Anne Keenan: We agree entirely with reparation; we think that it is a super idea. It engages people properly and makes them address their offending behaviour. We think it is possible that you could extend supervised attendance orders without creating a new structure and a whole bureaucratic regime to go along with it. I understand that two pilot projects are already being developed to explore the extension of the use of supervised attendance orders as a disposal at first instance for people who are thought to be unable to pay fines. Extending the orders does not seem to be a huge leap.

Jackie Baillie: The current proposal for the orders is that they will be for 12 to 21-year-olds. You suggest that we should not have an upper age limit.

Anne Keenan: We think that they are such a good idea that they should be available to everyone.

Jackie Baillie: Thank you.

The Convener: A bit of cheer there.

Karen Whitefield: I want to ask a couple of questions about restriction of liberty orders. In your written submission, you highlight the Executive's monitoring of restriction of liberty orders in the three pilot projects that were introduced. You also mention the experience in England and Wales where such orders have been used with young people. Do you believe that—in certain circumstances, depending on the needs and offending behaviour of the child—changing the legislation to allow restriction of liberty orders to be used for under-16s may have some positive benefits?

Anne Keenan: I will start by saying that this was one of the most difficult issues that the criminal law committee had to discuss. We had to go to a vote on it. Members could see the merit in using restriction of liberty orders in some situations, as long as they went along with other welfare provisions and were not used in isolation. What you have before you is the majority view, which was that, on balance, we felt that we should look back to the ethos of considering the welfare of the child—getting people under-16 out of the courts so that they could be dealt with by the hearings system.

Section 90 deals with the court order, and we are talking about only a very small group of children. Previous experience from the Scottish Executive pilots—which highlighted the fact that younger offenders were less likely to complete their orders—and the experience in England and Wales made the criminal law committee question whether using restriction of liberty orders for younger people would be an effective use of those orders.

The committee was divided on the proposal, although we saw the merit of it. I do not want to copy what Michael Clancy said about dispersals, but it might be effective to consider having a pilot to see how effective the orders are before they are rolled out, or at least conduct some form of research and monitoring to see what their impact is, particularly if they are adopted for such a small group of offenders. We said in our submission that of 80 children who were dealt with by the courts, 16 were detained in secure accommodation. The numbers are likely to be similar in relation to the use of the orders.

Karen Whitefield: I do not think that it should be the Executive's intention to use restriction of liberty orders in place of secure accommodation. If that were the case, many people would have concerns. However, it might not be appropriate to place a young person in secure accommodation and a restriction of liberty order might be a preferable option for them.

Anne Keenan: We would welcome the assurance that the orders would not be used in that way. That was one of the main concerns that a number of members of the criminal law committee had.

Karen Whitefield: It is something that can be pursued with the Deputy Minister for Justice shortly.

Anne Keenan: Yes.

Colin Fox: I want to explore with you the question of fixed-penalty notices and whether you think that there is a practical difficulty with the police having to exercise their discretion in handing them out. Do you think that the measure will lead to a contradiction in relation to whether the central role of the police is as dispensers or as enforcers of justice?

Anne Keenan: The police already exercise discretion in giving fixed-penalty notices for specific offences, most commonly road traffic offences. We would have no concern if the notices were extended to straightforward and discrete offences that were easily identifiable and did not raise other issues. We highlighted in our submission the concern that we would have about using fixed-penalty notices in cases of contraventions of section 52 of the Criminal Law (Consolidation) Scotland Act 1995, which is in effect the statutory offence of vandalism. In those situations there are issues such as compensation for the victim of the crime, which should not be forgotten.

There are other issues around the extension of fixed-penalty notices to dealing with cases of drunkenness where it might not be appropriate for the discretion to be used, for example in cases of people being drunk and incapable. We have found routinely that someone might be arrested, held in custody, reported to the procurator fiscal and then released, because no proceedings have been taken, perhaps on the ground of triviality. We question whether it would be appropriate for fixed-penalty notices to be used in circumstances in which, ultimately, no criminal proceedings were likely to be taken. It might be useful to get statistics from the Crown Office and Procurator Fiscal Service or the Scottish Court Service about the number of prosecutions that are brought in such circumstances.

There were also concerns in relation to cases of breach of the peace. The Smith v Donnelly case to which I referred earlier gave the definition of breach of the peace and explained that where there is a likelihood—but no evidence—of fear and alarm being occasioned, a lot of other considerations have to be taken into account. We want to be clear that the discretion of the police will be used appropriately.

Colin Fox: The second part of my question was on the difference between dispensing justice and enforcing justice, which is the police's traditional role. It is about the idea that the police would be dispensing justice, as opposed to justice being dispensed by getting an order from a sheriff.

Anne Keenan: We have already experienced the use of fixed-penalty notices in clear circumstances. Provided that they were used in prescribed circumstances, we would not have any difficulty with their extension.

Colin Fox: Do you think that it would be better to leave particular provisions of the bill until after McInnes reports?

Anne Keenan: That was our initial reaction. We thought that it would be better for the provisions to be considered with summary justice globally.

Colin Fox: Do you think that the provisions on closure notices should wait until after the reform of the licensing laws?

Anne Keenan: Sheriff Nicholson made specific recommendations about closure of premises on page 155 of his report. It would be better to leave the provisions on closure notices until the review of licensing laws has been dealt with, in case there is confusion.

The Convener: I thank Michael Clancy and Anne Keenan for being with us this afternoon and for their patience and fortitude in answering our questions. Your presence has been extremely helpful and we have all found your opinions and views instructive. I suggest that we take a five-minute comfort break before our next evidence session. We shall reconvene at quarter past 3, going by the clocks on the wall.

15:10

Meeting suspended.

15:17

On resuming—

The Convener: I welcome to the meeting the Deputy Minister for Justice, Hugh Henry, together with his team: Alisdair McIntosh, head of the antisocial behaviour division; David Henderson, head of police division 1; and Gillian Russell—who has disparaged the big line that I had drawn through her name and is present—of the office of the solicitor to the Scottish Executive. I believe that we are also joined by Michael Kellet, who is the bill team leader. We are very glad that you are all able to be with us.

I will start off the general questioning, which focuses on the broad issue of resource. We have now heard extensively from other witnesses that the current legislative framework on antisocial behaviour is adequate, but that the system is not working because it is under-resourced. Among the groupings that have taken that view have been organisations such as the Scottish Consortium on Crime and Criminal Justice, Victim Support Scotland, Children 1st, NCH Scotland and Safeguarding Communities-Reducing Offending. What is your response to that view?

The Deputy Minister for Justice (Hugh Henry): That is not something that I recognise. A number of those organisations are being funded by both the Scottish Executive and local authorities to an unprecedented level. I find the argument about a lack of resources a strange one. I am sure that many organisations could always do with more money, but of all the criticisms that you might wish to make, I do not think that the one of not putting in more money can be justified.

Let us put this in context. We are spending about £2.5 million a year on youth courts, and we have announced that we are extending the pilot project to Airdrie. We have money going into the fast-track children's hearings pilot—£1.5 million in 2002-03 for start-up and £3.4 million in 2003-04 for first-year running costs.

The wider picture is that, on top of the record level of investment that we are making in police services and the record amounts of money that are going to local authorities for a wide range of services, including provisions for all sections of the community, we have identified an additional £95 million, over the next two financial years, to support the bill. Of that, £60 million will be used to support local authorities and their community planning partners in tackling antisocial behaviour. The first £30 million of that will be for neighbourhood wardens, mediation and other community initiatives.

The other £35 million that was announced last week by Cathy Jamieson for youth justice elements of the strategy and bill will include provision for programmes of support for under-16s

who are on ASBOs or tagging orders and—significantly—provision for diversion, restorative justice programmes and the extension of the youth court pilot scheme, which I have mentioned.

More money than ever before is being invested to tackle a growing problem. It is a matter for debate, but I do not accept that criticism.

The Convener: Specifically, the Scottish Police Federation has suggested that much could be done to address antisocial behaviour in our communities if more police officers were operating in our communities. I know that you will take a different view on that. I assume, from your earlier answer, that you are satisfied with police resources at the moment. However, do you think that there is a danger that if, under the bill, such police presence as exists in Scotland is focused on antisocial behaviour, police attention may be distracted from more serious crimes? SACRO suggested that that had been a consequence of legislation in England and Wales.

Hugh Henry: I do not think that that argument could be justified. The argument that the Scottish Police Federation made on police numbers, while generally recognising that police numbers had increased, contained a slight mistake regarding the most up-to-date figures, specifically relating to the number of part-time officers. It is our contention that the head count of 15,560 officers is a record number, which equates to 15,432 whole-time equivalents. You suggest that we are satisfied with that. I am not saying that we would ever be satisfied with any specific number of police officers or other staff. However, I am satisfied that we are putting in record levels of investment and that the police force has a record number of officers. We can take some pride in that.

How those police officers are deployed is a matter for the chief constables. Would the introduction of the bill lead to police officers being diverted from other crimes? I think that a chief constable and local senior officers in any area always have to make decisions about their priorities. They use intelligence-led policing methods; they try to identify hot spots; and they devote resources to certain problems as and when they see fit.

There is a danger in following your argument to its logical conclusion, which is that, if someone has their car broken into, they may receive attention from a police officer, but if someone is being prevented from getting to sleep at night and their nerves are being frayed because of antisocial behaviour in and about their locality, they are not deserving of police attention. I do not think that that is a valid argument. We are saying that there are problems that we believe that the bill will help to address.

It would be a matter for the chief constable and for senior officers in an area to determine how best the resources are used and to tackle what they see as the priorities. I am satisfied that they will continue to make decisions as they see fit and appropriate.

The Convener: Sections 20 and 21 of the bill provide for ministerial guidance and direction in respect of the dispersal powers. That cuts across the operating autonomy of chief constables. There is a real fear in some communities that if cogent representations were made to the Executive that areas such as Karen Whitefield's constituency required attention, ministerial guidance and direction would be given—I presume that the power for ministerial guidance and direction is in the bill to be used. If that were to happen, it would cut across the autonomy of the chief constable for the area to decide what to do with his resource.

Hugh Henry: I will put the point into the context of the wider debate. John Vine, the president of ACPOS, said recently that the argument about resources versus powers missed the point. He suggested that police officers, and indeed chief constables, should

"challenge our own perceptions of this issue within the police culture. … The time has come to realign our priorities and resources so that they are in keeping with the demands of the community."

That is the context in which we want to argue about resources and priorities.

The suggestion that we made about guidelines and about ministerial powers was intended to assist in that debate. People had asked what was meant by this or that and we wanted to clarify what is required and for there to be no doubt about what we need to do. We do not believe that section 21 has the consequential effect that has been suggested. We do not believe that it will interfere with the operational independence of chief constables. However, we heard what was said not only by the police but by some members of the Parliament and others and we will reflect on it. We intend to clarify the fact that it is not our intention to do anything that would interfere with the operational independence of chief constables. If something further needs to be said as a result of the debate, we will say whatever is required. We take seriously the points that have been made and we will do what we think is necessary to help to clarify the point and to give assurances that our intention is not as has been suggested.

The Convener: Members might revert to that when we get on to the issue of dispersal powers. In the meantime, I thank you for your response.

Colin Fox: I want to press you on the issue of resources, minister. I admire you for coming to the committee and suggesting that it is not possible to

spend any more resources. A whole mound of evidence has been submitted and submission after submission suggests that the existing powers are sufficient but that there are not sufficient resources.

You mentioned the extension of the Hamilton youth court pilot to Airdrie. In the debate on youth justice last week, the Minister for Justice mentioned the welcome money for youth diversionary activity. Have you had the chance to reflect on the success of the Hamilton pilot, which is to be spread to Airdrie? The pilot highlights the way in which the children's hearings system might be able to cope with those cases in the same fast-track way. As welcome as the £10 million for youth diversionary activity across Scotland is, it is a relatively small sum of money.

A large body of opinion feels that the bill is unnecessary. The feeling is that, in the main, communities are crying out for extra resources and not extra legal powers.

15:30

Hugh Henry: I stand to be corrected when I look at the *Official Report*, but I do not think that I said that we could not spend any more money. I said that we are spending record amounts of money and I indicated that many organisations, including local authorities, will always find ways to spend more money if it is made available. I hope that I did not give the impression that no one could ever spend any more money—if I did give that impression, I apologise. The fact is that more money than ever before has been made available to many organisations throughout Scotland, including local authorities.

I do not believe that the youth courts and the fast-track children's hearings are mutually exclusive—we are providing both. We have been pleased with the results that we have obtained so far from the youth courts pilot project, hence its extension to Airdrie. The fast-track children's hearings are also showing impressive results. Cathy Jamieson has made it very clear that she is not prepared to tolerate excuses. We have had meetings with local authorities to indicate our expectations, our standards and what we expect to see in return for the record investment. During last week's debate, you heard that the issue is not just about money. Some authorities that are turning in impressive results are doing so without the resources that are held by other authorities that are turning in poorer results. What we do with the money is every bit as important as the amount of money that we provide.

Colin Fox: I am sure that everyone here accepts that the efficient use of resources matters more than anything else. However, just to be clear, you are saying that there is a case for saying that if more money is made available by the Scottish Executive, the antisocial behaviour that blights some communities in Scotland could be addressed. You are saying that extra resources being put in by the Executive could make a difference, along the lines that the minister talked about last week, in augmenting the work that is done by the children's hearings system and court mediation.

Hugh Henry: That may be your interpretation of what I said, but I am happy to rest on the *Official Report* of what I said.

Mike Pringle: I have a question about the definition of antisocial behaviour. Some people have suggested that the definition is too wide and too subjective and that it does not contain a test of reasonableness. Will you address that point?

Hugh Henry: The definition of antisocial behaviour builds on what we currently have. The interpretation in section 110 is fairly specific. The concept of reasonableness is familiar to a range of organisations, including the police. I am not aware of any significant concerns either about the definition, which builds on previous experience and comes from the Crime and Disorder Act 1998, or about reasonableness.

Jackie Baillie: The bill includes several measures, such as ASBOs for under-16s, parenting orders and community reparation orders. We have heard from a variety of witnesses and there are conflicting views about whether the disposals for under-16s should be for the children's hearings system or for the courts. What is the Executive's current thinking on that?

Hugh Henry: We stand by what we previously proposed, which is that they should be disposals of the courts. There are certain things that we can and should support the children's hearings system doing, but we worry about fundamentally changing the nature of the children's hearings system, which has a proven record and is seen in a relatively non-adversarial light, by bringing in a significant punishment of the criminal justice system. Such a measure would probably change fundamentally the nature of the children's hearings system. It would change dramatically the requirement to have legal representation. What is being proposed probably strikes the right balance, because some of the measures—which you may want to come back to—such as the serving of an antisocial behaviour order on someone under the age of 16, require a degree of interface with the children's hearings system in any case. That is probably the right way to proceed.

Jackie Baillie: A number of organisations mentioned the attraction of taking an holistic approach when dealing with children under the age of 16, for the simple reason that a number of

children who go through the hearings system are welfare cases, and not simply reparation cases.

Hugh Henry: There is a powerful argument for dealing with matters in an holistic way, but that does not necessarily mean that the children's hearings system has to deal with them. The relationships between the hearings system and the courts, the police and local authorities are all important. Indeed, one of the points behind parenting orders, ASBOs and community reparation orders—which we can explore in more detail if you wish—is that we would much prefer to take early action to avoid the criminalisation of children and to help to divert them away from potential problems. That requires a significant interface with the children's hearings system, the provision of the required levels of support, and the examination of the care and attention that is available to a child within their household. If that is not available, it may mean looking at other methods of supporting parents and children to help them to address offending behaviour.

I acknowledge the point about taking an holistic approach, but I do not accept that putting some of the requirements into the children's hearings system is necessarily the best way to take that approach.

Mike Pringle: Can I just follow on from that—

The Convener: I am sorry, but Nicola Sturgeon was first.

Mike Pringle: Sorry.

Nicola Sturgeon: I have two points. The first is a general point that has been raised by some witnesses—I cannot remember which ones. The general concern has been expressed that the bill—and ASBOs are an example of this—seeks increasingly to use the civil law to respond to criminal behaviour, which is inappropriate.

The second point relates specifically to ASBOs for under-16s, and the penalties for breach of an ASBO. The bill gives the option of two penalties—imprisonment or a fine—but goes on to state that if the person breaching the ASBO is under 16, imprisonment is not an option, which would seem to limit the penalty to a fine. Is it practical to impose a fine on somebody who is under 16, who is likely to have no resources of their own?

Hugh Henry: We have provided for the courts to refer under-16s with ASBOs to hearings to consider the broad picture and the support needs. Other measures could be available. I would not have thought that a fine was necessarily the only conclusion that a court would reach. It is important that imprisonment is not an option for that age group. We hear all too frequently about people who become accustomed to being in the criminal justice system and about how hard it is for them to get out of the system when they are in it. It would be preferable to consider a range of options, and one such option is certainly the imposition of a fine.

Action would be taken when an ASBO was breached, but we also stress that a number of options could be considered before an ASBO was even granted. For some people, the fact that an ASBO was being sought might be sufficient to encourage them to address their behaviour. The involvement of the children's hearings system would present the opportunity to develop the holistic approach to which Jackie Baillie referred. It would be unfortunate if we regarded the bill too starkly as being about criminalisation, punishment and fines. Other possibilities are available before those stages are reached and, of course, the bill provides for the procurator fiscal to consult the reporter about the action that is to be taken when an ASBO is breached.

Nicola Sturgeon: I want to press you on that point. I absolutely agree that we do not want to imprison children under 16. However, the bill is quite specific in providing that when an ASBO is breached, the only options that are open to the court are imprisonment or the imposition of a fine. As imprisonment is not an option for the under-16s, the only penalty that the court could impose on a child who was under 16 would be a fine. However, as you said, the court could refer a child who was under 16 to the children's panel. I cannot for the life of me foresee any circumstances in which a court would impose a fine on a child under 16, so I presume that, more often than not, a young person who breached an ASBO would end up before the children's panel. Would it not be better if the responsibility to grant ASBOs lay with the panel, rather than the court, so that the children's panel dealt with the situation from the word go?

Hugh Henry: The people who have the greatest experience of the children's hearings system clearly say that such matters should be extraneous to the hearings system. There are good reasons for that.

You said that imprisonment would be ruled out for children under 16 who breached an ASBO. However, the imposition of a fine would not be the only punishment available to the court; it could impose any penalty other than imprisonment.

Nicola Sturgeon: That is not what the bill says. Section 9(2) says:

"a person guilty of an offence under subsection (1) shall be liable—

(a) … to imprisonment … or to a fine".

Hugh Henry: That refers to the maximum penalty, which should not be imposed in every case. As you say, imprisonment is specifically ruled out.

Nicola Sturgeon: Will you outline some of the penalties, other than imprisonment or a fine, that you envisage that a court might impose on a young person?

Hugh Henry: A court might order probation or make a community service or supervised attendance order. There are a range of penalties that the court might decide that it was appropriate to apply, rather than impose the maximum penalty.

Mike Pringle: Clearly, the work of the children's hearings system is conducted in private—there is no publicity when the parents and children turn up at a hearing. However, when a case reaches the courts system, the media can start to highlight the fact that a youngster and their family are causing problems. Is there a conflict in that?

15:45

Hugh Henry: No. I envisage that ASBOs would be used for under-16s in a relatively small number of cases—as is the case for other age groups—and that the children's hearings system would pursue every alternative before an ASBO was taken out. However, when the system is not working for a very small number of persistent offenders, it is right that we consider taking out an ASBO or an interim ASBO, albeit with the consequences that that would entail. It is important to try to preserve the integrity of the children's hearings system and the way in which it operates, and to recognise that an ASBO is something different. That is why we are thinking about applying such orders through the courts.

Mike Pringle: You say that ASBOs will be used in a very small number of cases. However, under the bill, they can be granted against someone as young as 12. The Law Society of Scotland has said that that is because children can consult lawyers at that age. Is that why that age was chosen? If, as you say, the orders will be used in such a small number of cases, why does the bill seek to lower the age to 12? Is there any evidence that the offences in question are being committed by 12, 13, 14 or 15-year-olds? Should we not simply lower the age to the level at which it is clear that there is a significant problem? If evidence in the past year shows that only one 12-year-old might have been subject to an ASBO, why does the bill seek to lower the age as far as 12?

Hugh Henry: In the meetings that we held throughout the country—from Aberdeen to the south of Scotland—at which ministers carried out an Executive consultation, we received consistent reports from communities that many of the people who were causing problems were very young. Indeed, in some communities, children younger than 12 were drinking, being exposed to potential drug taking and causing mayhem and significant amounts of vandalism. In the circumstances, we believed that it was right to lower the age from 16.

You have already touched on some of our reasons for drawing the line at 12. For example, someone at that age can instruct a lawyer. Moreover, a balance has to be struck between strengthening the range of interventions to deal with antisocial behaviour and avoiding the prospect of younger children appearing in court. We assume that children of 12 and upwards are mature enough to understand civil proceedings, whereas those who are younger might not be able to. Those children—and the majority of under-16s—would continue to be dealt with through the children's hearings system.

After reflecting on the specific concerns that have been expressed by communities throughout Scotland, we felt that many people under the age of 16 were causing bother and as a result decided that it was right to lower the age to under 16. However, we also felt that it was right to strike a balance on the basis of a person's maturity and ability to understand what was happening. Most people would accept that 12 was probably a reasonable age in that respect.

Mike Pringle: In evidence to the committee, a professor from the University of Edinburgh said that people who are what I think he called life-course persistent offenders simply offend continuously. Indeed, making an ASBO against those people will not change their behaviour at all.

Hugh Henry: If one were to accept that counsel of despair, one would do nothing about anybody. It is right to say that some people who engage with the criminal justice system start at an early age and persist in their behaviour. Some of those people are products of difficult environments and family circumstances. We also acknowledge that many of the problems that people manifest in their teenage years and later can often begin early on.

That brings us back to Jackie Baillie's comment about an holistic approach. We are determined to allocate extra resources to initiatives such as sure start and to invest heavily to support our primary and secondary schools because we know that many young children can be diverted if they receive support and skills early on. Similarly, supporting families at times of crisis can help them, too. Early support is the right way forward, but we are also determined to ensure that, while we invest in and develop all the preventive measures, we react to the immediate problems that many communities throughout the country are experiencing.

The Convener: We will move on to the provision that has become the most controversial—the power to disperse groups. I want to be clear about the Executive's position.

Nobody disputes that we already have a significant body of relevant criminal law and the bill makes no attempt substantially to repeal it, so what is wrong with the existing law?

Hugh Henry: There is nothing wrong with the existing law per se, but in some circumstances it is just not sufficient or appropriate. The existing law did not anticipate a range of other activities that are now evident throughout the country. We will add to, not replace, existing powers. People may say that the existing law is sufficient, but it is clear that if they experienced many of the problems that are regularly faced by my constituents and your constituents—as a member for the West of Scotland, convener, you, too, represent my constituents—they would not consider the current powers and laws adequate or sufficient to protect them.

The Convener: Let us be clear. In your judgment, is the lack of adequacy down to a lack of enforcement?

Hugh Henry: No. I am sure that people could describe instances in which enforcement could have taken place, but it is not for me as a minister or a local MSP to dictate to the police how they should enforce the law. As I am sure you do, I pass on regularly—probably to the police's annoyance—examples of people's concerns about response times, specific incidents or regular events in some localities. Arguments could be had about enforcement and adequacy. I see a range of activities on which we need a bit more than the current law provides and the bill attempts to provide that.

The Convener: Police officers will be needed to institute and implement the proposed new power. The question that comes through strongly from various groups of witnesses is that, if the Executive thinks the power necessary and if a problem exists with enforcement—the Scottish Police Federation believes that it does and said clearly that the situation that Karen Whitefield outlined in her constituency could be dealt with now—how on earth will our police officers deal with a raft of new powers such as the power to disperse groups? Where are those officers to be found?

Hugh Henry: That goes into a different debate. It would be inappropriate for me to discuss whether enforcement in Karen Whitefield's constituency is appropriate.

The Convener: That was purely an illustration of the committee's experience of direct disagreement.

Hugh Henry: Whether the situation takes place in Airdrie or Johnstone, it is not for me to comment on whether enforcement is appropriate. It is clear to us that people want more money to be spent on police. We have done that: we have provided record investment and we have a record number of police officers. People want other things to be done, too, so we have invested in community wardens. As a West of Scotland MSP, you know that the introduction of community wardens in Renfrewshire has been so successful that one problem is coping with the demand from communities who want the scheme to be extended to their areas.

The Convener: Do you agree that community wardens in the West of Scotland are not being asked to deal with groups of 50 youths behaving in a manner that makes other residents fearful?

Hugh Henry: They are not, but they complement the work of the police and local authority staff commendably and successfully. When I speak to local police officers, they tell me that they are pleased with the co-operation that now exists and with the fact that there are now people who can relieve them of certain burdens so that they are not being dragged into inappropriate activity and diverted from tackling crime.

We then go to the next stage and ask whether we are just talking about enforcement. The committee has said that it has heard from many witnesses that the power of dispersal is not required. Until today, 12 organisations have been before the committee and given their considered, valuable and informed opinion. For whatever reason, they have concluded that the power of dispersal is not required.

However, let us consider the bigger picture. The Communities Committee has also taken evidence from a range of organisations, including some local community groups. Those groups have drawn an entirely different picture from that drawn by many of the professional organisations. Sometimes politicians, legislators and councillors have to make decisions because they believe that those are the best decisions. They do not just make decisions based on who has the loudest voice or who is making the most popular clamour. Sometimes they have to make the right decisions, even if those decisions are difficult.

It would be wrong for Parliament to consider passing legislation that ignored the voice of the vast number of people whom we represent. It would be wrong for us to say that our views will be influenced only by the 12 organisations that have come before the committee at the expense of the views of others.

I have two examples that might be relevant, which relate to Paisley South and Cunninghame North in the convener's constituency of the West of Scotland. In Paisley South, I am consulting local people and asking them for their views. They are responding individually; the responses are still

coming in and they will be provided to the Communities Committee. I am doing that not as a minister, but as a local MSP. I have had almost 700 individual responses from our constituents, convener. When I asked whether police should have the power to disperse groups that are displaying antisocial behaviour, one person in that 700 said no, seven said that they did not know and the rest said yes. In Cunninghame North—

The Convener: May I just interrupt you for a moment, minister? I do not wish to—

Hugh Henry: May I finish the point? After that, you can come back to me.

The Convener: Right.

Hugh Henry: When the people in Cunninghame North were asked whether the police should have more powers to tackle groups of unruly youngsters, 97 per cent of more than 1,000 respondents said that they should. I think that almost 1,000 people in Cunninghame North and 700 in Paisley South—presumably the figures would be similar in the rest of the country—deserve to have their concerns articulated, heard and given as much weight as many of the informed views that we have heard. They are saying yes to enforcement, to more police and to community wardens, but they are also clearly saying yes to more powers.

The Convener: I am certain that none of the 700 in your constituency or of the 1,000 in Cunninghame North was asked whether they thought that existing law was being adequately applied. I am certain that none of them has the foggiest idea of what the existing law is. Is that not at the root of our problem? If we tell people that there is a difficulty in their community and ask them whether they believe that something should be done about it, they will automatically assume that there is no existing law to deal with that problem.

16:00

Hugh Henry: You are trying to lead me into a debate that criticises the police's failure to act, but I am not prepared to enter into such a debate. When I raise issues with the police in my area, they respond to the best of their ability. The Executive has responded to resource issues. However, there are problems about the adequacy of powers, which is what the bill attempts to deal with. I believe that your constituents and my constituents need to know that we are prepared to do more than simply spend money. They need to know that we are also prepared to examine the ability of current legislation to deliver and that, if the legislation is insufficient, we will add to it rather than replace it, so that a more comprehensive package of measures can be enforced to give our constituents peace and security, which they justly deserve.

The Convener: I know that some members want to ask questions about specific aspects of the proposed power, but other members want to ask general questions at this stage.

Nicola Sturgeon: The results of your survey do not surprise me, minister. If anything, I am surprised that you found anybody who would not say that they wanted the police to disperse unruly groups of people who hung around the streets. I am sure that you agree that our job as legislators is to get beyond the simplicities and to ask ourselves seriously whether the problem that exists has a legislative solution. Do the police lack powers and will we add to their powers if we pass the bill? Alternatively, do the police have the necessary powers and are they not enforcing them effectively, for whatever reason? If that is the case, it would suggest that we should consider other, non-legislative solutions.

My reading of the bill—which I believe is reasonably accurate—is that procedures are laid down under which the police can designate certain areas. A designation of an area would not make it an offence to congregate in that area, but I accept that it might have a preventive effect on some people. However, if some people ignored a designation and congregated anyway, the bill would give police the power only to disperse groups who were congregating and causing alarm or distress. I believe that it is beyond argument that current law gives police the power to disperse such groups. They have the power under common law and the offence of breach of the peace, which is incredibly wide ranging and covers a multitude of sins. They also have the power under a specific statute: the Civic Government (Scotland) Act 1982.

If you contend that current common law or statute is inadequate, will you outline how it is inadequate, using examples? By extension, will you outline, using examples rather than generalisations, how the proposed law would specifically improve the situation?

Hugh Henry: I suppose that I could answer rhetorically and say—

Nicola Sturgeon: I am asking you not to do that, but to answer specifically.

Hugh Henry: Please let me finish, Nicola. I suppose that I could answer rhetorically and simply say that, if the current law can achieve the desired effect, why are so many people throughout Scotland so concerned—

Nicola Sturgeon: Perhaps because the police do not have the resources to enforce the law. That is a possibility.

Hugh Henry: Please let me finish, Nicola. I spoke earlier about resources and you referred to current law and the offence of breach of the peace. However, an aspect that has not been adequately considered is that the designated area power will give police the ability to achieve a desired effect without arresting, charging or criminalising anybody—that would become an issue only if a person failed to respond to the police's exhortation.

Given the logic of some of the other things that you have said, I would have thought that you would welcome the opportunity for communities to get respite and for the police to get the power to move people on without those people having to be charged and convicted, thus entering the criminal justice system. If people fail to take heed, there will be consequences.

The power to disperse groups is not a replacement; it is an addition. Some people have criticised us for introducing what they see as a sweeping new power; others have said that the power to disperse adds nothing. The truth is probably somewhere in between. We have considered introducing certain safeguards in response to some concerns that have been expressed, including a requirement on the police to consult the local authority. We will reflect on some of the things that have been said about how that could be done and about who in the local authority needs to be consulted about that.

We believe that it is right to identify and target specific areas. That might be a street, an area smaller than a street or an area larger than a street, depending on the specific problem. If we can give attention to an area for a certain length of time in a way that encourages people to move on and disperse without the potential for confrontation and their being charged, that would be better than simply using the existing powers and locking people up. However, if that is required, I see no reason why the police should not do that.

Nicola Sturgeon: You say that the police will be able to achieve the desired effect without charging people. Under the current law, any police officer in any community in Scotland who comes across a group of kids causing trouble tonight will ask them to move on. In most cases, the group probably will move on. That is getting the desired effect without necessarily charging people or taking them—

Hugh Henry: No—

Nicola Sturgeon: Let me finish, given that you, quite rightly, asked me not to interrupt you.

Hugh Henry: I was not trying to interrupt.

Nicola Sturgeon: You have not outlined how the new law will change anything. Ultimately, under the current law and under the potential future law, people will be charged only if they refuse to move on.

You say that, because we still have a problem with antisocial behaviour, the current law is, by definition, not working. I accept that to an extent, but we must then ask why the current law is not working. Is it because the law is defective or is it because the police, for resource reasons, cannot effectively implement the law? You cannot simply dismiss that possibility because it does not suit you, especially given that the police are saying that that is what the problem is.

Hugh Henry: I am not sure that the police as a whole are saying that that is what the problem is. ACPOS, which represents the chief constables, is saying something different in respect of intelligence-led policing and the way in which the police should, and could, operate. You might find that there are differences of emphasis within the police.

The bill would give front-line officers arriving on the scene a clear power to require groups to disperse, even if people are not committing an offence. The current law does not allow that.

Nicola Sturgeon: We have just heard from representatives of the Law Society of Scotland, who pointed out that the bill gives the police power to move groups on, even if those people are doing nothing wrong—they can be moved on because it is deemed that their presence is causing a problem. The Law Society raised the possibility of that power falling foul of the ECHR and the right of assembly. Have you considered that possibility? Are you confident that a challenge made on ECHR grounds is not likely to be upheld?

Hugh Henry: All legislation that we introduce needs to be ECHR compliant. We are confident that that is the case for the bill. It is important to remember that we are not just talking about a group of people standing in a particular area in isolation and in a one-off event. A process must be followed. Some people have criticised that process for being bureaucratic; others have criticised the lack of safeguards.

We have attempted to ensure that the perceived problem is identified by requiring that evidence be gathered and the local authority be consulted before the decision is made at a senior level within the police. Once the area is designated, the constable or police officer concerned would be given authorisation to use the dispersal powers within the designated area.

Police officers who happen to be wandering along the street could not just say to a group of people, "I want you to move." The power could be used only as a consequence of a number of things that had taken place in the area over a period of time. There would need to be evidence that, over a period of time, a particular facility or particular

houses or particular groups of people were under intimidation or threat. If the congregating of people helps to contribute to the continuation of that fear and alarm, the police may use the power when they believe that that is the right thing to do. The power would not be used just because a police officer decided that they wanted to use it.

The Convener: You mentioned the evidence that was given by ACPOS. Do you share the First Minister's view on the evidence from the Scottish Police Federation? In your judgment, was that evidence unconvincing in that respect?

Hugh Henry: The First Minister has made his views clear. He repeated them again in Parliament last week. I believe that the Police Federation is mistaken in its interpretation of the figures and in its interpretation of the general issue. I believe that the communities that we represent are crying out for such a measure. The police officers to whom I have spoken have welcomed the intention to take further action.

We should remember that the Police Federation is hostile to the notion of community wardens. However, when I talk to police officers in my locality, they are positive about working in partnership with community wardens. Sometimes there can be different emphases among people who are talking in different circumstances. The First Minister's clear view has articulated the frustration and concern that many of us hear in communities the length and breadth of Scotland.

Jackie Baillie: First, I want to make a general point that I hope will be helpful. Having conducted over the summer what was not a questionnaire but a quite complex consultation seminar in my local communities, I am aware that there are views that are quite different from those that have been expressed to the committee. That does not make those views any less legitimate; it just means that the wider committee has not heard those views. In the committee's defence, we are a secondary committee on the bill. We did not take evidence from communities, but looked at the efficacy of the provisions from a justice perspective.

Having uniquely received a phone call from a constituent who had read the *Official Report*—he was well versed in the arguments and was robust in his support of the dispersal provision—I think that we should check that the Communities Committee has indeed covered the scope of the different views that are out there. It is important that we ensure that one committee truly reflects the differing views that exist. Clearly, we have not done that because we were doing a specific job. I do not seek the minister's response to that, but I just wanted to put it on record.

Secondly, before the minister arrived, we heard some interesting evidence from the Law Society of Scotland. The society suggested a Scotland-wide four-year pilot for the new dispersal provision, after which there would be research to check the efficacy of the provision. None of that sounded like anything other than common sense. Does the Executive ordinarily commission research on such new provisions to check their efficacy so that, if they are found not to be working as intended and require amendment, something can be done about that?

Hugh Henry: As a matter of course, we would want to review over a period of four years how the bill—as, indeed, any legislation—was working. We would want to consider the evidence. I am sure that the Executive is not alone in wanting to do that. The committees of the Parliament would be looking at legislation that has been passed to ensure that it was having the desired effect and to see whether measures that had inadvertently been missed could be added to strengthen the legislation. As a matter of course, we would continue to review what was happening and, where required, we would seek to improve. I would not describe that as a Scotland-wide pilot; it is just a sensible thing to do.

16:15

Mike Pringle: We have heard a lot about communities that have responded over the summer. However, when the Executive put out its consultation document, I understood from it that 58 per cent of the responses that we got were opposed to introducing further police measures and powers in relation to the dispersal of groups of young people. Only a third of the respondents supported the proposals and 7 per cent of them had some reservations. Will you comment on that first? I will come back on the subject of organisations.

Hugh Henry: It is clear that when we look at a small number of organisations that work in a particular field and reflect a specific point of view, it is inevitable that we can get that type of response. I tried to suggest that, in any consultation, it is right to listen to and reflect the widest range of views of people who wish to express an opinion. The Scottish Parliament is not only about reflecting the views of groups that are called to give evidence. We also need to reflect the views of the many people out there who seek representation through MSPs and to consider how they make their voices heard—collectively or individually.

During the consultation in the summer I was struck by the fact that a range of concerns needs to be reflected. The consultation seems to have been made in two phases, because the early part of the consultation, which took place out in communities and involved meeting people, was

overwhelmingly and vociferously in favour of taking action and indeed, taking action beyond existing restrictions. In the latter stages of the consultation, in which we sought to engage with a number of organisations, the balance was entirely different. I am not saying that the evidence that the committee has heard so far has no legitimacy; it does, and the witnesses have had a great deal of experience and integrity. Equally, the experience and integrity of the people to whom we listened over the summer must also be reflected—not just my constituents, those in Cunninghame North or those in other parts of the West of Scotland. In Brian Adam's constituency in Aberdeen, it was sobering to listen to how much further some of the local community representatives wanted to go—it was kind of frightening to listen to them. They gave a reflection of not only the concern, but the sheer terror, anger and frustration that they felt in seeing decent communities brought to their knees by the behaviour of small groups that began to link up with others to become mobs in some cases. I remember one woman in Aberdeen telling me about the real fear that she had when she tried to collect one of her children who was coming off a bus run. It was early in the day and she had to go through a mob of people who were causing mayhem by their general behaviour. Hearing that at first hand is every bit as important to the parliamentary process as what the committee is doing quite legitimately from the justice perspective.

Mike Pringle: I accept everything that the minister says, but I refer to what was said earlier: the police already have the powers to address the problem.

I accept that all the communities that were visited said that they wanted the power of dispersal. I have not looked in detail at the responses that were given under the consultation document, but have you spoken to any groups that have not given evidence to us and which have said that they agree with the communities?

Hugh Henry: There are certainly community organisations that would take the same view. It is not that they are saying that there is a problem; they are looking for action, and I do not think that we can easily ignore their concerns. You prefaced your remarks by saying that the current law is sufficient.

Mike Pringle: What I said was that many organisations have said that to us.

Hugh Henry: I beg your pardon. I thought that you were saying it.

I would pose the following question to those organisations: if the current law is sufficient, why are so many communities, not just in one area but throughout Scotland, telling us the same thing time and again? There is a problem, and to say so is not necessarily to criticise the police for lack of enforcement. Police officers tell us that sometimes their hands are tied and they can only go so far, so there is a problem that needs to be addressed. The current law is not sufficient.

If there is a question about our making more resources available, I say that we have put more resources into law enforcement, youth justice and other elements of community support, but that that is not the whole solution. What we propose in the bill is another part of a package that attempts to give some succour and support to communities that are under pressure.

Some organisations—I do not have time to go through them all, but the City of Edinburgh Council, Victim Support Scotland, Fife Council and Aberdeen City Council were among them—have argued that there is a need to address the behaviour of individuals within groups as well as focus on the collective action of groups. East Ayrshire Council stressed that powers should be applied to over-16s too, and the issue of mixed-age groups that include under-16s and over-16s must also be addressed. Cunninghame Housing Association mentioned the use of closed-circuit television, and other individuals have said different things in different ways.

Mike Pringle: Much has been said about what the police have said and members of the committee have heard the police say that they need the dispersal powers. I have spoken to the police, not in Cunninghame or in Paisley, but in Edinburgh; they told me that they do not need the proposed power because they have existing powers. In fact, when I asked the ACPOS representative whether he thought that the proposed power would be used, his diplomatic answer was, "That is possible." There is a serious conflict; some police are saying yes, they do need the power and some are saying no, they do not. Do you accept that?

Hugh Henry: Yes. Some politicians are saying yes and some are saying no, too. Some community representatives are saying yes and some are saying no. There are differences of emphasis and differences of opinion; people acknowledge that that is possible. I hope that the police will give serious consideration to using the power if it is introduced. I do not think that the police would deliberately seek not to use a power that is given to them if communities were crying out for that power to be used to support them.

I am intrigued by the fact that people keep saying that the current powers are sufficient; no one has yet adequately demonstrated that to me. If the powers are sufficient, why are there problems in so many communities throughout Scotland?

The Convener: If you are so confident about the willingness of the police to use the new power, why include statutory provision for ministerial guidance and ministerial direction?

Hugh Henry: I explained that at the beginning of my evidence. We believe that it would be helpful to give some guidance on the circumstances in which the power would need to be used. I repeat what I said earlier—it is not our intention to interfere with the operational independence or accountability of the chief constables. ACPOS supports the guidance provision and believes that it will be useful.

We will reflect on the comments that have been made about ministerial direction and, where concerns exist, we will consider whether there is any justification for them and whether we need to do anything to help to clarify that we are not seeking inadvertently to enter an area that we did not intend to enter.

The Convener: Colin Fox will be followed by Karen Whitefield, then Maureen Macmillan. It is understandable that part 3 of the bill is attracting great interest from the committee, but I am keeping an eye on the general range of questions that we know we want the minister to answer. I presume that the minister wants to get home to his bed tonight, so I ask members to be appropriately concise.

Hugh Henry: I have a long night ahead of me.

Colin Fox: I am sure that both the minister and members of the committee agree that all of our constituents, whether in Paisley, the Lothians or elsewhere, want to find a solution to the problems that face their communities; they want that more than they want extra powers, extra law or even extra assurances from politicians. We can take that as read.

On Sunday on Radio Scotland, in response to a report of a rebellion in the Executive's ranks over the power of dispersal, your colleague Margaret Curran, the Minister for Communities, said:

"dispersal is only for persistent offenders".

Will you tell us what you believe she meant by that? Did she mean that dispersal is for people who congregate persistently or for people who have committed a series of offences on other occasions? Is it the case that there are occasions on which she would consider not using the relevant powers?

Hugh Henry: I think that she was attempting—within the space of what I presume was a short interview—to describe succinctly how dispersal would work. Dispersal would apply in a locality in which the police believed that the presence or behaviour of groups was causing members of the public alarm or distress. The situation would be monitored over time; dispersal would occur in response to events that happened more than once, not to one-off events.

If a senior police officer is provided with information that there have been problems in a particular locality over a period—one such place that the Communities Committee heard about was outside a sheltered housing complex—that senior officer will be able to determine that a designation should be made in that locality, either in a particular street, part of a street or a wider area. That officer would then contact and consult the local authority; it is probably sensible that there be one point of reference in the local authority for that. We have not quite determined who should fulfil that role, but we are open to discussion on the matter.

Colin Fox: I am sorry to interrupt you. I know where you are going and I probably agree with the point that you are making, but I want to press you on how an officer who arrives at the scene will know whether he is facing persistent offenders. How will he know whether he has already cautioned the members of that group and they have refused to disperse or whether he has cautioned them for antisocial behaviour elsewhere?

Hugh Henry: Before an officer who arrives at a locality will be able to use the power, the locality in question will have to have been designated. A locality will be designated because a persistent problem has been identified in that area, consultation with the local authority has taken place and a notice to say that the area will be designated for specific periods of time has been issued. It has been suggested that the notice would be published in the local paper and that posters or bills could be put up to identify a particular locality; we are open to further discussion on that. If members and community organisations have any suggestions on how notification should be carried out, we are quite willing to listen to them.

If persistent offending has taken place—

Colin Fox: In an area?

Hugh Henry: Yes, in an area—

Colin Fox: But a person would not have to have been a persistent offender or to have been there before to be dispersed.

Hugh Henry: No. If a person is part of a group in an area where there is a designated and identified persistent problem—

Colin Fox: So Margaret Curran was wrong when she said that the measures will be only for persistent offenders because you can be dispersed even if you have never done anything before.

Hugh Henry: No. I think—you have no doubt done this in the course of interviews, as I have done in the course of interviews—that we have to try to explain—

Colin Fox: With respect, minister, Margaret Curran was quite specific.

16:30

Hugh Henry: If there is a persistent offence in a particular area that is causing a persistent problem, and if anyone gathers or congregates with others in an area that has been designated as having a persistent problem, the police have the power to ask those people to move on. So the minister is quite right.

Colin Fox: So what is persistent is the problem in the area, and not necessarily the offender.

Hugh Henry: Well, if you want to split hairs about whether that individual has persistently been part of the problem that has led to the designation of that area as having a persistent problem then, yes, let us split hairs.

Colin Fox: Or beards.

Hugh Henry: I am sorry?

Colin Fox: Or beards.

Hugh Henry: Aye, wherever the limited hair is left, obviously.

If there is a persistent problem in an area and a person is congregating with others in a way that an officer believes is likely to cause fear or alarm to the local community, that person could be asked to move on if the officer believes that they are contributing further to the problem in that area.

Karen Whitefield: The matter is obviously very contentious. I know that the Executive has consulted on antisocial behaviour. Did the proposals on dispersal of groups come about as a result of a suggestion from the Executive or as a result of representations that were made to ministers as they travelled around the country?

Many people who have given evidence to the committee today and over the past few weeks have said that the proposed powers are unnecessary. However, if they are unnecessary, why does the problem persist in my community? How do we explain to the people whom I represent that the problem is a figment of their imagination—especially when we have more police officers in the division that covers my constituency and when North Lanarkshire Council has a very effective antisocial behaviour task force, which is leading the way in dealing effectively with problems of antisocial behaviour? That task force tells me that problems still exist and that it still has insufficient powers to address all the problems that are faced by the community that I represent.

The Convener: Minister, I will understand if you do not want to respond to the question on that specific example, but can you respond to the points made in generic terms?

Hugh Henry: I will deal with the second question first and say that I wish that I had an answer. I have posed the same question: if the existing powers are sufficient, why do we still have all these complaints and problems? As I said, I have still not heard a convincing argument that existing powers are sufficient and can be used to best effect to protect communities. That is clearly not the case. I would be interested if anyone could come up with a clear view on that.

The first question was on how the proposals came about. In the consultation paper, a number of questions were asked and, as part of the consultation process, we met organisations, representatives and individuals throughout the country. We reflected on what we heard and, as a result, we decided not to proceed with some proposals, which were then dispensed with. However, on the proposal on the power to disperse groups, we decided that the evidence that we were receiving at first hand was so convincing that the power should be included in the bill.

The Convener: Do you agree that there was a significant response to the consultation to the effect that more people want more visible police officers in their communities?

Hugh Henry: Yes, and people are getting that: there are more police than ever on the streets of Scotland. We are also taking measures to release police officers from non-operational duties such as prison escorting. Three hundred police officers are being given more appropriate duties as a result of that work's being allocated to others. We have made more resources available than any previous Government in Scotland and we are taking the administrative and operational decisions that will ensure that more police are available on the streets for precisely the reasons that you identified.

Karen Whitefield: Do you agree that although most Scots want high-visibility policing and to see police officers out and about in their communities, they do not expect to have police officers at the end of every street watching everything that is going on in particular communities just because there is a persistent problem with young people hanging out and causing concern to that community? Perhaps the proposals in the bill will address that problem for communities because they will mean that young people cannot congregate indiscriminately or pick on one

community. The proposals will also ensure that a signal is sent to communities that protection is available and that such behaviour will not be tolerated in their localities.

Hugh Henry: A balance must be struck between having more police and making sure that our society does not become a police state in which there is a police officer on every corner, as Karen Whitefield has described. The work on intelligence-led policing that ACPOS and others are doing is so welcome because it is about using resources to best effect. As the phrase suggests, it is about using resources intelligently and getting a better return for our investment.

It is also worth remembering that although there are many older people in our communities who sometimes live in fear of groups of young people—sometimes with justification and sometimes without—other young people are often the victims of that type of unacceptable behaviour, as Karen Whitefield and others have said in the chamber on more than one occasion. That behaviour diminishes people's quality of life and reduces their confidence that they are able to go abroad in their communities. We must have a sense of proportion and we must give some confidence back to communities that have had real knocks to their confidence. We are not talking about taking powers for the sake of it; the solution is about adding to what exists and doing what we can proportionally and incrementally to improve quality of life.

Maureen Macmillan: I have a few questions from a different perspective. Charities such as NCH Scotland gave evidence that dispersal orders would harm the relationship between the police and young people, and would alienate young people from their communities, although I have to say that to charge them all with breaches of the peace would be even more alienating. Will you assure me that resources will be available for addressing holistically the problems of some of those young people once dispersal orders have been put in place? Do you agree that dispersal orders could give communities breathing space to mend bridges between communities and young people in a way that might not be possible if breach of the peace powers are used?

Hugh Henry: The point I made earlier has been reinforced by what Maureen Macmillan said. Using breach of the peace charges does nothing to enhance the relationship between young people and the police, nor does it do anything for groups of young people simply to criminalise them by charging them with breach of the peace without considering other ways of diverting them from unacceptable behaviour.

As far as the relationship is concerned, we are talking about a small number of antisocial young people; we must also consider the relationship between the police and other young people, who are sometimes sceptical and believe that they are not given the protection that they require when they want to go somewhere at night. Resources are provided to local authorities through the community planning process and we expect that the police will be able to engage in a debate with partners to consider how communities are supported and resourced and how money is used.

Sometimes, resources are an issue, but not always. In my many years as a councillor, one of the local communities that had a high level of community facilities also had a high level of criminal and antisocial behaviour. Young people would often congregate outside those facilities and the facilities would lie empty. I commend the authorities that are doing more for young people in swimming support and in other sporting, leisure and recreational facilities; some authorities have had remarkable success. We must address the issue of resources, but provision of facilities is not the answer in itself.

I accept that youth culture is an issue and that young people want to meet other young people. We do not seek to prevent that, but we do seek to prevent cases in which it becomes a problem to other young people in the community or to others who are harassed, intimidated and distressed. A balance is needed, along with a wider debate at local level.

The power to disperse is part of a wider package and a wider context. We expect local strategies for tackling antisocial behaviour to be drawn up by local authorities, the police and community groups. We expect those strategies to identify prevention and diversion and to allow parties to engage in a debate on enforcement. We want the community, the police and others to have a proper debate about how local resources are used.

The Convener: One area in relation to dispersal that we have not covered in any great detail is how the power will work in practice if the bill is passed without amendment. It is foreseeable that in a small community, most people will know which areas they would like to be designated—in my neighbourhood, I can think of four such areas without difficulty. They are the current honeypots for groups of individuals, particularly during the summer months.

It is reasonable to assume that if the bill is passed as it stands, an understandable body of opinion will be expressed by local residents to their local senior police officers. The residents will want particular areas to be designated because they do not like the fact that people regularly congregate there to drink, swear and cause nuisance to others. Under an unamended bill, that designation would be made and people who

returned to the area would be dispersed. It does not take an Einstein to work out that they will disperse to the next area, probably one that is a little further away and not as convenient for them as the first. I assume that residents who are troubled by the people's arrival in that area will tell their divisional police commander that they want that area to be designated. That will be done, and when people congregate there, they will be ordered to disperse.

What I am driving at is that, if the provision is going to work, and if it is to deal with the sort of situations that have been outlined, as the Executive clearly intends it to do, are we not facing a revolving door of designated areas in our communities? Frankly, those areas will become a litany of no-go areas for young people. All that the provision will do is disperse people—it will not provide solutions.

16:45

Hugh Henry: If dispersal was for the reasons that you mentioned—significant problems of drinking and antisocial behaviour—I think that you, the people whom you represent and the people who live in those areas would expect the same protection to be afforded to them. The groups would simply be moved from one area to another.

We are trying to address behaviour. We are not telling people that they cannot congregate in groups—nowhere is that suggestion being made. The police officer has to have reasonable grounds for their belief that the presence or the behaviour of a group or groups is causing alarm or distress to members of the public in a particular locality.

Although it is not for me to tell the police officer how to specify the designated area, I would think that, if the police's local knowledge of an area meant that they believed that the problem would simply move round the corner, they would also designate that other area. The police have to deal with the problem in the wider area and the police officer will have the power to designate as small or as large an area as is required. That is for the police to determine.

I do not expect young people to be shunted from one street corner to another over the summer months, simply because they are young people who are gathering in a group. What I expect is that, if the young people who are causing mayhem, alarm and distress on one street corner go to another street corner, they will be dealt with there. If they are behaving in that manner, they should be dealt with wherever they turn up.

The Convener: But, under the bill, "dealt with" means only moving them on.

Hugh Henry: "Dealt with" certainly means to move them on and to prevent them from behaving in that manner. If they choose to move to another area, it would be for the police to determine whether that area should be designated at that time or subsequently.

I would think that intelligence-led policing, the identification of problems and the response that would be made to the needs of the community would not be done in isolation. Other measures would also be employed. The police would seek to look at why and where the problems occur and what the problems are.

I am thinking of some of the issues that I see in my area concerning hot-spot policing and extensive intervention. Members will be aware that in Foxbar and in the west end of Paisley, police recently addressed a specific problem that was happening at a specific time. I would expect that to happen; I would also expect a council to play its part in liaising with the police to look at the other problems that are occurring in its area and how they have been addressed.

I do not accept, however, that it is reasonable for us to say simply that, because groups might move from one area to another, we will allow one individual, street or community to be plagued. I expect action to be taken and I expect it to be reasonable, proportionate and effective. If the police think that other measures are required, as a local representative and a local resident, I expect the police to look at those measures as well.

The Convener: That is a helpful answer, as it accedes to the point that the police would anticipate the designation of other areas in the community. Given what we know about how most people react, the consequence of dispersal would be for them to go elsewhere until they can be prevented from doing that.

The other question that I want to pose relates to the point that Colin Fox made. Let us assume that the provision has been enacted and that four areas in a community have been designated—probably the four areas that are not built upon, which have proved attractive to congregating groups of individuals. Let us assume that individuals who have not been in trouble wander into one of the designated areas and shout or yell or have a bit of a knock-about with a ball. If residents who live nearby do not like that kind of behaviour, they could, under the terms of the bill, phone the police and say, "Get down here. This is a designated area. More than two people are congregating and they are causing us alarm and distress. Disperse them." Do you concede that that could happen? In the Scottish society that we all want to see, would that be a reasonable use of the law?

Hugh Henry: The specific question is whether I accept that it is reasonable that someone might pick up the phone and make that call. Yes, I accept that. That happens at the moment. People pick up the phone and make such calls when groups congregate in that way.

I would not accept it if the police, having investigated, came along and—simply because the area had been designated—dispersed a group of young people who were playing a game of football and posing no threat to the community. That would be unreasonable; it would be an abuse of police powers and an abuse of the law that we are considering. However, if, in that designated area, those who congregated to play a game of football went beyond that and brought carry-outs with them, got drunk and started to abuse passers-by and to cause fear and alarm among local neighbours, I would expect the police to use their powers to ask them to disperse.

There is a difference. If a group of two or more people are in an area but are not, in the opinion of the police, causing fear and alarm or acting in an unreasonable way, I would not expect the police to do anything about it. However, if those people were acting in an unreasonable way, I would expect the police to use whatever power was available to them to designate the area and to ask them to move on.

The Convener: But, in the case of law-abiding people who are not causing alarm and distress—except that, subjectively, some residents think that they are causing alarm and distress—you would accept that the platform for the police being able to intervene in what may be perfectly legitimate behaviour is the fact that those people are now in what has been designated a no-go area—an area with a question mark above it.

Hugh Henry: The police would still need to determine whether the action in an area was sufficient for them to ask for dispersal to take effect. That is what happens now. The police receive phone calls from people who say that there is a group of youths in their area and that they are scared or intimidated. The police then come out and investigate. At the moment, the police would be able to act only if the youths were acting in a way that, under the current law, constituted a breach of the peace. I would not expect the police to come out and say that simply because some people were in a designated area, they would have to move on although none of the other requirements had been met. I would rely on the professionalism of our police to make the appropriate decision.

The Convener: But the bill says specifically that the decision will be down to a constable who, on occasions, will be acting in isolation. Surely that is a considerable responsibility to place on one police officer.

Hugh Henry: Our police officers have considerable responsibility placed on them day in, day out. They have to make decisions about whether to issue fixed-penalty notices, whether to arrest somebody or whether to send someone away with a warning. It is something that they are trained to do and—as you will concede, convener—they act in a professional and responsible manner. I would expect them to continue to do so.

The Convener: We have considered the practicalities of the implementation of the power to disperse. We are going to have a lot of police officers going round to designated areas. Surely that will be an inevitable consequence of giving communities this power and inviting members of the public to say, "The Scottish Executive has answered our prayer. We have four designated areas. There are people there and we do not like what they are doing. We will get the police out."

Hugh Henry: The police will go to the designated areas only on the basis of evidence that they have received that there is a problem in those areas. The areas of designation will be of no higher or lower priority than the police have determined in consultation with the local authorities.

The Convener: Or as the Executive has directed.

Hugh Henry: I have addressed that point twice, convener. If you want me to go over it a third time, for the purposes of clarification, I will do so. However, I hope that I have answered that question.

I hope that no member would suggest that, if people are being threatened and are experiencing fear and alarm, if their quality of their life is being infringed and they are having a real problem, they cannot expect the support of the police in dealing with that simply because there is demand from a number of areas. Intelligence-led policing will allow the chief constable and other senior officers to determine how to use their officers and resources in particular communities at specific times. I am sure that, with the additional moneys that are going not only to the police, but to others, we will see the proportionate response that is required.

The Convener: Are there any more questions on the dispersal of groups? If not, I thank the minister for his contribution.

We move on to other parts of the bill.

Maureen Macmillan: We received evidence from Children 1st, which said that voluntary parenting classes were always 100 per cent successful, that nobody ever turned down the

opportunity of going to them, and that all parents emerged from the classes as better parents. If that is the case, why do we need compulsory parenting orders?

Hugh Henry: First, you are absolutely right that the best thing to do is to get people to co-operate and respond voluntarily. There is no doubt whatever that that is the best situation. Unfortunately, a small number of parents fail to show due care and attention, love and affection, and support—however you want to describe it—towards their children. I am sure that you have heard complaints—as I have, as a councillor and an MSP—from the police and community organisations about some parents who not only turn a blind eye to their children's under-age drinking and their involvement in the drugs scene, but may be complicit in it. Unfortunately, when a parent fails to give the proper support to the child and refuses all efforts that are made to have a voluntary arrangement—which should be the first step—something more is required to encourage that parent to give due support and attention to their child.

Maureen Macmillan: You do not feel that parenting orders would just further stigmatise parents who are already under a lot of strain? Are there ECHR implications, with regard to interfering with the right to family life?

Hugh Henry: Unfortunately, in some cases, the problem is that there is no adequate family life. It is tragic that, in some families, many of the things that you take for granted are not present. I do not see the provision as stigmatisation; it is about providing the support to help parents to cope. Being a parent is difficult, but it is not just parents who are at the sharp end in the context of this debate. We all accept that it is difficult. We are putting a lot of time, effort and money into looking at support facilities, counselling, parenting skills and so on, which have to be developed. However, when a parent is putting their child at risk by their failure to engage with the child, for the child's sake we need that parent to take more of a role. That is far preferable to taking the child away from the parent, as sometimes happens in extreme cases.

Maureen Macmillan: Some of the evidence that we took suggested that if the stage was reached at which a parenting order was required, the child ought to be taken away from the parent.

The witnesses from the Law Society of Scotland, in their evidence to us this afternoon, were worried about the extension of vicarious liability. They thought that you might find yourself in a situation in which a parenting order required parents to do something that they could not do. They gave the example of a parent who was required to keep their child away from certain other children, but who might not be able to supervise the situation, for example when the child is at school. As a result, they could find themselves being criminalised for something that they had no power to prevent. Can you give assurances that parenting orders will be tightly drawn?

17:00

Hugh Henry: It would be for the court to draw the conclusion and I am sure that the court would consider all the circumstances.

If a parent could demonstrate that they had made an effort to do what was expected of them, it is clear that it would be unreasonable to punish them for a failure that was beyond their control. The purpose of the legislation is not to tell parents, "You will ensure that this happens in all circumstances." I do not think that any of us who are parents can guarantee that our children do everything that we expect them to do at all times. Instead, we must ensure that the parent can demonstrate that they have tried to the best of their ability to fulfil the requirement that has been made of them.

The situation is perhaps no different from that which currently applies to parents under the Education Act 1980. For example, under that act, a parent can be held responsible for not ensuring that their child goes to school. The parent is taken to court not because the child has failed to attend school, but because they have failed to take sufficient action to ensure that their child has gone to school. Under that long-standing legislation, the sentence can be a fine of up to £1,000 or a month in prison.

As far as the Antisocial Behaviour etc (Scotland) Bill is concerned, the requirement on the parent would be no different. We are simply trying to get the parent to comply with the order. The bill says:

"If a person in respect of whom a parenting order is made fails without reasonable excuse"—

that is the important phrase—

"to comply with"

the order, they

"shall be guilty of the offence".

It would then be up to the court to determine whether their excuse was reasonable or not.

Maureen Macmillan: The parenting order will be imposed in a civil procedure, so the usual rules of anonymity that one gets in a criminal procedure will not apply. As a result, the parent—and therefore the child—could be identified in the press. How will you address that issue?

Hugh Henry: We expect that the safeguards that apply to children under the Education Act 1980 with regard to a parent who is taken to court because of a child's failure to attend school will

also apply in this respect. We will reflect on the matter and will certainly do anything more that can be done.

Jackie Baillie: All witnesses without exception have welcomed the principle of community reparation orders. However, I have a couple of points of detail. Although the proposed orders apply to 12 to 21-year-olds, a variety of witnesses has told us that they do not feel that there is any need for an upper age limit. In fact, the Law Society of Scotland went so far as to say that it liked the orders so much that it wanted them to be made available to everyone. Is there any possibility that the Executive will consider extending a measure that has been welcomed as a valuable intervention?

Hugh Henry: We felt that there was a good argument for making community reparation orders available for use for that younger age group while making community service orders available for older people who were perhaps engaged in higher levels of bad behaviour. We do not believe that this is a matter of fundamental principle. People who are 21 or older might be engaging in types of behaviour that are not sufficient to warrant a community service order but which might be addressed through a community reparation order. We are willing to consider the matter. I can see the logic behind making a softer disposal available if it helps to address someone's behaviour, turns them round and keeps them away from criminality. Indeed, I can see no logical reason why that should not happen if it can make a contribution.

Jackie Baillie: That comment is very welcome. Other committee members share the same view.

The Law Society suggested that perhaps we do not need a new order and that revised supervised attendance orders would fit the bill. What is the view on that?

Hugh Henry: We are talking about a different matter. A supervised attendance order has a specific application that normally relates to fines, so the measures are different beasts.

We could endanger SAOs. An SAO concerns education and life skills, but we are talking about putting something back in and an attempt to make good the damage that has been done. We could certainly consider the matter, but we are not convinced that merging community reparation orders with SAOs would necessarily be the best option.

Jackie Baillie: I have no problem with the minister's response. That matter had to be clarified for when we write our report.

Karen Whitefield: Some way behind the dispersal of groups remain some contentions about extending the use of restriction of liberty orders to under-16s. Some witnesses have expressed concern that restriction of liberty orders will be used in place of secure accommodation and will therefore not address the needs of young people who have engaged in antisocial behaviour. Is that the Executive's intention?

Others have expressed concern that restriction of liberty orders will have limited effect, because the outcome of the Executive's monitoring of the effectiveness of such orders for people aged over 16 was that orders were most readily complied with by individuals who were slightly more mature and could comply with all the terms.

Hugh Henry: There is no doubt that restriction of liberty orders could contribute towards helping someone who might be under consideration for a secure unit. If they could have that consequence, that would be desired. However, it would be wrong to say simply that every case is at that last point. People in some circumstances might be heading in that direction, but may not have reached that point. The logic is that if people take action now, they can avoid entering that debate. The criteria for secure accommodation would not necessarily have to apply in order for a restriction of liberty order to be used, but such an order could help people to avoid secure accommodation and could help people who are travelling in that direction.

A hearing would use tagging only when it was in the child's best interests. If it could keep a child away from potential danger, risk and the capacity for antisocial behaviour, it would be useful. A restriction of liberty order with tagging can keep children confined to a locality or away from a locality.

Will you remind me of your second point?

Karen Whitefield: My second point was about the Law Society's view that the monitoring carried out by the Executive and experience in England and Wales had shown that restriction of liberty orders are not as effective for younger people—the more mature the individual, the more effective the order proves to be.

Hugh Henry: I am sure that maturity is an issue, not just in relation to RLOs, but when any order is made. The more mature someone is, the more open they are to any disposal that might help them to change.

RLOs must not be considered in isolation; they must be part of a package of measures that are designed to help the young person. The hearings system must consider other issues. It would be a complete waste of time and money and an abuse of the system to think that tagging a young person and confining them to their home or requiring them to stay away from a particular area was all that was needed. There must be input from social workers, support workers and others to help the young person to address their problems and face

the consequences of their actions for themselves, their families and the wider community.

Karen Whitefield: The Scottish Human Rights Centre raised concerns that we might put some young people at risk by confining them to their home. They believe—as do some children's panel members in my constituency, who raised the matter with me—that although by no means all young people who offend come from abusive homes, antisocial behaviour can sometimes be a manifestation of the abuse that a young person is experiencing at home, whether that abuse is physical, sexual or the result of neglect. If we force such a child to be confined to their home, might we be accused of making their situation much worse and furthering the abuse?

Hugh Henry: Yes, and we would be guilty of that if we knew or had serious concerns that abuse was taking place in a household, or that a family was failing in some way, but did nothing other than impose a restriction of liberty order on the child and confine them to their house. That would be an outrage. I hope that in such circumstances it would not be a question only of monitoring or tagging; the wider interests of the child must be considered. Indeed, we would have to consider whether that house or family was safe for the child, regardless of whether tagging was used. The proper professional procedures should apply when such concerns exist and it is not acceptable—particularly given some recent cases—to leave a child in a potentially abusive situation, whether or not tagging is an issue.

Karen Whitefield: I am grateful for your clarification.

Will children under 16 regard an electronic tag as a badge of honour? We have talked a lot about the dispersal of groups, because young people gather together. How can you ensure that a young person who has been tagged does not either regard that as something to be proud of or encourage other young people to follow suit?

Hugh Henry: I must confess that I am a little confused about that issue. Some people have said that a tag would be regarded as a badge of honour, but others have said that to tag young people would stigmatise them—it cannot be both a stigma and a badge of honour.

The issue is not how the young person feels about the tag, but how effective the disposal is in helping the young person to address their behaviour and in helping to provide relief to a community that is under threat or under pressure. I see tagging as neither stigmatisation nor a badge of honour: it is about doing something effective and appropriate that helps to produce long-term and short-term improvements.

17:15

Colin Fox: I remember the Minister for Justice saying in debates that tagging would be an alternative to secure accommodation, and, when the Scottish Children's Reporter Administration gave evidence, it said that tagging should be used only in that way. When we pressed the SCRA, it emphasised that tagging should never be used on its own, only as part of a host of measures. You have covered the second part, but I ask for clarification—I might have picked up wrongly what Karen Whitefield said—of whether you are suggesting that there is a use for tagging other than as an alternative to secure accommodation.

Hugh Henry: I do not have to hand the precise words that ministers used on previous occasions, but we have consistently said that, if electronic monitoring can be used to prevent someone from having to be taken into secure accommodation, that should and could be done. However, a process is also involved: some young people are heading in the direction of secure accommodation, and early intervention could prevent them from reaching that destination. We would not consider whether a young person should be tagged only when they are right at the point of being taken into secure accommodation; we would consider the wider issues—the concerns, behaviour and problems—and put in place a range of other supportive measures so that the young person does not end up in the situation in which our only alternative is to consider secure accommodation. There is an earlier point in the journey towards secure accommodation where we think—and I have said—that electronic monitoring could be useful. We see that disposal in the overall context of the debate.

Colin Fox: With respect, that sounds like a change of position, but I will not press you on it; I will enter into correspondence with you and the Minister for Justice about it.

I will ask about fixed-penalty notices. Is there an issue with police issuing fixed-penalty notices when dealing with antisocial behaviour offences, in which they have to exercise their discretion about whether an offence has been committed? Is there a danger that issuing a fixed-penalty notice on the spot might inflame the situation?

Hugh Henry: I would not have thought so. The police can already issue fixed-penalty notices for road-traffic offences and have recently obtained the power to issue notices for dog fouling, so I do not think that issuing fixed-penalty notices significantly alters their role.

In any particular circumstances, it would be a matter for the discretion and judgment of the individual police officer on the spot to determine whether a fixed-penalty notice could be issued

safely and securely and whether that would be the best way forward. I am sure that, if the officer felt that the situation was likely to become inflamed or get out of control, they would want to consider other ways of resolving it, but the evidence shows that we can cut down a significant amount of wasted police time by issuing fixed-penalty notices. People still have the right to challenge a notice if they believe that there is no justification for its having been issued, but some of the behaviour that we are considering could easily and more justifiably be tackled by issuing a fixed-penalty notice rather than by charging someone with a breach of the peace.

Colin Fox: It has been suggested that it might be better to wait until Sheriff Principal McInnes's committee has reported on the wider issue of summary justice and the place that fixed-penalty notices play in that. Do you not see that as a concern?

Hugh Henry: I see that some people have that concern, but I am not sure that the matter needs to be tackled in that way. We are moving apace with the McInnes review and hope to publish that report, which examines a wider range of issues, soon. The bill's provisions on fixed-penalty notices are specific, and I do not envisage that the McInnes review will change in any way the concept of fixed-penalty notices, so I do not think that any of the bill's provisions will contradict anything in the McInnes review.

Colin Fox: The final issue is closure notices for premises where a particular problem is developing. Other witnesses have suggested that closure notices might not solve the problem but simply move it elsewhere. What do you say about those fears?

Hugh Henry: If the problem is antisocial or illegal behaviour, I am not sure how easy it would be to move it elsewhere. I do not think that that would be a legitimate concern. If there are problems to do with parties, illegal drinking, drug taking or fighting within premises, steps could be taken not only through the bill, but through the measures that we will consider as part of the licensing review. I am fairly relaxed about that argument. I do not think that closure notices would simply move a problem from one area to another. Taking effective action in relation to specific premises could send out a very powerful warning signal, as well as provide fairly rapid relief.

Colin Fox: You do not think that you are putting the cart before the horse, because it might be necessary to readdress the issue after the licensing review is published.

Hugh Henry: No, because I think that what is being discussed as part of the licensing review would fit in with some of the other measures that we are talking about. We are in the process of consulting on that.

The Convener: I have a short final question about fixed-penalty notices. Do you agree that, so far, their use has been restricted to dealing with what we might describe as absolute or statutory crimes—in other words, cases in which the car is on a yellow line or the speed limit has been broken and the police are in possession of corroborative evidence to support that view. In such cases, the use of a fixed-penalty notice is very much the technical consequence of a patent breach of the law. To return to Colin Fox's question, if we are talking about behaviour and we ask a policeman or a policewoman to make a judgment about whether certain behaviour constitutes an offence, are we not entering a more uncertain area?

Hugh Henry: I suppose that, to some extent, the legislative proposals that we are talking about are not that different from the law that you and I voted to introduce on dog fouling, in relation to which fixed-penalty notices are used. Corroboration would still be an issue.

The Convener: I would make the point that there is substantive evidence—if I may use that phrase—for dog fouling; officers either see the offence being committed by the owner and the animal or they do not see it being committed. We are asking police officers to start making judgments about whether, in their opinion, certain behaviour constitutes breach of the peace, for example.

Hugh Henry: Police officers do that anyway when they arrest someone for breach of the peace—they make a judgment.

The Convener: They only charge the person concerned with breach of the peace.

Hugh Henry: Yes, but a person will still be able to challenge the issuing of a fixed-penalty notice if they feel that they are innocent. We are asking police officers to make a judgment in the way in which they would usually do. The Lord Advocate will provide guidance on that. I believe that there would still need to be corroboration. I do not think that we are proposing a measure that will cause that much difficulty; indeed, some of the evidence from elsewhere in the United Kingdom is that the use of fixed-penalty notices in such circumstances can work.

The Convener: As members have no further questions, I thank the minister and his colleagues for coming before us this afternoon. It has been a lengthy session and we are grateful to you for your forbearance. It has been helpful for the committee to have had the opportunity to examine the bill with you. Thank you for your attendance.

Hugh Henry: Thank you, convener.

Meeting closed at 17:25.

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