# JUSTICE 2 COMMITTEE

Tuesday 27 September 2005

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

# CONTENTS

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## JUSTICE 2 COMMITTEE
**23rd Meeting 2005, Session 2**

**CONVENER**

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

**DEPUTY CONVENER**

*Bill Butler (Glasgow Anniesland) (Lab)

**COMMITTEE MEMBERS**

Jackie Baillie (Dumbarton) (Lab)
Colin Fox (Lothians) (SSP)
*Maureen Macmillan (Highlands and Islands) (Lab)
Mr Stewart Maxwell (West of Scotland) (SNP)
Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)

**COMMITTEE SUBSTITUTES**

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

*attended

**THE FOLLOWING ALSO ATTENDED:**

Hugh Henry (Deputy Minister for Justice)

**CLERKS TO THE COMMITTEE**

Gillian Baxendine
Tracey Hawe

**SENIOR ASSISTANT CLERK**

Anne Peat

**ASSISTANT CLERK**

Steven Tallach

**LOCATION**

Committee Room 3

# Scottish Parliament

## Justice 2 Committee

*Tuesday 27 September 2005*

[THE CONVENER *opened the meeting at 14:04*]

## Petition

### Justice System (Child Sex Offenders) (PE862)

**The Convener (Miss Annabel Goldie):** I welcome everyone to the Justice 2 Committee's 23rd meeting of 2005. We have apologies from Jackie Baillie, for whom Cathie Craigie is substituting; from Stewart Maxwell, for whom Kenny MacAskill is substituting; and from Jeremy Purvis, in whose place I understand Margaret Smith may attend. Colin Fox is not attending meetings during September. I welcome Kenny MacAskill and Cathie Craigie to our meeting. We are glad that you could join us.

Agenda item 1 is petition PE862, at the instance of Margaret Ann Cummings, on the monitoring of child sex offenders. I thank the clerks for preparing a helpful briefing paper, which provides full background information. The Public Petitions Committee considered the petition and thought that the Justice 2 Committee should be aware of it, because we are scrutinising the Management of Offenders etc (Scotland) Bill. That is why I thought it appropriate to put the petition on the agenda. I am happy to invite comments from members.

**Bill Butler (Glasgow Anniesland) (Lab):** The petition was prompted by a tragic case—the murder of the petitioner's son. The Executive is considering various ways in which all human efforts can be applied to ensure that such a case does not occur again. I think that the Public Petitions Committee forwarded the petition to this committee more as a matter of courtesy, because the bill's scope is too narrow to deal with the many important and serious issues that the petition raises.

The Public Petitions Committee has sought the ministerial team's views and a response is expected by 9 November. We should await the ministerial response. After reading that, this committee should decide whether to pursue the petition, perhaps with an inquiry—I do not know. It would be wise to await the ministerial response. The case is tragic and has serious ramifications. Because of that, it is right that we should consider what the Executive says and respond in due course.

**Mr Kenny MacAskill (Lothians) (SNP):** I concur fully with Bill Butler. It would be appropriate to let Mrs Cummings know our position. What Bill Butler said was eminently sensible. If nothing was due to happen, our actions might be different, but given that it is the end of September and that the response is to be made by the middle of November, little can be done to accelerate the process. The starting point should therefore be what the Executive says, which will be viewed as adequate or inadequate.

I understand Mrs Cummings's frustration, but to do anything other than to await the outcome might be wrong. However, we should intimate to her that the matter is not being shoved under the carpet. For practical and sensible logistical reasons, we will await the response. When we receive it, we will review matters and advise her of what might be done.

**The Convener:** I agree with what other members have said. The petition arises from a tragic background and none of us is unmoved by that. Our function as a committee is to determine in what way we can assist genuinely with the consideration of a petition and—we hope—contribute to bringing it to a meaningful outcome.

As a matter of courtesy, the Public Petitions Committee passed the petition to us because of the work in which we are involved, but the petition is still before that committee. As we are aware, the subject that the petition addresses embraces a wide range of issues, which involve not just criminal justice, but disclosure, housing, sentencing, tariffs, bail and miscellaneous related matters.

I infer from what members have said that this committee has an interest in hearing what happens to the petition and that it would be appropriate to let the minister respond to the Public Petitions Committee, but that we ask that committee to copy us the response. We can then put the matter on our agenda for the committee to determine what future action, if any, it would like to take, with a view to assisting consideration of the petition. Is that agreeable?

**Members** *indicated agreement*.

**The Convener:** We shall therefore defer consideration until a response has been received by the Public Petitions Committee and copied to this committee.

# Management of Offenders etc (Scotland) Bill: Stage 2

14:10

**The Convener:** Item 2 on our agenda concerns the Management of Offenders etc (Scotland) Bill, on which we commenced the stage 2 procedure last week. We continue with that procedure today. Once again, I welcome the Deputy Minister for Justice, Hugh Henry, to our meeting, along with his officials. Members should have received a copy of the papers, including the second marshalled list of amendments. We reached section 10 last week and we pick up from where we left off.

**After section 10**

**The Convener:** Amendment 47, in the name of the minister, is grouped with amendment 62.

**The Deputy Minister for Justice (Hugh Henry):** The purpose of amendment 47 is to ensure that the Risk Management Authority can delegate its functions appropriately so that the board will not have to take every decision. As the legislation stands, there is some doubt about whether that is permitted. We have been working with the RMA to set up arrangements for accrediting risk assessors and risk assessment methods. Those will be provided for in a scheme under section 11 of the Criminal Justice (Scotland) Act 2003. As part of that, we seek to ensure a clear separation between decisions on whether to award or remove accreditation and decisions on appeals. The amendment will therefore allow the scheme to establish separate committees within the RMA to carry out those functions. Amendment 62 is a consequential amendment to the long title of the bill.

I move amendment 47.

**The Convener:** I seek clarification about whether the Criminal Justice (Scotland) Act 2003 is in force yet; I do not remember.

**Hugh Henry:** Yes, parts of it are.

**The Convener:** So amendment 47 would technically link with the provisions of that act.

**Hugh Henry:** That is correct.

**The Convener:** I am grateful to you for that clarification.

*Amendment 47 agreed to.*

**The Convener:** Amendment 48, in the name of the minister, is grouped with amendments 51, 63 and 64.

**Hugh Henry:** The Criminal Justice (Scotland) Act 2003 establishes the order for lifelong restriction as a new way of dealing with high-risk sexual and violent offenders. We intend to bring the orders into force early in the new year. Amendments 48, 51, 63 and 64 are concerned with the procedures leading up to the making of an order for lifelong restriction and with the choices that are available to the High Court when dealing with high-risk mentally disordered offenders.

The purpose of amendment 48 is to ensure that the right disposals are available to the High Court when dealing with high-risk mentally disordered offenders. In parallel with the Criminal Justice (Scotland) Act 2003, the Mental Health (Care and Treatment) (Scotland) Act 2003 puts in place new arrangements for dealing with mentally disordered offenders. Amendment 48 will correct a small problem where those two systems touch.

The intention that was set out when the bills were being considered was that, in the small number of cases where an offender meets the criteria for an order for lifelong restriction and the criteria for a mental health disposal, the High Court should have the choice of which route to take. That choice would be guided by the reports that are before it. Unfortunately, the terms of the Criminal Justice (Scotland) Act 2003 are such that, if the offender meets the criteria for an order for lifelong restriction, the court has no option but to impose it. The amendment will put that right and will give the court the choice of disposals that was intended. Amendment 63 is a consequential amendment to the long title of the bill.

14:15

The purpose of amendment 51 is to ensure that there is protection of vulnerable witnesses in court proceedings associated with the new orders for lifelong restriction. Over the past few years, the Parliament has put in place special measures to protect victims of sexual offences and other vulnerable witnesses through the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 and the Vulnerable Witnesses (Scotland) Act 2004. Through the Criminal Justice (Scotland) Act 2003, the Parliament also established the order for lifelong restriction as a new way of dealing with high-risk sexual and violent offenders.

Before making an order for lifelong restriction, the High Court must first order a risk assessment of the offender, which will be prepared by an accredited assessor following guidelines and standards set down by the RMA. However, there is an opportunity for the offender to challenge the assessment in court and to call witnesses. That process happens after conviction and is therefore distinct from the trial. As a result, the special protections for victims of sexual offences and other vulnerable witnesses do not apply. Although we expect the main witness in such proceedings

to be the author of the risk assessment, other witnesses could be called, including the victims of previous offences.

Amendment 51 will close that loophole by applying the victim and witness protections to the procedure for challenging risk assessments. We believe that it is a prudent amendment that will ensure that victims and vulnerable witnesses are protected to the fullest extent possible. Amendment 64 is a consequential amendment to the long title of the bill.

I move amendment 48.

**Bill Butler:** I welcome what the minister has said about closing a possible loophole in respect of vulnerable witnesses and victims being called to give evidence. That is only right and I am glad that the Executive has lodged amendment 51, which is sensible.

*Amendment 48 agreed to.*

### Section 11—Amendment of Prisoners and Criminal Proceedings (Scotland) Act 1993

**The Convener:** Amendment 49, in the name of the minister, is grouped with amendments 53 and 56 to 60.

**Hugh Henry:** I am pleased to have lodged amendment 49, because it demonstrates once again that we are delivering on the commitment made by the First Minister in November 2004 and confirmed during the stage 1 debate that we would take steps at the first opportunity to end unconditional release for short-term sex offenders. In doing so, we add another measure of public protection to an already impressive collection of measures in the bill, including sections 9 and 10 on assessing and managing the risks posed by sexual and other offenders, which we debated last week, and section 12 on the sex offender notification requirements, to which we will come later this afternoon.

The effect of amendment 49 is clear: sex offenders who are convicted after the provisions come into force and then sentenced to more than six months but less than four years will be released from prison only on licence and under supervision. That will mean that short-term sex offenders will be released on the same basis as their long-term counterparts—those sentenced to four years or more. They will be subject to the terms of a release licence containing specific conditions, including the requirement to comply with supervision.

Other conditions will be added to the offender's licence to reflect the nature of the offence and the offender's risk. For example, an offender may be required to undertake offence-focused work and addiction counselling. The licence will remain in force until the end of the individual's prison sentence. Failure to comply with those conditions may lead to the licence being revoked and the offender being returned swiftly to custody. No other offence needs to have been committed for that to happen.

That group of offenders will also fall within the joint arrangements introduced by sections 9 and 10 of the bill for the assessment and management of risk posed by sexual and violent offenders. The arrangements in sections 9 and 10 will be further underpinned at operational level by the relevant agencies' use of common risk assessment tools, information-sharing protocols and integrated case management systems that are designed to work with prisoners from the beginning of sentence in preparation for release and supervision. Amendment 49 means that those valuable measures will apply to short-term sex offenders.

Amendment 49 reflects the Executive's overarching aim of supporting stronger, safer communities. By ensuring that short-term sex offenders are released into the community subject to a licence and post-release supervision, we will make a valuable contribution to public protection. As well as protecting the public, amendment 49 will enable offenders, if they so choose, to make a positive reintegration into society, with the emphasis on constructive outcomes. The number of offenders who will be affected by the change is not high—the current estimate is that there will be about 80 each year—but the outcome for public protection is unarguably significant.

The Executive is aware that the Sentencing Commission for Scotland could not support our proposal. We are, of course, grateful to the commission for its advice on the matter and for its on-going work on the wider issue of early release. However, the issue is not about numbers or whether such people reoffend more or less than other groups of offenders; the compelling issue is that the long-term and often terrifying impact of sex offending on its victims and communities in general cannot be overestimated. We saw an opportunity to help to reduce that impact, which is why we have acted speedily to introduce the measure. Ministers believe that it is our duty to make the change now to put safety in the community first.

Amendments 53 and 56 to 60 are consequential amendments that will principally ensure that the arrangements for cross-border transfers and the repatriation of prisoners operate correctly.

I move amendment 49.

**Bill Butler:** I commend most of what the minister has said. We obviously want to support stronger, safer communities, so the ending of unconditional release for short-term sex offenders

is most welcome. The minister said that, after the provisions come into force, those who receive a sentence of between six months and four years will have to go through the process that he outlined. However, is there not a gap? Perhaps I am reading the amendment wrongly—I am no lawyer—but what about those who fall into that category but who were convicted before the commencement of the provisions? If there is a gap, will the minister think about the matter again to see whether anything can be done to bridge it?

**The Convener:** I will leave the minister to reflect on that, while other members ask their questions.

**Mr MacAskill:** I have seen the correspondence between the Executive and the Sentencing Commission. Perhaps unusually, I was with the Executive rather than with the commission, which I thought was disingenuous. What will the interface be with the likely outcome of the Sentencing Commission's review on early release? I appreciate that amendment 49 deals with aspects that are beyond the scope of that review and I fully support the licensing scheme and the change in operation. However, what interaction is envisaged in due course with the early-release proposals?

I would prefer transparency in sentencing—I have sympathy for Miss Goldie's views on that—but I worry about the practicalities if we change the early-release scheme. What does the minister anticipate will be the potential interface with what might be coming next? I appreciate that the Executive must act now on the matter, but there will be an interface with early release. The biggest difficulty in any future action will be the changeover. We must ensure that people sentenced before 26 September 2005, or whenever the date is, do not receive a different sentencing tariff from those who are sentenced after that—that is not an impossible situation.

**The Convener:** Minister, my amendment 1, which we will come to in a moment, is all embracing—not that I am asking you to embrace me. I am just pointing out that amendment 1 would be more sweeping in effect than amendment 49 would be. I understand what Kenny MacAskill is questioning you about. If there is a will to end automatic early release, we all want the ending to be a seamless operation. I accept that amendment 49 will make the situation for a particular group of offenders better than it is, but it is still only a bit-piece approach to a wider issue.

**Hugh Henry:** I do not want to anticipate the debate on amendment 1, except to say that there could be complications if the Parliament accepted both amendment 49 and amendment 1, because inconsistencies would arise. However, I will leave that issue aside just now and turn to Kenny MacAskill's questions. I reaffirm that the numbers that we are talking about are small. We regard amendment 49 as largely an interim measure, but we believe that it is right to act on it just now. It would be wrong to try to anticipate what the Sentencing Commission might say or what the Executive's response might be, but we are committed to tackling the inherent problems in the arguments about early release. We will come to that issue shortly.

If amendment 49 is accepted, it would not complicate anything that we want to do in respect of early release. What amendment 49 proposes must be done in any case. If other measures overtook amendment 49, that would be well and good. However, it would be wrong to miss this opportunity in the expectation of something for which we do not know the outcome. Amendment 49 is right and prudent and it will provide safety and protection for the public. I am sure that we will propose robust measures in response to the debate on early release at the appropriate time.

Bill Butler is right: as amendment 49 is currently constructed, the provision would apply only to those convicted after the bill's enactment. He is correct to argue that the provision would not cover those who were convicted prior to the bill's enactment and who were serving sentences. In that respect, there is a potential gap and he has raised a valid point that is worth considering. We will go back and look at it, but I am not sure at this stage whether something can be done. However, if something can be done, I can assure the committee that we will return to the issue at stage 3.

**The Convener:** Thank you for that, minister.

*Amendment 49 agreed to.*

14:30

**The Convener:** We come to an amendment that requires me to put on all sorts of hats. Amendment 1, which is in my name, is grouped with amendments 42 and 43.

I must make clear a couple of procedural matters in relation to amendment 1. If it is agreed to, amendments 42 and 43 are pre-empted. I should also explain that, as the minister has already pointed out, amendment 1 encroaches to some extent on ground that has already been covered by amendment 49, which we have agreed to. There was no way around that matter, because procedure dictates that we have to deal with amendments in order. That is why amendment 49, in the name of the minister, had to be heard first. However, let me say, in a mood of wild optimism, that if amendment 1 is agreed to, it will be possible at stage 3 to make the necessary technical adjustments to accommodate it in the bill.

I will take only three or four minutes to speak to and move amendment 1 and propose to give the

minister the same amount of time to respond. If other members wish to speak, I ask them to confine their remarks to three minutes or so.

Amendment 1 looks—and is—very technical, so I shall try to clarify its purpose. The first part of it, which refers to section 11, effectively seeks to replace the provisions on automatic early release for short-term and long-term prisoners in the Prisoners and Criminal Proceedings (Scotland) Act 1993 with a scheme in which prisoners would, with the Parole Board's agreement, be released after they had served five sixths of their sentence. I must point out that, if agreed to, the amendment will also sweep away the bill's provisions on home detention curfews. I happen to approve of such curfews per se but I do not like the way that they have been added on to existing automatic early release provisions. In recognition of that, the second part of amendment 1 reinstates the home detention curfew provisions to ensure that they are not lost.

Although a Conservative Government introduced automatic early release, it recognised later that it was creating problems. As a result, it sought to scrap the measure in sections 33 to 41 of the Crime and Punishment (Scotland) Act 1997 and to ensure that prisoners would again have to earn remission of up to a sixth of their sentence. However, there was a change of Government; the incoming Labour Government repealed the 1997 act in part V of the Crime and Disorder Act 1998 and since then we have continued with automatic early release. In this Parliament, my colleague Bill Aitken attempted to amend the Criminal Justice (Scotland) Bill to bring automatic early release to an end, but his amendment was voted down at stages 2 and 3.

I feel that, since the matter first surfaced in the Parliament, political sympathies have warmed to the notion that the issue of automatic early release must be carefully examined. Both the minister and the First Minister have commented on the matter and, if we can rely on any information that comes into the public domain, the Sentencing Commission seems to take the view that such a measure might no longer be appropriate.

My impression is that the facility has raised huge public concern about the credibility of the sentencing regime. Indeed, there is evidence for that. When, in the previous session, the Justice 1 Committee—I think—carried out a survey into public attitudes towards sentencing and alternatives to imprisonment, the public expressed very negative views on how sentencing worked with automatic early release. We cannot lose sight of such widespread public concern.

Many of our constituents have been more dramatically affected by a number of high-profile, tragic cases in which people on automatic early release have proceeded to commit very serious crimes on or shortly after their release from prison. We find such situations unpalatable and feel that the time has come to examine the matter.

Of course, the other effect of ending automatic early release—aside from the restoration of the credibility of and confidence in the sentencing system—would be the provision of a system that includes an incentive for a convicted criminal to think about what has happened to him or her and to work towards trying to earn remission rather than having it applied automatically. That is a much healthier situation.

From what the minister said in relation to amendment 49, I am aware that there is no hostility to the concept of what I am proposing but I gather that there might be concerns about the timing. However, I think that there is a need for a message to be sent by this Parliament that we are conscious of the widespread public concern about sentencing, that we acknowledge that the system is not transparent and is difficult to understand and that we recognise the growing belief that the situation is not satisfactory. That would be a timely message for us to send, and amendment 1 gives us an opportunity to send that message.

I accept that, if my amendment is agreed to, the minister might want to alter aspects of it and I point out that he has an opportunity to address those issues at stage 3.

I move amendment 1.

**Hugh Henry:** I do not disagree that there needs to be a debate about ending automatic early release. However, I would like to put our proposals into a broader context. We have sought to change from top to bottom the way in which our criminal justice system works. We have tackled the reform of the High Court; we are examining summary justice; we are dealing with measures relating to sex offenders; the Management of Offenders etc (Scotland) Bill is under way; a police bill will be introduced shortly; we are examining ways of reforming the legal profession; and we are examining legal aid and so on. Whatever criticism can be made of the Executive, the criticism that we are not paying attention to the problems that are inherent in the Scottish criminal justice system is not one that can be reasonably made. Any change that is made has to be seen as part of that overall package. That is why the way in which we are proceeding—with consideration of what the Sentencing Commission might recommend—is the correct way.

My disagreement with your amendment, convener, is not just to do with timing; it is fundamentally about content. Largely, your proposal is unworkable. Even if it could be made to work, there are serious and significant consequences.

I do not disagree that the Parliament should send a message about the ending of automatic early release. However, I think that any message that is sent by the Parliament needs to be a responsible and practical message that can be substantiated and backed up. I do not think that bringing forward an ill-thought-out proposal that is, perhaps, designed to score political points makes a valid contribution to what is a serious debate.

If the Parliament were to adopt the proposal in amendment 1, would it apply to all prisoners serving their sentence at the point at which the bill was enacted? We estimate that, in that case, an additional 4,000 places would be required. Where would those prisoners be accommodated before the new prisons that would be required were built? Would we return to a situation in which there was significant doubling up of prisoners? Would we have to go back to slopping out?

If the numbers that we calculated when we considered amendment 1 are correct, it would take approximately six new prisons for the system to be able to cope reasonably. Even if we could get the money—I will return to that point in a minute—it would take at least two years to build six new prisons; it could take longer, subject to the granting of planning permission. There is also the question of what would happen to all the prisoners in the meantime, unless the introduction of the proposals was delayed until the prisons were available. The cost of six new prisons would be something like £100 million to £130 million a year. Which budget would you take that from? There are also issues to do with building costs, which are quite significant.

You talk about people looking to the Parliament to do what is right. They should also expect a degree of honesty from us. If we lodge amendments to a bill, we should not only do so in the belief that they can be substantiated, but we should be prepared to articulate loudly and clearly what their consequences might be. If we need six new prisons, where in Scotland will those prisons be built? Do you have a list—secret or otherwise—that identifies the areas in Scotland where the prisons might be? Would they be built in areas such as the ex-Royal Ordnance factory site at Bishopton, which is a huge site, or would you rule that site out? If you ruled that site out, where else in Scotland might the prisons be? If we are to take the amendment seriously, we need to know where the prisoners and the prisons would go. In which communities would the prisons be built? I assume that, if you have done the work that was required to lodge the amendment, you have also done consequential work to identify where the money would come from and where the prisons might be built. Those are questions that the public would legitimately expect to be answered.

Yes, we will move to act on the issue; however, we will not simply tinker with existing arrangements, as amendment 1 seeks to do. It is time that we had a system that takes full account of the need to protect the public, especially victims, and which reflects the public expectation that wrongdoers will be adequately punished. We want to put in place a system that has public protection at its heart and which fulfils the expectation that those who are sentenced to imprisonment will not only serve their time, but will do so in a constructive way that is geared towards addressing offending behaviour. We want to reduce reoffending rates—of which we have spoken so often—and make our communities much safer places.

We acknowledge that change is needed, and we are acting on that; however, this is a complex area of law that needs to be carefully considered. The First Minister has said that he will not be rushed into introducing ill-thought-out reforms that will not convince the public or stand the test of time. That is why we have asked the Sentencing Commission for Scotland to undertake a thorough review and make recommendations on early release. We expect its report to be published by the end of the year. We will build on those findings and reflect on them. We will then bring forward a comprehensive set of proposals for the Parliament to consider.

Amendment 1 has given us an opportunity to restate our commitment to producing proposals; however, there is nothing in what you are saying that merits the adoption of your proposals rather than take a responsible and considered approach. I acknowledge the fact that you lodged the amendment ahead of the First Minister's announcement on the legislative programme, and I hope that you recognise that it is, potentially, premature and probably could not work in any sensible way. I hope that you will, therefore, withdraw the amendment. If you do not, I hope that the committee will reject it.

14:45

I turn now to Executive amendments 42 and 43, on home detention curfew. The purpose of the amendments is to clarify and speed up the appeals process for those who are recalled from release on HDC. Where they are recalled from HDC and wish to appeal, we want any written representations made by the prisoner to be sent to Scottish ministers—in practice, to the Scottish Prison Service. Scottish ministers will then be required to refer to the Parole Board the case of a prisoner whose licence has been revoked and who has made representations. The route from ministers to the board will improve the administration of recall cases, and will bring it into line with the procedure that currently operates in

relation to prisoners recalled from early release on a standard release licence.

Amendment 43 will also allow the board to consider whether certain HDC recall cases—for example those in which the facts pertaining to the recall are in dispute—should be heard at an oral hearing, rather than relying solely on written material. The detailed processes will be set out in the Parole Board rules. In its judgement in the cases of Smith and West earlier this year, the House of Lords ruled that determinate sentenced prisoners should, in certain circumstances, be offered an oral hearing before the Parole Board decides the case. The issues pivoted around common-law fairness and the engagement of article 5.4 of the European convention on human rights.

I invite the committee to support amendments 42 and 43.

**Bill Butler:** I echo the minister's words when he said that, as a Parliament, we want a policy that has public protection at its heart—nobody would gainsay that. To achieve that objective, we need practical measures. Although your amendment 1 generates welcome debate, convener, it is impracticable at heart. The minister mentioned the consequential increase in the number of prison places—4,000 I believe—which would require six new prisons. He also talked about the time that it would take to build the prisons. I am sure that the cost per prisoner would escalate.

There would be pressure on the Parole Board, because amendment 1 lays down that the board would have to make recommendations in respect of all those who were to be granted a licence. Is it practicable to consider after two and a half months someone on a three-month sentence to see whether they can be granted one sixth off their sentence?

I do not accept that it is good drafting to delete the home detention curfew proposal with one part of the amendment and then insert it with another. It is a hokey-cokey amendment, which does not work at all.

Does amendment 1 cover new sentences or prisoners who are already serving their sentences? You said that the amendment is about removing automatic early release, but it would do something different—it would remove automatic conditional early release. You know this better than I do, but, as I have found out in the past few months, there is a difference. One of the worrying effects of amendment 1 is that if it were agreed to, there would be no supervision for long-term prisoners. That is unlikely to reduce reoffending and promote the reintegration and rehabilitation that we all see as the other side of the coin and which, if we are to protect the public, must be paramount. However, we have to ensure where possible that best measures are taken to ensure that a prisoner released under conditions is not likely to reoffend. Through amendment 1, you are seeking to end not automatic early release, but automatic conditional early release. What hope would there be then for the proper reintegration of short-term prisoners? There would also be a detrimental long-term consequence for long-term prisoners.

In your summing up, perhaps you could address some of those questions because, in essence, amendment 1 has more demerits than merits.

**Mr MacAskill:** I have a great deal of sympathy with what you are trying to achieve, convener. However, I have my doubts about whether amendment 1 is the best way of achieving it, or whether, as Bill Butler suggested, the amendment can achieve it at all.

We would all agree that we wish that we were not where we are. We are not in the chamber so, to some extent, who did what and when does not matter. What matters is what we are going to do about it. Lawyers are all aware of the differences: 50 per cent for those serving under four years and two thirds for those serving more than that. The public, however, are baffled; they simply think that whether the sentence is six months, two years or 12 years, what you see should be what you get. There is a lot of merit in such a view.

Arguments about the prospect of early release encouraging good behaviour have all been blown asunder; whether people behave or not, they are granted early release and the whole system is brought into disrepute.

We need to agree on how we can change things. Having seen some of the correspondence from the Sentencing Commission, I am not filled with optimism. However, the commission has been entrusted with the issue and we should consider it in the round.

I do not think that amendment 1 is appropriate. However, that is not because I disagree that change is required. I agree with much of what Bill Butler said. Before devolution, we would have dealt with one piece of Scottish criminal justice legislation every decade or so, and that legislation would have been all-encompassing. However, something as important as automatic early release cannot be dealt with simply by means of an amendment. The issue almost requires an act to itself, or to be the major part of an act.

Amendment 1 would have huge ramifications. Will there be a date after which we would have prisoners in parallel systems, with some serving a pre-act sentence and some serving a post-act sentence? There would also be ramifications for resources—unless we could make other changes

that I would agree with. However, that debate will be for another day.

Amendment 1 would have an effect on an array of other matters—Bill Butler was right to mention the Parole Board. Yes, we have to change, and yes, we need transparency, because that is what the public want. I am not persuaded that incentives for good behaviour are required; other things can be done.

The million dollar question is how to achieve change, and I do not think that it would be achieved by amendment 1. The best that we can do is await the outcome of the Sentencing Commission's work, and await legislation from the Executive.

**The Convener:** I thank members and the minister for their contributions. From what has been said, I infer that there is no longer an objection in principle to ending automatic early release. That takes us a significant step forwards from the time when my party was alone in advocating that the practice be brought to an end.

In the minister's objection to amendment 1, he raised the issue of timing. I accept that that is a perfectly relevant issue to raise. However, in our political process, timing no longer has to be an issue between committees or members in the chamber or ministers or the Executive; it seems to me that timing is now very much an issue of public concern. Public confidence in our sentencing system has become frayed at the edges.

I paid attention to the minister's objections to the content of the amendment and to his assessment of the practical consequences. Obviously, I cannot comment in detail about his projections of 4,000 additional places, six new prisons and additional funding. However, I accept that amendment 1 would give rise to a need for additional capacity. That would be the practical consequence of a Government taking responsibility for public need. The public feel that the current system is not working. If that is to be addressed, there has to be political will on the part of Government to allocate the necessary resources.

I am surprised at the estimate of an extra 4,000 places and an extra six prisons. I know that some of the estimates arise from speculation that judges would change their sentencing processes, but I do not think that that is what would happen. I think that judges would make a much simpler calculation and would probably end up dealing out pretty consistent sentences. Instead of having to calculate that if they wanted someone to be in prison for six years, the sentence should be nine years, they would be able simply to sentence people in all honesty and transparency to six years. I suggest that if a political desire really exists to address the issue in the public interest, the practical consequences of that political decision must be taken on board and dealt with.

Mr Butler's and Mr MacAskill's objections are similar. Mr Butler's concern was that long-term prisoners would have no supervision, but that is precisely why I took care to reintroduce home detention curfews. The bill is framed in such a way that it was extremely difficult to draft an amendment that achieves what I am trying to achieve. As I said, the implications of the first part of the amendment meant sweeping out one bit, so I was careful to rewrite in the bits that we do not want to lose. Under my proposal, home detention curfews would be available and conditions would apply.

I detect that although no disagreement in principle is expressed to achieving the end, attitudes vary hugely on the timescale within which to make the change. We disagree fundamentally about that. I feel that the Parliament is under a political imperative to send a message to the public that their concerns have been heard and are being addressed and, in particular, that we have listened to the anxieties and worries of victims and recognised the distress and tragedy that have attended their families. We must show that we are prepared to do something about that.

I heard nothing from other members that indicated urgency, priority or immediacy. I heard that members liked the sound of the idea in general but did not want to be forced on the timing; they would come round to the matter in the future when they felt like it. That sums up the disagreement between my party and the other parties. We think that the time has come to call time on automatic early release.

I thank members for their contributions. It has been interesting to have a debate. I do not propose to withdraw amendment 1—I will press it.

The question is, that amendment 1 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**FOR**

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

**AGAINST**

Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
MacAskill, Mr Kenny (Lothians) (SNP)
Macmillan, Maureen (Highlands and Islands) (Lab)

**The Convener:** The result of the division is: For 1, Against 4, Abstentions 0. One solitary mitt was in favour.

*Amendment 1 disagreed to.*

*Amendments 42 and 43 moved—[Hugh Henry]—and agreed to.*

*Section 11, as amended, agreed to.*

**The Convener:** Before we deal with amendment 50, I will allow time for the minister's advisers to shift round.

**Before section 12**

15:00

**The Convener:** Amendment 50 is grouped with amendment 61.

**Hugh Henry:** Amendments 50 and 61 relate to the sex offenders register. Currently, anyone in England and Wales who is put in prison for public protection, as provided for by section 225 of the Criminal Justice Act 2003, is subject to the requirements of the sex offenders register for only five years. That was not the policy intention, so the amendments will rectify the situation. Other people who are subject to indefinite sentences, including those who receive the equivalent Scottish sentence of an order for lifelong restriction, are subject to the requirements for an indefinite period. The amendments, which mirror provisions that the Home Office is seeking to introduce in the Violent Crime Reduction Bill, will require those offenders to be on the register indefinitely. The notification requirement will therefore apply for the rest of the offender's life. Our provisions will apply when such offenders are in Scotland.

In mirroring the provision that is being made in the Home Office's bill, which deals with England and Wales, we continue as far as possible to maintain a common registration scheme for sex offenders north and south of the border.

By virtue of proposed new subsection (2), the amendment to the 2003 act will apply to sentences that are passed before the bill receives royal assent and will come into force on royal assent. Again, that mirrors the approach that is being taken in England. The courts in England have had power to pass a sentence for public protection since April this year; it is important that the registration requirements apply to any person with such a sentence, whether or not their sentence was passed before our bill receives royal assent.

I move amendment 50.

*Amendment 50 agreed to.*

**Section 12—Offender's failure to comply with notification requirements: jurisdiction of Scottish courts**

**The Convener:** Amendment 44 is grouped with amendments 45 and 46.

**Hugh Henry:** Amendments 44, 45 and 46 relate to offenders who fail to comply with the sex offenders register. As drafted, section 12 of the bill will amend section 91(4) of the Sexual Offences Act 2003 to allow proceedings to be brought against sex offenders who fail to register, in any court having jurisdiction in any place where the person charged with the offence resides or is found. At present the bill uses the phrase:

"the person charged with the offence".

The provision might suggest that the offender has already been traced and charged by the police. However, there might be circumstances in which the person who commits such an offence has not been found and the police might have no knowledge about where that person resides. It is more normal in Scottish statute to refer to the "accused". Amendments 44 and 45 will make that change and will also cover the situation when a procurator fiscal raises proceedings, irrespective of whether the accused has been located by the police.

Amendment 46 relates to offenders who will be subject to sexual offences prevention orders made by the Scottish courts and who fail to comply with notification requirements relative to the sex offenders register. When section 17 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 comes into force, Scottish courts will be able to impose sexual offences prevention orders on relevant accused persons. The notification requirements of part 2 of the Sexual Offences Act 2003 automatically apply by virtue of the imposition of sexual offences prevention orders.

Amendment 46 will clarify and put beyond any doubt that people who are subject to the notification requirements by virtue of having received a SOPO imposed by a Scottish court can be the subject of proceedings commenced in the court that imposed the SOPO if they flout their legal obligations in relation to registering.

I move amendment 44.

*Amendment 44 agreed to.*

*Amendments 45 and 46 moved—[Hugh Henry]—and agreed to.*

*Section 12, as amended, agreed to.*

**After section 12**

*Amendment 51 moved—[Hugh Henry]—and agreed to.*

*Section 13 agreed to.*

**Section 14—Further amendments and repeal**

**The Convener:** Amendment 32 is grouped with amendments 33 to 36 and amendment 52.

**Hugh Henry:** Amendments 32 to 36 are technical amendments that will ensure that the bill

contains the correct references to provisions in the Social Work (Scotland) Act 1968. Amendment 52 is required as a consequence of the addition of two new subsections after section 27(1) of the 1968 act. Without amendment 52, the existing reference in section 27(2) to "the foregoing subsection" would be read as a reference to new section 27(1B), whereas we want it to continue to refer to section 27(1). The amendments take into account changes made to the 1968 act by the Criminal Justice (Scotland) Act 2003 and the Antisocial Behaviour etc (Scotland) Act 2004.

I move amendment 32.

**The Convener:** Thank you, minister. Members have no questions, so—

**Hugh Henry:** I should say one further thing, which is that we may lodge further amendments at stage 3 to tidy up provisions in the bill. I intend to write to the committee in advance of stage 3 to alert it to further amendments on which I have not touched during stage 2.

**The Convener:** Thank you. We understand that there are drafting complexities, so it is kind of you to offer to do that.

*Amendment 32 agreed to.*

*Amendments 33 to 36, 52, 37 to 40 and 53 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 54, in the name of the minister, is in a group on its own.

**Hugh Henry:** Amendment 54 seeks to amend section 8 of the Prisons (Scotland) Act 1989, which gives ministers the power to designate local authorities as bodies responsible for appointing members of prison visiting committees and visiting committees of legalised police cells. Amendment 54 would extend the provision to allow ministers to designate community justice authorities as also having that function. The effect of the amendment would be that ministers may specify CJAs or local authorities, or a combination of the two, to appoint members of prison visiting committees and visiting committees of legalised police cells. Currently, we expect CJAs generally to make appointments to prison visiting committees, but amendment 54 would provide flexibility, which may be particularly relevant in the case of visiting committees for legalised police cells.

The visiting committees for young male offenders at Her Majesty's young offenders institution Polmont and for female offenders at Cornton Vale are appointed by Scottish ministers rather than by local authorities. Future arrangements for those specific committees are under review. Depending on the outcome of those considerations, we may wish to refine the provisions further at stage 3.

I move amendment 54.

*Amendment 54 agreed to.*

**The Convener:** Amendment 55, in the name of the minister, is in a group on its own.

**Hugh Henry:** Amendment 55 seeks to clarify a provision to be inserted into the Prisoners and Criminal Proceedings (Scotland) Act 1993 that sets out the meaning of "wholly concurrent" and "partly concurrent" terms of imprisonment and detention.

The provision has not yet been brought into force because a minor drafting problem was spotted and required correction. Amendment 55, which seeks to replace references to the date of imposition of sentence to the more appropriate date of commencement of sentence, will achieve the policy intention in relation to the definition of "wholly concurrent" and "partly concurrent" terms of imprisonment and will allow the relevant provision to be commenced.

I move amendment 55.

*Amendment 55 agreed to.*

*Amendments 56 to 60 moved—[Hugh Henry]—and agreed to.*

*Section 14, as amended, agreed to.*

*Sections 15 and 16 agreed to.*

**Section 17—Commencement**

*Amendment 61 moved—[Hugh Henry]—and agreed to.*

*Section 17, as amended, agreed to.*

*Section 18 agreed to.*

**Long title**

*Amendments 62 to 64 moved—[Hugh Henry]—and agreed to.*

*Long title, as amended, agreed to.*

**The Convener:** That ends our stage 2 consideration of the bill. I thank the minister and his advisers for attending the meeting.

# Regulatory Powers Inquiry

15:13

**The Convener:** Item 3 concerns the Subordinate Legislation Committee's regulatory powers inquiry. I thank the clerks for providing the committee with a paper that helpfully takes us through the various issues on which the Subordinate Legislation Committee would like to hear our views. That committee has asked me to give evidence, perhaps in November.

If members agree, I will simply go through the clerk's note and we can discuss any points that might arise. On page 1, under the heading,

"Current negative and affirmative procedure",

paragraph 4 poses two questions, the first of which is:

"Does the committee feel that, by and large, the importance of the instruments coming before it is reasonably reflected in the use of affirmative and negative procedure?"

How do members respond to that question?

**Bill Butler:** I think that the importance of instruments is reasonably reflected in that way. Moreover, the Subordinate Legislation Committee's distinct role in commenting on the instruments that we receive is also very helpful.

15:15

**Mr MacAskill:** I agree with Bill Butler. However, the issue is less about the procedure and more about how matters are intimated and there being better committee intelligence. It could be argued that things should be left up to individual members, but that is a difficult approach in the light of the number of Scottish statutory instruments. Rather than disagree about whether instruments should be subject to the affirmative procedure or the negative procedure—in the main, I do not have a quibble in that respect—we need to discuss a better system that flags up instruments with which there are difficulties. My major quibble is about instruments that might sneak through without our realising that they have done so.

**The Convener:** Perhaps we can deal with that specific point later, as it reflects a shared concern, but I would like to confine our thoughts to the first questions in paper J2/S2/05/23/3. Do members answer yes to the main two questions in paragraph 4?

**Members** *indicated agreement*.

**The Convener:** Do members have views on whether Parliament should have the power to amend or to recommend the amendment of SSIs?

**Mr MacAskill:** I understand that there are arguments for why Parliament should have such a power, but I also see how a minefield could be opened up. I was convener of the Subordinate Legislation Committee long ago, so I appreciate why soundings are being taken. I can see the benefits of having such a power, but I also appreciate that real problems could be caused. I would prefer the Subordinate Legislation Committee to say what would be the downside of such an approach. I can see the upside, but the procedure could also be used for political posturing and point scoring because many SSIs are worthy aspects of Parliament's work that must be dealt with.

**The Convener:** I am interested in your views, as you are a former convener of the Subordinate Legislation Committee. Do you agree that, under the current system, draftsmen are disciplined to be very careful about what they do when they frame SSIs because an SSI will either succeed or fall at the committee stage?

**Mr MacAskill:** Absolutely.

**The Convener:** That is an important point.

**Bill Butler:** As a former member of the Subordinate Legislation Committee who has served under Kenny MacAskill and Margo MacDonald, I agree that minefields should be avoided. Parliament should therefore not have the power to amend or to recommend amendment of SSIs.

**Maureen Macmillan (Highlands and Islands) (Lab):** I would reinforce what has been said. If amendments are allowed, the committee will be in danger of being hijacked by special interest groups. Often, there is not much time to consider regulations at great length and there would tend to be a one-sided view of their impact. I would not like committees to be manipulated by special interest groups into amending instruments.

**The Convener:** Members seem to be saying that there should be respect for the integrity of subordinate legislation, which is not primary legislation.

**Mr MacAskill:** I agree with Maureen Macmillan. The problem with amendments is that they might be popular and supported but, as a result of timescales, might result in bad laws. The best method of addressing a bad or unpopular statutory instrument is the all-or-nothing method. As you correctly say, the draftsman must get things right or the instrument must be withdrawn. Instruments are focused and the danger in accepting amendments is that things could be all over the place as a result of drafting by individual MSPs, their researchers or whoever. That would cause mayhem.

**The Convener:** There would also be consequences in that, if such a procedure were in effect and the committee's original finding was overruled, there would be a retrospective effect on what may for a time have been enacted legislation. The suggestion would therefore lead unwisely into very difficult territory. I have a clear feeling that members are against Parliament's being given such powers.

Let us look at the paragraph that is headed "Consultation" and the suggestion that there might be increased consultation of Parliament, as opposed to outside stakeholders, on draft instruments, which would be a kind of super-affirmative procedure. It is pointed out that that has not been used for any bills that have been considered by the Justice 2 Committee. Two questions are posed. First, do we want an increased general requirement to consult Parliament on draft instruments? Secondly, does the committee want increased use of the super-affirmative procedure? Those are two separate issues, so I ask members to differentiate between them when they comment.

On the general issue of consultation, Parliament works based on a structure of political parties; those parties cannot escape the obligation to be aware of what is happening, to inform their members and to deal collectively with how they want to respond to particular situations. I would have thought that that is an appropriate way for political education to take place. It is then open to anybody—Parliament or anyone else—to get in touch with the appropriate committee and say that they are worried about something or that they have views on something.

**Mr MacAskill:** I agree with that. My view is that the super-affirmative procedure is probably best used sparingly. There may be an argument that it should have been used more often, but I believe that it would be devalued if it was used routinely. Its use is more a matter for the consideration of committees and ministers at the time and I would be wary of tinkering with the system. Perhaps the Parliament just needs to be reminded that the procedure exists and can be used.

**Bill Butler:** I agree with Kenny MacAskill and you, convener, although I do not say that that is a holy trinity—that would be blasphemy.

**The Convener:** It is an unprecedented harmony.

**Bill Butler:** Well, this is an inclusive Parliament.

I take your point that there is a structure that should ensure that members and their parties are informed and I agree with Kenny MacAskill that the super-affirmative procedure should be used sparingly, if at all. We should work with the structure that has been laid down. For members who are not lawyers but who have the benefit of joining the Subordinate Legislation Committee, it takes time to learn about the system. We should, therefore, keep to the structure and not start mucking about with it if there is no good reason to do so.

**Maureen Macmillan:** The only time that the super-affirmative procedure is necessary is in relation to a bill where the devil in the detail will be in regulations that are made later. During scrutiny of the bill, the committee may request that the super-affirmative procedure be used when regulations on contentious issues come before the Parliament. The regulations would then be well flagged up in advance. Other committees of which I have been a member have said that they wanted the affirmative procedure to be used on such-and-such a matter when it came before the committee again as regulations. That would be a place—possibly the only place—for use of the super-affirmative procedure.

**Bill Butler:** The note that we received two weeks ago reminds me that the procedure that we are discussing would make the Parliament responsible for moulding and shaping an instrument, whereas the Scotland Act 1998 states that subordinate legislation should be made by Scottish ministers or by bodies that are responsible to the Parliament, not by the Parliament itself. If we crossed that line, I would become confused and we could get ourselves into an area in which confusion, mistakes and all sorts of unintended consequences could occur. I really think that we should answer no to both questions.

**The Convener:** Okay, that is helpful. On the first question, on whether we wish to see an increased general requirement to consult the Parliament on draft instruments, the committee's firm answer is no. On whether we wish to see an increased use of the super-affirmative procedure, the committee's answer is, again, a firm no, for the reasons of which Gillian Baxendine has managed to take a note.

The next question concerns other forms of instrument, such as directions, schemes, codes of conduct or guidelines, which are not subject to parliamentary supervision, although some might be regarded as instruments of a legislative character. I do not know what Kenny MacAskill thinks about the issue, but my lawyer's hackles were rising with every word that I read. An instrument either has a legal status or it does not. When we deal with subordinate legislation, everybody understands what it is—we have a mechanism and primary statutory guidelines. There is completely confused thinking here. My firm view is that such instruments should not become SSIs, because they are not.

**Bill Butler:** I point out again that I am a non-lawyer, but apples are apples and lemons are

lemons, so we should not mix them—and that is without even mentioning oranges.

**Mr MacAskill:** We must be careful of overlegislation and overburdening. The other instruments that are mentioned are important, but they should not be SSIs. Whether parliamentary committees should be involved in scrutinising some of those schemes and codes of conduct is a separate matter, but they should not be SSIs, which was Bill Butler's point. They relate to administrative and procedural matters.

**The Convener:** A clear message is coming out, for which I thank members.

The next issue is timing, which takes us back to the concerns that Kenny MacAskill expressed earlier. Members have seen the explanation of the timeframes for the different types of instrument, particularly the reference to the annulment procedure. Our committee has not had to use that procedure, but the timeframe is tight. I was once on a committee in which that procedure was used, which was extremely difficult, because we had to summon up a minister from somewhere at short notice, which gave rise to practical challenges.

The broad question that is posed is whether the current timescales are adequate and, if not, whether we would we like an increase and, if so, how and in what cases. One suggestion is that additional time should automatically be made available if a motion to annul is lodged. Again, as I am a lawyer, my hackles rose at that, as I see it as wide open to abuse.

**Mr MacAskill:** The 21 and 40-day limits are sensible. The problem is not so much the number of days, but the procedure of parliamentary committees and the structure of the parliamentary week. If a committee meets on a Tuesday and an instrument is lodged on the Monday, it will be the next week until it is considered. One idea is in some instances to stop the clock, depending on when a committee sits, although some legislation could not be built around that. However, that is a matter for the Subordinate Legislation Committee, which is closer to the issue than we are.

I am wary about changing the 21-day rule. The real problems tend to arise when an instrument is lodged on a certain date and does not fit in the cycle of a particular committee's meetings—the committee's next meeting may be after the Friday on which the decision must be made, for example. I wonder whether the clock could be stopped, or whether the Executive might be asked not to lodge instruments until they can be fitted into the parliamentary cycle. That is a matter for the Subordinate Legislation Committee.

**Bill Butler:** I agree with Kenny MacAskill and the convener. Any device or mechanism by which we attempted to stop the clock running would have, I guess, all sorts of unintended consequences. The timescales of 40 and 21 days are reasonable. There are times when an instrument comes close to the wire, but that is just the way things are and there is no way round that. The committee that is closest to the matter—the Subordinate Legislation Committee—will have to deal with it, as it did under the convenership of Kenny MacAskill and Margo MacDonald, and as, I am sure, it will continue to do under Sylvia Jackson's convenership.

**Maureen Macmillan:** I have known situations in which an instrument is in force before a committee considers it, which should not happen.

**The Convener:** That happens with instruments that are considered under the negative procedure.

**Maureen Macmillan:** Yes—when they come to a committee, they can already be in operation.

**The Convener:** Yes, but I have never known a case in which it has not been competent to annul the instrument, if a member wanted to do that.

**Maureen Macmillan:** That is true, but such situations seem nonsensical. However, I am not a lawyer. Perhaps it is all right in law, but it does not seem to be common sense.

**Bill Butler:** I think that it would be nonsensical if an instrument were not subject to annulment. If an instrument is subject to annulment—

**The Convener:** Something can be done about it.

**Bill Butler:** There is a safety net.

15:30

**The Convener:** Sometimes the situation is difficult, particularly when instruments have to be dealt with over recess periods. They have to be drafted and promulgated. There might be a need for them to come into force, but the first opportunity that a committee might have to consider them might be in week 1 after a parliamentary recess. I would not find fault with that.

That has happened in my previous committee experience. A negative instrument was in force and, because of recess pressures, nobody had been able to consider it. After the recess, someone lodged a motion to annul competently within the 40 days and the minister came before the committee. One of the arguments advanced by the minister for opposing annulment was that annulment would have practical consequences—the instrument was already in force and people had already been able to do certain things. He was not arguing that the committee could not annul the instrument, but he pointed out that, if it did so, it must take those consequences into account. It might sound slightly illogical for an

instrument to be in force before it is considered for annulment, but it is not fatal.

**Bill Butler:** The patient will recover.

**The Convener:** If there is a serious concern about the instrument, it can be annulled. That is a consequence of the negative procedure. Negative procedure is meant to introduce a reasonably fluid track line for subordinate legislation. The example that I set out is my only experience of a negative instrument being annulled—or challenged, I should say; it was not annulled.

**Mr MacAskill:** We have to allow for Executive action. I never realised that there was so much law on shellfish, potatoes or agriculture. With some instruments, we have to allow for Executive action, subject to the fundamental right of the Parliament to review it. There are consequences that the minister has to weigh up before making a judgment.

**The Convener:** Are we content to suggest that we do not see a need to change time limits and that we find the existing annulment procedure for negative instruments adequate as a protection?

**Members** *indicated agreement*.

**The Convener:** Those were the meatiest issues arising from the paper. As members will see from the following paragraph, the other issues are very technical and are less directed to the subject committees.

**Bill Butler:** You are right, convener. We do not need to comment on the clarity of the explanatory notes; it is up to the Subordinate Legislation Committee members to do so. We have responded reasonably and timeously to the main considerations.

**Maureen Macmillan:** I sometimes think that the explanatory notes do not explain anything.

**Bill Butler:** Explain your explanation, as Groucho Marx once said, I think.

**The Convener:** Often the statutory instruments that we are asked to consider are very technical; at first sight, particularly when they are taking bits out of acts and changing terms, it is difficult to understand what on earth they are about. I wondered whether it would be helpful to ask the drafting officials to indicate whether there were any challenges as they prepared a particular SSI and what areas seemed problematic.

**Mr MacAskill:** I agree with that and with what is said in the annex to the report about timescales and amendments. It is incumbent on the Executive's civil servants to realise that they are drafting instruments not simply for the Subordinate Legislation Committee, but for subject committees. Instruments should not just be written in lawyerspeak, which everyone on the Subordinate Legislation Committee, whether they are lawyers or not, eventually picks up and gets into.

Civil servants should also consider the timescale. If they want to get it right, they need to decide to which committee the instruments will go for consideration—whether to the Justice 2 Committee or somewhere else. They should say to themselves, "We'd better not lodge it on Friday, because it won't meet the clock." The civil servants should not simply have regard to the Subordinate Legislation Committee, because the documents have to be read by subject committees, too. The civil servants must consider when they lodge an instrument and what they attach to it in order to make it clear.

**The Convener:** I support that helpful suggestion.

**Bill Butler:** A plea for plain English.

**The Convener:** We will say to the minister's department that the civil servants should remember that instruments will also be looked at by a subject committee and that they should allow for that not just in the timetable, but in preparing the explanatory notes.

**Mr MacAskill:** I add the caveat that, although I have not practised law for six years, I still get chastised by my wife for using legalspeak. I just cannot get out of the habit after 20 years and still use terms such as "with respect" and "cognisance".

**Bill Butler:** You will grow out of it in due course.

**The Convener:** The discussion has been helpful and will enable our clerks to draw together a paper. We want to get a response back to the Subordinate Legislation Committee before 14 October. We do not have a committee meeting on 4 October, but I think that it will be adequate to clear our response through correspondence. I ask the clerks to circulate the paper to all members; if there are any comments, members should send them to the clerks so that we can adjust the final version. Is that acceptable?

**Members** *indicated agreement*.

**The Convener:** That is us. I remind members that tomorrow we have a joint meeting with the Justice 1 Committee on the budget. The meeting will be held in private and we will be briefed by the Scottish Parliament information centre and Professor Midwinter.

*Meeting closed at 15:37.*

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