JUSTICE 2 COMMITTEE

Tuesday 29 November 2005

Session 2

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JUSTICE 2 COMMITTEE
33rd 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

Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
Carolyn Leckie (Central Scotland) (SSP)
*Mr Kenny MacAskill (Lothians) (SNP)
Margaret Mitchell (Central Scotland) (Con)
Mike Pringle (Edinburgh South) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Bill Barron (Scottish Executive Justice Department)
Ian Ferguson (Scottish Executive Justice Department)
Hugh Henry (Deputy Minister for Justice)
Alastair Merrill (Scottish Executive Justice Department)

CLERK TO THE COMMITTEE

Gillian Baxendine
Tracey Hawe

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Steven Tallach

LOCATION

Committee Room 1

Scottish Parliament

Justice 2 Committee

Tuesday 29 November 2005

[THE CONVENER *opened the meeting at 14:06*]

Item in Private

The Convener (Miss Annabel Goldie): Good afternoon, everybody. I welcome you to the 33rd meeting in 2005 of the Justice 2 Committee. Today, we will continue our scrutiny of the Police, Public Order and Criminal Justice (Scotland) Bill, but before we proceed to that, I ask members to agree that we will consider the draft report on the bill in private. Is that agreed?

Members *indicated agreement*.

The Convener: I have received apologies from Colin Fox. I understand that Carolyn Leckie will attend in his absence. I have also received apologies from Stewart Maxwell, and I welcome Kenny MacAskill to the committee in place of him.

Police, Public Order and Criminal Justice (Scotland) Bill: Stage 1

14:07

The Convener: I welcome the Deputy Minister for Justice, Hugh Henry, who is very much a kent face before the committee. His various colleagues from the Scottish Executive are Bill Barron and Ian Ferguson, from the bill team; Brian Cole, from the community justice services division; Alistair Merrill, from police division 1; and Carolyn Magill, from the office of the solicitor to the Scottish Executive. I thank you all for joining us.

Minister, would you like to make some brief introductory remarks?

The Deputy Minister for Justice (Hugh Henry): I will say only that this is a significant bill that touches on many of our policy intentions on which we are keen to deliver. We want our police to work more effectively and we must tackle the serious concerns about knife crime that exist in many parts of Scotland. There are also broader issues, such as the trouble that is often associated with football matches and the much-publicised issue of marches and parades. The bill has excited public debate and deals with some significant issues. I look forward to answering the committee's questions.

The Convener: Thank you. Without further ado, Bill Butler will start the questioning.

Bill Butler (Glasgow Anniesland) (Lab): Good afternoon. I will touch on several issues concerning the Scottish police services authority and the Scottish crime and drug enforcement agency. You will be aware of the requirement to appoint lay members and a lay chair to the new Scottish police services authority, which is a movement away from the traditional tripartite model of governance. Some representatives of police organisations have strongly criticised that, as has the Convention of Scottish Local Authorities. Why does the Executive consider it necessary to introduce lay membership rather than lay advisers to the new authority?

Hugh Henry: We are creating a new structure; we are not creating another constabulary or another board on the traditional model. Given our experience of existing non-departmental public body models and the nature of some of the functions that the SPSA will cover relating to the common police services and so on, we think that it is right to draw on the considerable experience of chief constables and to have them represented on the board rather than simply having the board hold them to account. We also think that it is right that there should be political input through

representatives of the board and we are keen to see broader and new experiences being brought to the new organisation. We are not being prescriptive at the moment about the mix of skills or the type of individual who should be involved, but we believe that having new skills and someone independent who has not been fully immersed in policing issues might bring a different perspective, a breath of fresh air and new thinking, which should enhance rather than detract from the operation of the body. We are clear that any such members will be in a minority and we are not persuaded that a model in which they are simply asked to be advisers without their taking any responsibility would necessarily work.

Bill Butler: I take your point that people must be able to take responsibility. You say that the Executive is not being prescriptive at the moment about the type of individual who would be a lay member of the authority, but do you have any notion of the type of individual who would bring a new perspective and a breath of fresh air?

Hugh Henry: It would be interesting to see who is available and who would be interested if we reach that point. Off the top of my head, I can think of a number of skills that might be useful. A person might have significant personnel or financial experience or significant experience of the use of computers and information technology. Indeed, a person might be considered who can marry experience in all those fields and who not only can deal with the administrative functions of what will be a significant and sizeable organisation, but can help with the application of technological skills to the detection of crime, for example, if they have tried and tested their skills in other environments. That is not to say that board members would be involved in such matters, but their ability to comment on the type of systems that are involved, how those systems operate and new methods of organisation and administration would be welcome. Those of us who have been involved in the public sector for some time must recognise that the world has changed at a rapid and significant pace and we should be alive to learning from what has happened elsewhere. I have outlined some of the things that could be considered, but it would be wrong of me to suggest a job description.

Bill Butler: I am sure that members are grateful for your thoughts.

You will be aware that the Executive's additional submission sets out the proposed role of the senior strategic officer. Is the Executive confident that one individual could fulfil that role? What do you think of the suggestion of the Association of Chief Police Officers in Scotland about a corporate services directorate to co-ordinate the work of the different services in the authority?

14:15

Hugh Henry: It is an interesting model, although I am not sure that it would necessarily work well in a sizeable organisation with a sizeable budget. For example, in relation to the management of the police, we do not say that it would be better to have a collective of senior officers responsible for operational decisions in a police authority's area; instead, we say that one person should be ultimately responsible for decision making. Also, in the deployment of services in the Parliament, we have one person who takes responsibility as chief executive for all the administrative and organisational functions; we do the same in the Executive. Most political parties have one person who is identified as being responsible for administrative purposes; and similar things happen all the time in the business world. Trying to have a collective or a grouping of people rather than one specifically identified individual could be a recipe for confusion and could be more inefficient. I see nothing wrong with one individual being the senior accountable person for budgetary, administrative and organisational purposes.

Bill Butler: That is very clear. In evidence, concerns have been expressed about the role of ministers in determining the Scottish crime and drug enforcement agency's strategic priorities. As you will be aware, section 13(2) provides that ministers must not do anything that would or might affect the operational independence of the agency. Some people have argued that a perception has been created that ministers will be able to exert undue political influence over the SCDEA. What is your take on that? Will ministers be setting the agency's strategic priorities? I stress that I am talking about strategic priorities as opposed to operational priorities.

Hugh Henry: We will not necessarily do so, but we will have the option to set strategic priorities if we think it appropriate. However, I want to be clear: in all matters to do with the police, it is important that there is no political interference or involvement in operational decisions.

Bill Butler: I take that point, but are you satisfied that section 13(2) makes that crystal clear, with no room for confusion about operational matters?

Hugh Henry: I do not think that there is any potential for confusion. We will scrutinise the provision again to be absolutely sure, but I am convinced that section 13(2) differentiates the issues and makes it clear what we intend to do. Subsection (2) reads:

"In making a determination under subsection (1), the Scottish Ministers must not"—

I stress, "must not"—

"do anything which would, or might, affect decisions of the Agency about which particular operations are to be carried out by it in compliance with those priorities and how they are to be so carried out."

I am satisfied that that is very explicit in stating what ministers must not do.

Our involvement in setting strategic priorities is an interesting issue. It is not especially usual in police matters. However, if we reflect, we see that this is the first time since the creation of the Scottish Parliament that we have moved to set up a new structure and a new body of this type. All the other structures were in place long before the existence of the Parliament.

It is right that the Executive—and through the Executive, the Parliament—should be able to express an interest in and to comment on the direction of such an organisation. For example, if the Parliament and the Executive believed that reducing the harm caused by drug trafficking should be a strategic priority, it would be not mandatory but right that we should ask the new agency to look into that. We might want to consider the disruption of serious organised crime networks. Following the recent coverage on television and in the newspapers, we might decide that human trafficking is of sufficient concern for us to pay attention to it. I see no reason why that should not be a strategic priority.

Bill Butler: Do you see that as being roughly equivalent to the strategic priorities that the Executive sets out for health, for instance?

Hugh Henry: Priorities have been set out there, but I have not looked closely enough to know whether the priorities that I am discussing would be the same. I am clear that we would not attempt to influence how organisations carry out their duty. I am also clear that it would be a matter for the SCDEA if its director decided that a major operational initiative was required and that it needed to deploy staff on drugs, human trafficking, money laundering or violent crime.

If we want to improve the quality of life in Scotland and make Scotland a safer place, there is no reason for us not to set out broad strategic priorities to which organisations should apply themselves.

Bill Butler: That is clear.

Can you tell the committee why funding for the SCDEA is to be set separately by ministers?

Hugh Henry: If we did not do that, we would provide 50 per cent of the funding and the other 50 per cent would notionally come through local authorities and police boards. However, in reality, the Executive provides most of that funding as well.

Bill Butler: Therefore, funding the SCDEA separately just recognises reality.

Hugh Henry: It recognises reality and it avoids confusion. There is no reason for setting up bureaucratic impediments. We make the decision and we get on with it. This will be a more effective way of seeing how much money goes into the SCDEA and of ensuring that it is followed through.

Bill Butler: What do you say to those who are concerned that ministers' 100 per cent funding of the Scottish police services authority will remove the sense of local ownership and engagement?

Hugh Henry: I find it a peculiar concern, given that most of the money comes from the Executive anyway. If I follow the logic of the argument through to police boards and boards that have more than one member authority, I do not recall there being much detailed discussion at local level about the money that has gone into joint services at a Scottish level, although you may correct me if I am wrong, based on your experience in Glasgow. I am not convinced that the argument about local input is valid; it is artificial. One hundred per cent funding by ministers is a better, clearer way of identifying the money that is required and of getting on with the job.

Bill Butler: Okay, that is clear. I would like to ask a couple more questions on that issue.

Some witnesses from ACPOS were concerned that police officers who are recruited directly by the SCDEA might not be trained to the same standard or be involved in the same range of policing activities as other officers. Is that a valid concern? Would officers recruited directly by the SCDEA be able to develop the same range of experience?

Hugh Henry: One of the things that struck me when I visited the Scottish Drug Enforcement Agency was the new territory into which it is moving. We are talking about very sophisticated operations and about tackling crime at a level that many of us would never have imagined 10 or 15 years ago. Such operations require skills that would not necessarily be associated with traditional policing. Traditional policing and policing methods have a major role to play, but a new mix of skills needs to be added to that, including some of the skills that I mentioned earlier regarding the use of new technology. It may well be necessary to recruit directly to the SCDEA people who understand very sophisticated accounting procedures and techniques and people who have a detailed understanding of the law and how it works.

Bill Butler: I think that even ACPOS accepted that. However, its representatives said that even though those recruits could bring a more sophisticated range of skills and talent, they would not, if they were directly recruited, have the range of experience of a constable who goes through the

rigorous two-year training. ACPOS was worried that there would be a two-tier arrangement and that people would not have the skills of what some might call an "ordinary" constable. What do you say to that?

Hugh Henry: It is fair to say that direct recruits may not have the same depth of operational experience on the street or in the community as someone who has come up through the traditional ranks, but we are talking about identifying people who for whatever reason either have different skills or have the potential to develop different skills that can be applied for specific purposes.

The other side of the argument must be considered, and that has been raised. Once those people have been recruited, it will still be necessary to ensure that they go through thorough training and have full access to facilities such as the Scottish Police College. We must consider in-house training and the range of training opportunities that are available to all police recruits and identify which aspects of training are required. I hope that if they wished to go into other forces at some point in the future—having had the benefit of substantial and high-quality police training, allied with the particular skills that they will have developed in the job and the experience that they will have gained—they would be regarded as prize assets for other forces to recruit.

Bill Butler: So you do not see the direct recruitment of those people as being inimical in any way—it is complementary and they could cross over.

Hugh Henry: It is very much complementary, and it reflects the sophistication of the challenge that faces us in dealing with organised crime.

Bill Butler: I have one more question. You will be aware that the Executive's additional submission states that the designation of the SDEA director as a deputy chief constable has not caused any operational difficulties. We heard evidence from the current head of the SDEA that to enable him to work effectively at national and international levels he needs to be seen as being on a par with the heads of territorial police forces. How would the Executive view a move in that direction, given what you have said about the sophisticated nature of operations and the new challenges at a national and international level?

Hugh Henry: I am not sure that to meet that challenge or to address the concerns that senior officers from other jurisdictions might express we necessarily need to create a new police authority with a new chief constable. The director is a very senior police officer, who plays a full and major part in the workings of ACPOS.

14:30

Bill Butler: If it were felt as the situation played out that, for that person to be on equal terms, that title was necessary, in reality, would you be against it in principle?

Hugh Henry: I am not against considering the title that is used. Whether that person needs to be designated as a chief constable is a different debate from the debate about whether they need to be called director or director general.

Bill Butler: Let us leave the title to the side. What about equivalence? You are not against equivalence in principle, are you?

Hugh Henry: From the logic of what you say, equivalence is about how people abroad see that senior person.

Bill Butler: Yes.

Hugh Henry: I am intrigued that senior officials in jurisdictions abroad are so knowledgeable about our operations that they know that a director or director-general has no grading equivalence per se with a chief constable. If we need to consider the title that is used, we will. If we need to consider how the post operates, we will. We are not persuaded that setting up the SCDEA with a head who is designated as a chief constable is necessary for it to fulfil its functions. We will have in post a very senior person who plays a full part in ACPOS. I am not aware of any evidence that the title has disadvantaged our work with our international colleagues, but we will keep our eye on that.

Bill Butler: You will reflect on that.

Hugh Henry: We will keep our eye on the matter.

The Convener: I think that "reflect" means keeping an eye on it in the mirror, but we will see what happens.

I seek clarification of a technical point. I was just getting my clerk to look at the bill. I assume that, under the bill, joint police boards are dismantled, but I can find no reference to that in the bill. Perhaps one of your advisers can confirm the position.

Hugh Henry: Joint police boards are dismantled for—

The Convener: The creation of the new police services authority.

Hugh Henry: Joint police boards will still exist, because they will be responsible for the other police authorities throughout Scotland.

The Convener: So they will continue to provide the services that they provide at the moment.

Hugh Henry: Strathclyde police and Lothian and Borders police have joint police boards, which will continue. If you are concerned that by doing something in the bill, we might inadvertently cause a problem elsewhere, by all means highlight that and we will consider it.

The Convener: I just wanted clarification of that aspect. The joint boards will without doubt continue. I simply want to know whether there is the possibility of friction between the joint boards and the police services authority.

Hugh Henry: Not that I can think of, because they will have different functions and will be responsible for different matters.

Bill Barron (Scottish Executive Justice Department): The purpose of establishing the authority with its functions is to take away some common services from police forces and authorities, which we see as freeing them up to do the main job of core policing and the local job. We see the two aspects as entirely complementary. The arrangement is not wholly new; we have had common police services for some time. The bill just provides a new governance arrangement for them.

Jackie Baillie (Dumbarton) (Lab): I have one tiny point. You will be pleased to hear that it follows on from Bill Butler's last question. Rather than taking an international perspective, I ask why, at the Scottish level, you think that the SCDEA director should have a lesser status than a chief constable.

Hugh Henry: We are not creating a new police authority or a ninth constabulary. We are talking about something that has evolved from the development of police operations. At some point in the future, the matter may well need to be factored into a discussion about how policing in Scotland is developed.

If we want to make comparisons, we should remember that Dumfries and Galloway constabulary, which is one of the smaller forces, has in excess of 700 policing support staff, whereas the SCDEA will have fewer than 300 policing support staff. We are talking about different organisations and skills. As I said to Bill Butler, we will continue to consider the matter. The bill makes provision for the ranks of the director and the deputy director of the agency to be changed by order to reflect any future change in circumstances. Who knows how the situation might develop in the next five, 10 or 15 years, for either the SCDEA or the police? At present, given the scale of the agency and taking into account the size of the forces in Scotland, we think that the ranks of the director and deputy director are probably pitched at the right level.

Jackie Baillie: To talk in the abstract about any job evaluation scheme, does the minister acknowledge that the important factor is not just the numbers, but the intensity and quality of the work that is carried out?

Hugh Henry: Yes. I have the highest regard for the work that the SDEA has carried out for a number of years. Equally, it is fair to pay tribute to the work of the police forces throughout Scotland, which can be an intensive exercise, too.

The Convener: We now move to the issue of police complaints and misconduct.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): Under the bill, many of the functions of Her Majesty's inspectorate of constabulary for Scotland will be taken up by a new complaints mechanism. The minister will, of course, be aware of HMIC's written evidence to the committee on the improvements that it is seeking to complaints handling and on the broader spectrum of complaints. What powers will the new police complaints commissioner have that will be stronger than those available in the existing framework and that should give people confidence that the complaints system is being improved rather than just replaced by a different structure?

Hugh Henry: We need to set the issue in context. The commissioner will be appointed by the Scottish ministers in accordance with the Nolan principles and will be fully independent of the police. We must remember that HMIC deals with complaints as a small part of a fairly big responsibility—complaints are not its sole focus. The bill will set up an individual and a support structure to focus purely on complaints. That specification will mean that the complaints take on greater significance. The commissioner will have important powers: there will be a power to review how complaints have been handled and a power to publish reports on that, including the ability to comment on whether disciplinary regulations have been applied properly. To give a fairly crude description, the commissioner could name and shame forces.

The commissioner will also be able to make recommendations on how complaints handling procedures can be improved. It is important that we consistently and continually try to improve what we do. The commissioner will have the power to order forces to reconsider a complaint; the power to oversee or supervise the reconsideration of complaints; the power to examine quality-of-service complaints that are made against a force as a whole, so that the focus will be not only on complaints against individual officers; and the power to issue binding guidance to forces on how non-criminal complaints should be handled. In addition, ministers will have the power to direct the commissioner to report on any issue that they see fit in relation to police handling of non-criminal complaints. That wide range of powers will

enhance the status of the role and give the commissioner the ability to carry out the job effectively.

Jeremy Purvis: Do you envision the commissioner being able to apply specific sanctions against individuals or forces, in addition to being able to issue guidance to individuals or forces?

Hugh Henry: The commissioner will have the power to order a force to reconsider a complaint. I look to my colleagues to clarify whether other provisions in the bill go further than that.

Alastair Merrill (Scottish Executive Justice Department): We also envisage that the complaints commissioner will be able to direct and to be involved in the reconsideration of a complaint that he or she judged to have been handled unsatisfactorily by a force.

Jeremy Purvis: Will the commissioner per se be able to apply sanctions against any force or individual? If, in reviewing a complaint, the commissioner finds that the complaints process was in order and had been followed correctly but that the final decision was nevertheless curious or unfair, would the commissioner be unable to apply any sanctions?

Alastair Merrill: The commissioner will be able to review and to report on how a complaint was handled and will be able to make recommendations to Scottish ministers. The commissioner will also have the power to direct HMIC to look into any service delivery issue that might arise from a complaint.

Hugh Henry: The commissioner will not have the power to order sanctions against individual officers. That will remain the responsibility of the chief constable.

Jeremy Purvis: How does that sit with the power to issue guidance to individual officers below chief constable rank? Could we have a situation in which a complaint went through the entire system? As the minister will be aware, ACPOS has raised concerns about the power in section 42(1)(c) to issue guidance to individual officers other than a chief constable. For example, if a divisional chief superintendent has handled a complaint incorrectly, the commissioner will have the power to issue guidance on how that complaint was handled. That might not undermine chief constables directly, but the guidance would be on the operational activities of that police force. How will that power to issue guidance to officers who are not chief constables be used in practice?

Hugh Henry: The power could be used in a number of ways. For example, the commissioner might comment on the way in which an officer has spoken to or dealt with a person. If the officer has failed to apply a force's procedures, the commissioner could issue guidance on how officers should comply with the proper procedures of the force. I may need to look for interpretation on this, but I am not sure that such guidance would be directed at individuals rather than at everyone in the force. I seek some support on that issue from officials.

Alastair Merrill: Each force currently operates its own complaints procedure, which is set out for that force. The commissioner's guidance would be directed at a specific force. Currently, the deputy chief constable is tasked with overseeing the efficient running of the complaints procedure. I am not sure that section 42 implies that the commissioner would issue guidance to an individual divisional commander or officer on how they had performed. Rather, the guidance will be for the chief constable to take forward by ensuring that the force's complaints procedures are improved and properly implemented.

Hugh Henry: If there is any doubt about whether the provision applies to individuals or to everyone in the force other than the chief constable, we will clarify the matter before stage 2.

14:45

Jeremy Purvis: I would be grateful for that.

I move on to a different aspect of the proposed complaints and misconduct regime. You will be aware that there is public concern about the fact, which has been highlighted in previous inspectorate reports, that complaints that are made against a force are investigated by officers in that force, but no change to that current arrangement is proposed. What do you consider are the appropriate steps to assure the public that complaints against a force will not routinely be handled by officers within that force? How could officers from other forces be encouraged to play a more active role?

Hugh Henry: I am not sure that we would necessarily want officers from other forces to play an active role in the first instance. We are not dispensing with the complaints procedure of each individual force, nor are we making the complaints commissioner the gateway for all complaints that are made against the police. We would prefer that any complaint is dealt with locally within the force, and if someone can reach a resolution and be satisfied with the investigation that is carried out—using the force's own officers or other officers, as the case may be—there is no need to take the matter any further. If someone remained dissatisfied after that investigation, that is when the commissioner would come into his or her own. There is now an opportunity to take the investigation beyond the force and to have

someone else look at the matter independently of that force. That is probably the best way of getting complaints resolved at the most appropriate level—at local level, if possible, and at the level of the commissioner if complaints have failed to find a resolution.

Jeremy Purvis: I understand that that is the argument against having greater powers of investigation, but I would like to ask about situations in which the commissioner believes that a case should be reviewed under the supervision either of the commissioner him or herself or of someone whom the commissioner may appoint. Could a person who is not in the police force be nominated and could it come about that those involved in carrying out the review of the case might also not be in a police force? In certain cases—perhaps they would be extreme cases—could investigations be carried out by non-police officers?

Hugh Henry: It is possible.

Jeremy Purvis: You have said that you are not of the view that the commissioner would be the gateway for complaints and you have explained why, but there would be no large bureaucratic obstacles to the commissioner being a gateway, would there?

Hugh Henry: Are you asking whether we might decide that all complaints should go in the first instance to a commissioner rather than being dealt with at a local level?

Jeremy Purvis: All complaints either would go automatically to the commissioner or could go to the commissioner. The situation would be like that for the Scottish public services ombudsman, to whom complaints can go directly or through a constituency MSP.

Hugh Henry: From my experience of complaints, my understanding—and I am open to correction—is that the person complaining has to exhaust a council's complaints procedure before the complaint goes to the ombudsman.

Jeremy Purvis: But a person can still make the complaint to the ombudsman, who will state whether it is valid. So, if the commissioner were a gateway, someone could complain and the commissioner could then refer that complaint to the internal procedures of the police force.

Hugh Henry: There are two separate issues there. First, there is the question whether, under the ombudsman procedure, people can go directly to the ombudsman rather than use the local complaints procedure. I understand that complaints are filtered through the local complaints procedure before going to the ombudsman, but if there is a facility for direct application, I stand to be corrected.

Secondly, I am not persuaded that fairly trivial complaints that could be resolved easily and locally should go in the first instance to the commissioner if the chief constable, either directly or through a delegated responsible officer, is able to deal with that complaint. It might be that an apology, a change in the way in which services are delivered or some other action is required. If such a complaint can be dealt with easily at a local level, why create the bother of getting a commissioner involved? I do not see the validity of that.

Jeremy Purvis: Why is there strong opposition to the commissioner being a gateway? A member of the public could complain to the commissioner, who could decide on the appropriate process for their complaint. In 2004-05, there were about 4,500 complaints. Over 2,500 of those complaints were either unsubstantiated or resolved by conciliation or explanation, which validates your argument, but nearly 2,000 of them were dealt with in the procurator fiscal system and led either to no proceedings or to criminal proceedings. A fair number of people made serious complaints and they might feel that it would be much better to use the commissioner as a gateway. They could go to their police force, their MSP, the ombudsman or the commissioner, but their complaint would be directed ultimately to the most appropriate structure.

Hugh Henry: We should remember that each police force will retain its own complaints procedure. Jeremy Purvis is right in one sense—people could go directly to the commissioner, but the commissioner might simply refer the case back to the police authority to deal with in the first instance. If someone wished to make a point of going to the commissioner rather than to the local police force, it would be a matter for them, but I do not think that it would expedite matters in any way because the case would still be referred back to the local police force. However, if people feel better about doing that, so be it.

Jeremy Purvis: So people would have the opportunity to make a complaint to the commissioner in the first instance.

Hugh Henry: If someone chose to initiate their complaint by going to the commissioner, it would be a matter for them. The commissioner would then refer the complaint back to the police force.

Maureen Macmillan (Highlands and Islands) (Lab): I will follow up on Jeremy Purvis's question. I notice that the Law Society of Scotland has decided to go for an independent complaints procedure because the public's perception is that the current system for dealing with complaints against solicitors is not fair. There is a perception among the public that the police complaints system is not fair either. We heard evidence about

that from John Scott of the Scottish Human Rights Centre, who said that, in particular, the people who often come into contact with the police and the fiscal service often do not distinguish between the two. They do not think that the system is fair and therefore it might be a good option to use the complaints commissioner in the way that Jeremy Purvis suggested.

Hugh Henry: It is certainly an interesting argument and one that we will consider when we look at the regulation of the legal profession. However, there are significant differences between the two systems.

If we had five, six, seven or eight large legal companies in Scotland, one could say reasonably that it would be better for them each to have their own complaints procedure. If there were then a failure to resolve a complaint, it could be subjected to independent scrutiny, which is what we suggest will happen with the police complaints commissioner. The difference is that there are many small companies and single practitioners the length and breadth of Scotland who do not necessarily have the structure to have their own complaints procedure. Where only one or two people are employed in a company, someone might have to go to the person about whom they are complaining to ask them to investigate the complaint.

For that reason, at the moment there is one body that supervises complaints: the Law Society of Scotland. We say that complaints should be supervised not by the Law Society but by an independent body. If we took the alternative approach, both the Law Society and an independent organisation would deal with complaints. I do not want to get into the detail of that proposal, but it would impose significant financial burdens on many small companies across the country. We are talking about something different: sizeable public sector organisations, with an infrastructure that makes them capable of sustaining their own complaints procedure. We are clear that if someone cannot get satisfaction, they should have the right to have their complaint considered by someone who is utterly independent of the police.

Jackie Baillie: I move on to football banning orders. Before I ask questions, I welcome the amendments that the Executive intends to lodge at stage 2 to remove the 24-hour limit within which an offence for which an FBO can be made has to be committed and to allow a defence of reasonable excuse in relation to breach of an FBO. The committee was pleased to note that those amendments are being worked on.

I understand that there is a lower evidential requirement when one is seeking to impose a football banning order under the civil system. In light of that, is there a possibility that civil orders will be applied for in situations where criminal charges should have been pressed instead?

Hugh Henry: It would be foolish of me to say that that would never happen. It is not our expectation that civil orders should be seen as undermining the use of criminal procedures, where the evidence warrants that. It is similar to the logic of the arguments that were used when we considered antisocial behaviour orders. There are circumstances in which the civil process may help to expedite matters. Significantly, it could be used in cases where someone has not yet committed a crime but their behaviour gives cause for concern. That behaviour might include previous activities beyond our jurisdiction, such as inappropriate behaviour at matches elsewhere in the United Kingdom or Europe. In those circumstances, there might be concern about how the person in question might behave at football matches here.

Jackie Baillie: I would like to develop that point. You are right to make the point that civil orders can be used not just when someone has contributed to violence but when a sheriff is satisfied that in the past they may have been responsible for violence. There is a prevention element to civil orders. A number of witnesses said that placing restrictions on someone's liberty and freedom of movement—even removing their passport—was not proportionate to the crime with which we are dealing. What is your view on that?

Hugh Henry: There are two safeguards. First, any legislation that we pass must be compliant with the European convention on human rights. That safeguard is built into all our legislation. Secondly, there is a safeguard in the ability of the sheriffs to act proportionately. We expect sheriffs to act proportionately and I am sure that they will. I do not anticipate that orders will be granted lightly. That will need to be done on the basis of the concerns that have been expressed and the information that is available. I do not worry that the power will be used disproportionately or improperly.

15:00

Jackie Baillie: We took evidence from witnesses from the Scottish Human Rights Centre suggesting that there is perhaps an alternative approach to removing somebody's passport to stop them travelling to a match outwith the UK. If my memory is correct, the witnesses cited the practice of getting the person to report to a police station on the day of a match. Have you considered such alternatives?

Hugh Henry: Yes. That is a reasonable suggestion. However, the problem lies with people's ability to get a flight on the day of a match

to go to the game, as many people will sometimes do, particularly for bigger matches. Whether the match was on a Wednesday or had a 3 o'clock kick-off on a Saturday, if the police wanted the person to turn up at that time, they might already be away, out of the country, causing mayhem by the time it became clear that they were not going to show up. It is about a degree of anticipation as well as prevention.

Despite the commendable record of the vast majority of Scotland fans when they travel to international games and the exemplary record of our fans at club level in recent years, it would be foolish of us to pretend that we are immune to some of the problems that exist with football fans elsewhere in Europe. It is not that long ago since our fans were involved in such activities. Indeed, we know from the reports that we read that there are casuals and others who associate themselves unofficially with football clubs who seek to link up with others elsewhere to cause trouble.

If we know that the removal of a passport is a better way to avoid a person going away and causing damage than waiting until the day of the match only to find out that they are away causing mayhem, I would rather pursue that approach.

Jackie Baillie: Do you think that it should be possible to impose additional conditions under a football banning order, for example a requirement on people to attend alcohol or drug treatment or courses aimed at changing their behaviour?

Hugh Henry: It would be for the sheriff to judge whether that was appropriate. I am not quite sure exactly what those additional conditions might entail. In some cases, there could be an additional condition of banning someone from being present in or about a town centre or in the vicinity of certain areas or individuals. The question whether a sheriff might require someone to attend alcohol or drug treatment takes us into a different issue. There is a separate debate about mandatory treatment. Notwithstanding the argument that a sheriff could have the power to impose it, I am not sure how mandatory treatment would work. What would be done about someone who, despite having complied with an order in other respects, failed to turn up for treatment? They could be liable for a fine of £5,000 or imprisonment of six months. I do not know that a sheriff would necessarily wish to go down that route. Theoretically, however, that option might be available to them.

Jeremy Purvis: I have a brief question. Section 48 states that a sheriff can make a banning order if he or she is persuaded not only that the person has a history of violence or disorder but that there are reasonable grounds for believing that imposing such an order would prevent violence or disorder. However, the definition of disorder in section 52(3)(b) includes "insulting words". That could be a wide, catch-all provision at a football ground, if the police wished to pick on an individual and if insulting words were being used against the other team's supporters. What confidence can we have that the power would not be used very widely and indiscriminately, potentially against a large group of people?

Hugh Henry: If we were to get into those realms, we could end up with political banning orders for people who use insulting words about political opponents.

I stand to be corrected, but I think that using insulting words could result in a breach of the peace at the moment if the circumstances were appropriate, especially in the aggravated circumstances of sectarian abuse. It would be for the sheriff to decide. I am trying to think of an example that will not offend people. If someone made comments about a defender's ability to defend or a goalkeeper's ability to catch cross-balls, in some cases it would be a moot point whether that was insulting or a statement of fact.

The Convener: This is diverting and highly entertaining. Keep going, minister.

Hugh Henry: The police would have to consider the context and, as a further safeguard, the procurator fiscal would need to consider the matter. Ultimately, if all the facts were proven, the sheriff would have to determine whether that constituted disorder. If the person was not charged and the application related to civil law, I am sure that it would be within judicial knowledge what constituted threatening, abusive or insulting words in the context of that or of any other behaviour.

When I have been to football matches—not just those involving one or other of the old firm teams; it has even happened when I have stood on the touchline at the racecourse in Paisley—certain words have been used that one might wish one had the power to do something about, but did not.

Jeremy Purvis: The point is that the power will be available and will be applied. However, as I do not want to entertain the convener any more, I will not ask any more questions.

Hugh Henry: I reiterate that the power to charge someone who uses insulting words with a breach of the peace already exists.

The Convener: Thank you, minister.

On behalf of the committee, I thank you for the supplementary memorandum that you have given us, which has been a great help in explaining the issues further in relation to public processions. The memorandum contains extensive additional information about the further guidance that could be issued on informing and consulting communities and the approach that would be

taken to exempting certain organisations. It also makes reference to the possibility of an order being amended.

The committee has heard cogent evidence from community groups about what they feel that they are subjected to when certain marches take place in their vicinities. What options are open to a local authority that receives strong representation from a community that is opposed to a procession?

Hugh Henry: Depending on the nature of the complaints, the local authority already has the power to take steps to prevent a march if it believes that there is a danger of public disorder or intimidation or the potential for violence. We have tried to focus on the process and to get people to think more clearly about all the circumstances that surround marches. People can draw the attention of their local authority to that through the normal process of democratic representation. They can ask the local authority to take into account some of the disruption and intimidation that they may experience if marches are rerouted.

It is for individual local authorities to ensure that any restrictions that they decide to impose in the face of such representations are justified and do not infringe the rights of those who wish to march. We are trying to achieve a balance between the rights of those who wish to assemble and march and the rights of communities to live in peace without fear of intimidation or disruption, should that be a factor. Such behaviour is not a factor in the vast majority of marches in this country, which pass off without comment or problem. However, if there is any perceived or identified problem, it is right that that balance should be considered.

The Convener: COSLA had a firm and widely publicised view on the matter and seemed anxious that individual local authorities could find themselves in difficulty and possibly in breach of the ECHR if they refused permission for a march on the basis of community representations. Is that concern well founded?

Hugh Henry: I am not sure. There is a valid argument that that could be the case if an authority unreasonably refused someone permission to march on the basis of a complaint that could not be substantiated or as the result of allegations that were not evidenced.

People have the right to march and to deny them that right would be to infringe their human rights, but no one has an unfettered right to march, whether or not the bill is passed. Other factors need to be considered, so the right to march is not absolute. Restrictions can be placed on marches if they are deemed necessary in the interests of national security, public safety, prevention of disorder or crime, protection of health or morals, or for the protection of the rights and freedoms of others. If the organisers of one march sought to deny others the right to assemble or march, there would be good cause for denying those organisers the right to hold their march.

The Convener: I am trying to tease out the detail, because communities may make a genuine contribution to a consultation process under guidance directions and I think that everybody is anxious to avoid them having undue expectations, only to find, ultimately, that their representations seem to have been disregarded. We are anxious that the bill should introduce clarity in the law. Are you satisfied that the balance is being clearly defined?

15:15

Hugh Henry: I think so. I would regret giving any impression that we are seeking to introduce a right of veto to an individual or to a collection of two or three people to determine who marches. That would be as dangerous as giving others the right to march unfettered, irrespective of the problems that that would cause. We simply have to strike a balance in that respect. I hope that we are not promoting intolerance of those who believe that they need or want to march for whatever reason, because we feel that it is important to defend that right in a democratic society.

Equally, those who wish to march—and indeed wish to do so frequently—should consider the effect of their actions. If marches are imposed on the same relatively small community time and again or if they take place at hours that are not conducive to the well-being of those who are about, such aspects should be considered. I hope that any such disputes would be resolved by a process of discussion, co-operation and conciliation that fully takes into account and respects the rights of all concerned.

As I said, I do not want anyone to be left with the impression that the bill will give people across Scotland the right to say no to any demonstration. I know that there has been a lot of focus on particular organisations that perhaps march more than others. However, if we simply leave the decisions in the hands of one or two people, they could object to marches by trade unions, people who support asylum seekers, women's rights organisations and so on. A list of people could be denied the freedom to assemble and march if one or two people objected. However, although that is not the intention behind the bill, the bill nevertheless recognises that people's lives can be blighted by inconsiderate behaviour. Those people deserve their local authority's consideration and protection.

The Convener: On exemptions and exclusions, the bill contains a universal obligation to notify,

with the exception of funeral processions. The additional memorandum refers to the Executive's willingness to consider possible exclusions, and I think that it would help the committee to ascertain the criteria in that respect. For example, at the top of page 7 of its additional memorandum, the Executive says that

"bodies such as the Boys Brigade, the Girl Guides etc would be obvious candidates"

for exclusion. Are such criteria to be established with reference to what the groups are, what they do or their likely size?

Hugh Henry: I suppose that they cover all those aspects. We will consider who will be on the list of exemptions. However, at this point, I should pause over the consequences of ministers saying "Well, these organisations are exempt and don't need to go to the local authority or the police". On the one hand, ensuring that processions are notified would mean that the local authority, the police and the community would have a full picture of what was going on and would be able to plan accordingly. On the other hand, if a small organisation decided to hold, say, an anniversary parade every couple of years, why should it have to go to all the bother of notifying the authorities?

Under those terms, we could exempt the girl guides, the Boys Brigade, the brownies or whatever. However, let us stop to consider that suggestion. If my son or daughter's involvement in a parade of such an organisation meant that they would be marching through the centre of a town, I would probably want to ensure that the authorities had been notified so that proper traffic control measures could be taken, the traffic would be stopped and everything would be planned, for no other reason than to ensure the safety of the children involved.

It might be superficially attractive to say that organisations such as the brownies and the girl guides should not need to notify the authorities because they march infrequently and such a march would be of no threat to anyone and would be tolerated by everyone, but I am not sure that if such an organisation suddenly turned up in the middle of a busy town and said that it was going to exercise its right to march, it would be entirely prudent to allow it to do so. That is not to say that I think that many such organisations would do that, because their leaders are all highly responsible people. We need to strike a balance. We would regard having an exception as being the exception—if that phrase is not redundant.

Jeremy Purvis: Rather than consideration being given to the type of march or to the type of organisation that is involved in the march, would an alternative way forward not be to say that if a local authority could demonstrate that a particular march had consistently adhered to good practice over a long period—I am thinking of the common ridings in my constituency, which have not presented a problem—it could obtain an order granting the march an exemption for a period of five or 10 years, say? The order could include a sunset clause, which would mean that the situation would be reviewed. It could be argued that the fact that a march has consistently adhered to the best practice that the bill advocates represents a better solution than does the proposal to consider the type of march or the type of organisation that is involved in it.

Hugh Henry: We will certainly consider that suggestion. If it would improve matters, it would be worth reflecting on. The example that Jeremy Purvis gave is interesting, in that there is probably more community buy-in to the common ridings than there is to any other type of event elsewhere in Scotland. It would be inconceivable that the police and the local authority would not be intimately involved in planning a riding almost from the minute that the previous one finished. Such events are not prepared for over a few weeks; the preparations involve a long period of discussion.

Given that community buy-in to the ridings is strong and that agencies such as the local authority and the police are heavily involved in their organisation, there would probably be nothing to lose in making an application in such a case. Why would there be any need to exempt the ridings when the local authority, the police and others are involved on a monthly, if not a weekly, basis in the run-up to their taking place?

Jeremy Purvis: There would be justification for that if the local authority could demonstrate that notification would result in unnecessary costs being incurred.

Hugh Henry: What would those unnecessary costs be?

Jeremy Purvis: Notification in the media and the press would be an unnecessary cost, as would any consultation process, whereby local residents would have to be informed of what was happening.

Hugh Henry: My reading of what is proposed is that there will be no requirement to take such action, but I will double-check on that. I can see no provision that would compel the local authority to do what you suggest.

Jackie Baillie: I do not have a question; I simply note that such events are not as idyllic as they have been presented to be. They are not without controversy. Was it not the case that women recently protested to be allowed to take part in a common riding? I share that point of information with the committee.

Jeremy Purvis: I was referring to the common ridings in my constituency. I think that Jackie Baillie will be aware that Hawick is not in my constituency.

Jackie Baillie: I defer to your local knowledge.

The Convener: There is obviously a lot of equestrian activity down in the Borders.

I have a final question on processions. Some of the marching organisations suggested that local authorities should have to respond to applications within a prescribed length of time because at the moment an organisation might have to go right up to the wire before finding out whether its application has been successful. It has been suggested that the local authority should have to let an applicant know the outcome of its application not later than 14 days before the planned date of a procession. Does the Executive have a view on that?

Hugh Henry: We think that the times that are proposed in the bill are reasonable. The period of notification of refusal is no different from what currently pertains and there does not seem to be a problem at the moment. If we moved in the direction that you mentioned, that might have a knock-on effect on the period of application. If we reduced from almost four weeks to about two weeks the period during which the local authority can consider its decision, we might have to make the period of application for permission longer than 28 days. We do not think that the period causes a problem. If there is evidence of a problem with people's ability to lodge an appeal with a sheriff, we will reflect on that, but we are not aware of such a problem.

The Convener: We did not get the impression that there is a problem throughout Scotland, but evidence was given to us that, in certain local authority areas, organisations are informed on a Friday night that a march on the Saturday may not go ahead. I wondered whether the Executive thinks that that is either necessary or reasonable.

Hugh Henry: What you describe is very much the exception. In the vast majority of cases, people are notified well in advance whether their march or procession has been given the go-ahead. I am not sure that prohibition of marches happens all that regularly. If evidence exists on how many marches have been banned and how many have been banned at the last minute, I will certainly reflect on that. If there is a problem throughout Scotland we will reflect on that, but I hope that most councils make decisions timeously.

Local authorities have to make decisions about marches at least two days in advance, so I do not think that the situation that you describe could happen. Local authorities have a duty to make decisions as quickly as possible and I am not sure why they would want to leave that until a late stage. I do not think that local authorities can make a decision only the day before the march.

The Convener: I am speaking from personal recall, but we will look at the *Official Report*. I cannot remember the precise period that was mentioned, but one of the marching organisations indicated that it had received an intimation that its march had been refused at very short notice. We will look at the evidence and direct any questions to your officials.

Hugh Henry: That would be helpful, convener. We will certainly look at that evidence.

Mr Kenny MacAskill (Lothians) (SNP): On the question of offensive weapons, evidence from the medical profession shows that it is often a matter of chance whether the injuries that are caused by a knife crime are minor, life threatening or fatal. Does the Executive have any views on whether there should be a greater focus on the potential for serious harm, as opposed to the actual outcome, in incidents in which knives are used as weapons?

Hugh Henry: I am not quite clear what Kenny MacAskill is driving at. Would the charge be, "You have a knife and it could kill" rather than, "You have a knife and you have used it"?

Mr MacAskill: The committee heard evidence from a casualty surgeon, who said that when a knife is used in an assault it is a matter of chance whether the person is seriously injured or is fortunate to survive. That doctor suggested that we should consider not the outcome of the injury that was inflicted on the victim, but the potential danger of the use of a knife.

Hugh Henry: I bow to Kenny MacAskill's legal knowledge, which is more extensive than mine, and I seek guidance from him, given his court experience. Would it not be the case, in the charge that is brought and the sentence that is dispensed, that consideration would be given to the circumstances of the use of the knife and the injury inflicted? The circumstances might sometimes determine whether the charge that was brought was a summary charge or a charge on indictment. I am not sure that that would be a matter for this bill, and I am not clear what point of evidence we would seek to resolve or remedy in the bill.

15:30

Mr MacAskill: The logical conclusion from the evidence of the casualty surgeon is the position that was suggested by the Association of Scottish Police Superintendents—that there should be a mandatory sentence of 18 months simply for possessing a knife. The casualty surgeon suggested that carrying a knife is dangerous in

itself and that what happens thereafter often comes down to pure chance. Does the Executive have a view on the superintendents' position?

Hugh Henry: Their suggestion about sending a clear message is superficially attractive, but there would be problems in relation to its inflexibility. If I recall correctly, in a previous parliamentary debate, representatives of all the political parties except one opposed the imposition of a mandatory sentence for carrying a knife. Specifying a fixed mandatory sentence would, to some extent, remove the courts' flexibility to reflect on the particular circumstances.

Off the top of my head, I can imagine problems. If the charge were simply carrying a knife, and not carrying a knife without lawful purpose, a person with a reasonable excuse for carrying a knife could face a mandatory 18-month jail sentence. That would be completely unreasonable. In addition, if we said that there would be a mandatory 18-month jail sentence if a person did not have a lawful purpose or reason for carrying a knife, that would not allow for other circumstances to be taken into account. The person might have been carrying a knife for the first time—casually and without having thought it through. If we went down that road, I do not know where we would end up.

There are people who need to be dealt with severely. That is why, for a charge on indictment, we are considering doubling the sentence from two years to four years, and why, for a summary charge, we are considering doubling the sentence from six months to a year. There may also be arguments for considering how to address other issues to do with the attitude of offenders. However, I do not think that the proposal for mandatory sentences would either solve the problem or help with it. Indeed, there could be unintended consequences.

Mr MacAskill: On whether a case can be dealt with by summary or solemn procedure, increasing the sentence for a summary charge to 12 months—as indicated in the additional memorandum—clearly goes some distance. How many charges are likely to be brought on indictment and in what circumstances? That would be the only way of going beyond a 12-month sentence.

Hugh Henry: It would be for the procurator fiscal to consider all the circumstances. It would not be appropriate for me either to second-guess a procurator fiscal or to suggest what a procurator fiscal might do. It is clear that fiscals are talking about more than simple possession, and about more than simple possession by someone who is a first offender. They may consider a person's record and the circumstances in which the person was arrested. They will then decide whether a charge should be brought and, if so, what that charge should be.

Mr MacAskill: Is it likely that a charge would be brought on indictment unless there were circumstances that went beyond simple possession?

Hugh Henry: If someone has a previous record, that could happen, but it is not for me to determine that or to suggest what should happen.

Mr MacAskill: The supplementary memorandum states that you do not intend to define the phrase "designed for domestic use". To some extent, I can understand why such definition could be perceived as a matter for the courts. Is there not a difficulty, however, in that when legislation on weapons has been introduced previously, lawyers and the courts have had a beanfeast of legal definitions? I appreciate that a balance has to be struck between including a definition in statute and leaving it to the courts to decide. What is your view on that? "Domestic use" is a common phrase, but such common phrases can result in numerous court cases and the procurators fiscal have to go through trial and error to determine the success or otherwise of those cases.

Hugh Henry: To some extent, that is always the case with the law. If the law could be applied without any interpretation or dubiety, and if the person was known to have committed the offence, there would probably be no reason to have lawyers or the full paraphernalia of the court process. There is always reason for dubiety and argument; that is the nature of our judicial system.

We considered whether to define the phrase "domestic use", but decided against it. We thought that the phrase would be readily understood, and that it would be best decided in court, in the light of all the information that emerged at the trial, whether a particular knife had been designed for domestic use. Other information would have to be provided and arguments would have to be made. Including a definition in the bill could give rise to all sorts of loopholes and lawyers would have the very beanfeast that you are worrying about.

The Convener: I am intrigued by Mr MacAskill's line of questioning. I think that most of us have a popular understanding of the phrase "domestic use", which derives from the Latin for "home". I wonder about a professional chef who buys a blade or a knife that will be used not in the home, but for professional and commercial purposes.

Hugh Henry: Some large knives can be used domestically, but it is an offence to carry a knife without lawful intention. The circumstances that you describe would be a reasonable excuse. At the moment, it is only 16 and 17-year-olds who cannot buy non-domestic knives.

Maureen Macmillan: I want to ask about the proposal to introduce mandatory drug testing and

referral for certain arrested persons. You will be aware that Safeguarding Communities-Reducing Offending and the Scottish Drugs Forum are a bit sceptical about that idea, because they believe that the present voluntary arrest referral schemes would probably be better at delivering the results that you seek than a mandatory requirement for people to be tested and assessed would be. Do you have any thoughts on that? Why have you decided to go down the mandatory route?

Hugh Henry: We know that drug addiction is an increasing problem associated with crime. We are keen that assistance should be provided as early as possible. If that helps to prevent someone from going further down the path of addiction, so much the better. If it helps someone to veer away from taking a path of criminality to fund an addiction, so much the better. What is proposed is a powerful support for arrest referral schemes rather than a replacement for them. The evaluation of the drug testing pilots in England and Wales was largely positive. We intend to pilot the schemes to see the results. That would give us the opportunity to share our evidence with the committee and with Parliament. If the pilots were to show no discernible impact, they would be a pointless exercise. However, if we can show that early intervention helps to get people away from criminal behaviour, it is worth trying.

Maureen Macmillan: We heard evidence from Mary Hepburn, who is a consultant at the Princess Royal maternity hospital. She was concerned about how the provisions for mandatory testing would apply to people who are receiving treatment for addiction through core services of the national health service—through antenatal care, for example. Has the Executive considered how it would ensure that such core services were not being duplicated or disrupted by mandatory testing? What would happen, for example, if a pregnant young woman was arrested for shoplifting?

Hugh Henry: If that person had already been tested and we knew that she had an addiction, the requirement for a mandatory test would be waived. There would be no point in subjecting someone to a mandatory test if their addiction had already been identified. If such a person was already in treatment, there would be no consequences.

Maureen Macmillan: Would some cross-reference be made when the person was brought into the police station, about what was happening to them?

Hugh Henry: Yes, through the assessment.

Maureen Macmillan: Okay. The police were concerned that they might need additional resources and training to carry out the new requirements. What consequences would there be for the police?

Hugh Henry: When something new is tried, it is understandable that those who are affected by it will seek to safeguard their own interests. I expect the police to look at the consequences for finance and personnel. However, we have been fairly generous in our assessment of what will be required. We estimate that the pilots would require about £50,000-worth of police time, which we will fund. We have assessed, quite generously, that it would take 20 minutes to carry out a swab and an assessment, although it should not take as long as that. We have overestimated the time that would be required in order to ensure that sufficient resources will be available. We have built in adequate safeguards.

Maureen Macmillan: Another issue that was raised was the timeframe between the mandatory testing and the mandatory assessment. Concerns were raised that the people who would be captured by the requirements would have fairly chaotic lifestyles and would perhaps not turn up for their assessment. There were concerns that they would end up being fined and going to prison, not for the crime—which they might not be convicted of—but for not turning up for their assessment. That was a particular worry for the Scottish Human Rights Centre.

Hugh Henry: Those who tested positive for drugs would have to attend an assessment centre within seven days of the test to obtain an appointment for the assessment. The intention is for the assessment to take place as quickly as possible after testing. However, that will depend on the number of people who require to be assessed and the availability of qualified assessors. I hesitate to put a prescriptive time limit on the assessment at this stage. Suffice it to say that we would want it to be done as quickly as possible.

15:45

Maureen Macmillan: You mentioned seven days. Do you think that an assessment would certainly be done within seven days?

Hugh Henry: If a person tests positive, they will be required to attend the assessment centre within seven days of the test to obtain an appointment for an assessment.

Maureen Macmillan: But we do not know how long things will take after that. Do you agree that a concern exists because of the nature of the people whom the legislation will cover? Perhaps it will be difficult for such people to keep appointments that are a long time in the future.

Hugh Henry: We recognise that. When we are identifying where our four pilots will be located, we will consider the availability of support services and treatment to try to ensure that the operation is

as smooth as possible. Maureen Macmillan raises a fair concern. We will consider whether it would be helpful to include the matter in guidance, so that there is no dubiety about what we seek to achieve.

Maureen Macmillan: That is helpful.

Finally, if people opt for voluntary treatment, will there be an incentive for them to continue that treatment? Perhaps participation in treatment could qualify them for a discounted sentence for the crime for which they were originally arrested, for example.

Hugh Henry: If a person was following such a course of treatment before they were sentenced, that would be reported to the court and I am sure that the court, in determining the eventual sentence, would take into consideration the fact that the person was following a prescribed course and was doing everything that they said that they were doing. However, I do not think that you mean qualifying for a discounted sentence—rather, you mean providing circumstances that could be considered in mitigation when a sentence is being considered.

Maureen Macmillan: That could be pointed out to the potential participants.

Hugh Henry: I am sure that the defence agent would be duty bound to do so if they were advocating properly on behalf of their client.

The Convener: Would such cases be piloted in the drugs courts—where there are drugs courts—or would they, particularly if they were summary cases, simply go through the district courts or sheriff summary proceedings?

Hugh Henry: They would not go through the drugs courts—that is a separate exercise. We have still to determine where proceedings will take place.

Bill Butler: I want to ask about those sections of the bill that deal with offenders assisting investigations and immunity from prosecution. Obviously, you know that the bill provides that, if an offender fails to provide the level of promised co-operation, immunity from prosecution can be revoked. The Faculty of Advocates and the Law Society of Scotland are concerned about that. Indeed, in evidence to the committee, Anne Keenan of the Law Society cited the important case of Mowbray v Crowe 1993 JC 212 and stated:

"In discussions between the Crown and the accused person, the accused person might reveal information about his or her potential defence, which would put the Crown at an unfair advantage".—[*Official Report*, *Justice 2 Committee*, 1 November 2005; c 1734.]

Given the level of contact that the person will inevitably have had with the prosecutor, is it realistic to think that they would get a fair trial if immunity was subsequently revoked? I refer specifically to section 88, which deals with immunity from prosecution.

Hugh Henry: I would hope and expect that a person would be entitled to a fair trial. The issue of fair trials has arisen in previous discussions on other legislation that the Parliament has considered. I think that we said then—and we say now—that the judge must be the ultimate arbiter of whether a trial is fair. If a judge is concerned that an accused is not being afforded a fair trial, it is incumbent on the judge to act. I am not sure therefore that the concerns that have been expressed are valid enough to prevent our moving forward. I do not know whether any of my colleagues have anything to say either on the case of Mowbray v Crowe or on the other general issues.

Ian Ferguson (Scottish Executive Justice Department): In Mowbray v Crowe, Lord Macfadyen said that the current procedures tied the prosecution's hands in offering immunity. That is why prosecutors support the change that the bill proposes.

On fairness, prosecutors are required at all times to act fairly and they would have to do so in the situation that we are discussing as well. If there was an unfairness to an accused, that would have to be taken into account.

Bill Butler: I accept the point that the minister and you, Mr Ferguson, have made about fairness. I also accept the point that it would be up to a judge to ensure than an accused had a fair trial. Interestingly, Ms Keenan went on to say—as did the court—that although the Crown may decide not to use any of the information that it has garnered, perception must be considered. Justice must not only be done, but be seen to be done. Do you have a comment on Ms Keenan's concern? Irrespective of a judge being as fair as possible, the public perception would be that, once a prosecution witness had given information, there could never really be a fair trial if their immunity was revoked at a later stage.

Hugh Henry: Of course, even if there were an agreement on the provision of evidence, that would be for a court to consider. There is no automatic guarantee that what you suggest would be the case. From a different perspective, the concern would be if someone said, "I will give evidence and provide information, if you can guarantee me a reduced sentence", and then, for whatever reason, they got off scot free or got a reduced sentence and failed to deliver. There does seem to be a worry in that direction.

Bill Butler: Yes, that came over in evidence.

Hugh Henry: We also need to remember that it is the accused who will enter into an immunity

agreement and he will know that, if he breaches the terms of the agreement, he may be prosecuted. The accused is not going blindly or unknowingly into an agreement. I would argue that there are safeguards on both sides.

Bill Butler: Moving on, how will any disputes over whether the promised level of co-operation has been provided be resolved?

Hugh Henry: That would ultimately be a matter for the court.

Bill Butler: It would be as simple as that, minister.

Hugh Henry: Yes.

Bill Butler: Do you concur, Mr Ferguson?

Ian Ferguson: There will be a written agreement in which an accused will set out what they will do in return for immunity or a reduced sentence. It is a matter for the court to decide.

Bill Butler: Okay. One other area—

The Convener: I am sorry to interrupt, Bill, but I do not quite understand this. If someone is promised immunity from prosecution, presumably in return for being a prosecution witness, and the case against another accused proceeds but there is a later debate about whether the prosecution witness was as helpful as he indicated he would be, I would have thought that that was nothing to do with the on-going case against the accused, which the court will determine in its own way. Who then makes a decision about whether to prosecute the prosecution witness for failing to arrive at the agreed level of co-operation? Surely that decision must rest with the Crown Office, after representations have been made by the witness's defence agent or lawyer.

Hugh Henry: You are right to say that the decision whether to proceed with a charge would rest with the Crown Office. The prosecutor must decide whether to revoke a notice, but the accused would always have the opportunity to seek a judicial review. I thought that we were talking about a dispute that arises in a case that has proceeded about whether a condition regarding the provision of information and the subsequent sentence of the person who provided that information has been met. In that circumstance, the subsequent sentence would be a matter for the court. If the decision relates to whether a case should proceed, that is a matter for the Crown Office.

Bill Butler: You made an interesting point about sentence reduction. The bill provides for agreements to be reached between offenders and prosecutors. Section 83(4) provides that any sentence reduction need not be disclosed in open court. The Law Society of Scotland and the Faculty of Advocates have expressed concerns about whether that allows for sufficient transparency in sentencing. Do you have anything to say in response to those concerns?

Hugh Henry: It will be for the court to decide whether it would be in the public interest to disclose the information. There could be circumstances in which it would be disclosed. However, I can imagine circumstances in which, for the sake of the safety and security not just of the individual concerned but of their family, it might be wise not to disclose the information. That should remain a matter for the courts.

Jeremy Purvis: There may be cases in which someone has given information and received immunity, but the person decides to withdraw the information or not to proceed, either because pressure has been brought to bear on them or for other reasons. That information, which they have provided in good faith, could prejudice either their prosecution or their own or their family's safety. How might the interests of such individuals be protected?

The Convener: By hiring a good lawyer.

Jeremy Purvis: If they can find a good lawyer, presumably they should hire one. I refer to cases in which someone has given sensitive information in order to secure immunity from prosecution. I understand that agencies such as the new SCDEA will be able to enter into agreements. That will allow people to give information at a very early stage. They may decide to withdraw that information—for good reasons, rather than just out of badness. How will they be able to show that there are reasons for their not proceeding to give the information that is contained in the written agreement? Pressure may have been put on them or their family. How will their interests be protected if they feel that, for good reasons, they cannot satisfy the requirements of the written agreement?

Hugh Henry: If they cannot meet the terms of the agreement, the agreement will not stand. There must be a sanction. We could not countenance a situation in which there has been a written agreement, a sentence has been based on that agreement, but the person concerned says that, although they want to keep the discounted sentence, they cannot disclose the information because they are scared of what might happen to their family.

Jeremy Purvis: Is there no sympathy for people in such situations?

Hugh Henry: If I were a lawyer advising clients, conceivably I could use the same argument in an awful lot of cases. That would allow me to tell clients that there was no requirement for them to see through the agreements that they had made. We need to put the issue in the context of the

witness protection scheme that applies to serious and organised crime cases in Scotland. However, I would not want to be party to introducing something that suggested to people that they could get a reduced sentence and then at the last minute say, "Incidentally, I'm a bit worried about what might happen to me or my family, so I'm not telling you, but thank you very much for the reduced sentence."

16:00

Jeremy Purvis: I am aware of that, but there could be a good reason why someone might be in such a situation. For example, they could judge the safety of their family—

Hugh Henry: If they were in that situation—

The Convener: I do not want to complicate matters, minister, but I would like to clarify something. If things have reached the stage at which the sentence has been determined and, in discounted form, imposed, the full situation will have been disclosed by that time, will it not?

Jeremy Purvis: I appreciate that, convener, but my question is about the situation beyond the courts.

Hugh Henry: The information may still have to be provided. The agreement could be reached but, as far as I know, further information might still have to be provided. If someone had those concerns, they should not enter into the written agreement in the first place.

Jeremy Purvis: Would guidance be provided to all agencies that might deal with that information? As far as I can see, a written agreement could be offered by SCDEA for information that could lead to the prosecution of another individual.

Hugh Henry: I shall ask Bill Barron to respond to that point.

Bill Barron: As I understand it, it is the prosecution that enters into those agreements. That does not prevent the SCDEA talking about possibilities and options, but they would not be taking the decision.

Jeremy Purvis: If there were guidance about the rights of individuals with regard to the witness protection scheme, would all the information be provided at the stage when written agreements were entered into?

Bill Barron: I would assume so.

Hugh Henry: The Crown Office should provide that information.

Jeremy Purvis: Should or will? We are talking about the human rights of individuals, regardless of what information they may or may not be offering.

Hugh Henry: If it will help, we can certainly discuss with the Crown Office how it will ensure that anyone involved in such sensitive negotiations supplies the requisite information to give both assurance and protection. If we do that, we must also ensure that people are aware of the implications of not fulfilling their obligations.

Bill Barron: It is in the Crown Office's interest to ensure that that information is available.

Mr MacAskill: I recall reading a book by an American criminologist—the name escapes me—about their experience of such arrangements. I appreciate that there is a different jurisdiction in America and that prosecution there is prosecution, as opposed to a procurator fiscal service that acts in the public interest, so it is vastly different. I also appreciate that we live in difficult times and must deal with organised crime, and I have no problem with immunity, but I seek clarification about whether the ultimate decision about any reduction in sentence would remain with the judiciary. Otherwise, the experience in America is that the prosecution becomes the court, and there is then a real problem. What will the basis of the agreement be, how binding will it be upon a judge and what flexibility will remain?

Hugh Henry: As Kenny MacAskill suggests, it will be a matter for the court. Section 83(2) states:

"In determining what sentence to pass on the offender, the court may take into account the extent and nature of the assistance given or offered by the offender."

We are not saying that the court shall take it into account; we are saying that the court may take it into account. It remains very clearly a matter for the court.

The Convener: In my questions about processions, I attempted to recall evidence from an earlier meeting. I am pleased to say that geriatric enfeeblement has not overtaken me and that the version that I gave was correct. We have alerted your officials to that evidence, and refer them to the *Official Report* of 14 November 2005, column 1799. The witness was a Mr Jim Slaven. I do not expect you to comment further, but that is where the information came from.

Hugh Henry: I see that now, convener. Thank you for that. All that I can say is that I am surprised, because there is a requirement for two days' notice. That is something that must be done, and if there is a failure there are other opportunities for Mr Slaven and his organisation to pursue whatever authority had failed to apply the regulations properly.

The Convener: On behalf of the committee, I thank you for attending, minister. I know that it has been a long session, but it has been helpful to the committee to go through those parts of the bill in detail. I also thank your officials for coming with you.

16:05

Meeting suspended.

16:11

On resuming—

The Convener: Next is a brief report from Jeremy Purvis on his attendance at the Hibs against Rangers game at Easter Road on Sunday.

Jeremy Purvis: Happily, I can report that it was uneventful. As far as I am aware—I do not know whether Anne Peat has received any information—there were no arrests at the game. There was no disorder, other than what would be termed insulting language under the bill.

I was very impressed by the police. The committee should extend its thanks to Superintendent Campbell and his officers for accommodating my visit and for the work that they did. The police would dearly like the powers in the bill; they can see that they would use them. Already, they are emphasising that intelligence on individuals and their conduct should be reported in a more co-ordinated manner, which will be a key way of making the bill's measures effective. They are already looking forward to the bill.

There was potential disorder later in the day, after the game, when a fight was reported between young people at Waverley steps, which would have been connected with the game. The officers we were with stressed that disorder often takes place not at the game or in the ground, but later in the day. I was impressed by the police's dispersal tactics, which they implemented professionally.

The Executive's intended amendment will be helpful in widening the scope of police action beyond the day of a game or the day after. My observations are similar to those that you reported, convener, when along with other committee members you went to an old firm game. If the police get the powers under the bill, they will use them on a small number of individuals about whom they have information in their database. Those people would have to be ringleaders or certain known individuals if the measures are to have the greatest impact. That is how the police wish to use the powers. Like other committee members, I have no problem with that.

The Convener: That is helpful as part of our feedback from events.

We are about to go into private session. I think that Carolyn Leckie has been detained. I note that she has been unable to be present for the meeting.

16:14

Meeting continued in private until 16:50.

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