# JUSTICE 2 COMMITTEE

Tuesday 24 October 2006

Session 2

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## JUSTICE 2 COMMITTEE
**26th Meeting 2006, Session 2**

**CONVENER**

*Mr David Davidson (North East 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 ALSO ATTENDED:**

Bill Aitken (Glasgow) (Con)
Hugh Henry (Deputy Minister for Justice)

**THE FOLLOWING GAVE EVIDENCE:**

Brian Cole (Scottish Executive Justice Department)
Charles Garland (Scottish Executive Legal and Parliamentary Services)
Rachel Gwyon (Scottish Prison Service)
Paul Johnston (Scottish Executive Legal and Parliamentary Services)
Gery McLaughlin (Scottish Executive Justice Department)
Jane Richardson (Scottish Executive Justice Department)

**CLERKS TO THE COMMITTEE**

Tracey Hawe
Alison Walker

**SENIOR ASSISTANT CLERK**

Anne Peat

**ASSISTANT CLERK**

Steven Tallach

**LOCATION**

Committee Room 2

# Scottish Parliament

## Justice 2 Committee

*Tuesday 24 October 2006*

[THE CONVENER *opened the meeting at 13:35*]

## Item in Private

**The Convener (Mr David Davidson):** Good afternoon, ladies and gentlemen, and welcome to the 26th meeting of the Justice 2 Committee in 2006, in the second session of the Scottish Parliament. I ask everyone present who has electronic devices—mobile phones, pagers, BlackBerrys and the like—to switch them off, please.

We have received apologies from the deputy convener, Bill Butler, so I welcome Cathie Craigie as his substitute. I also welcome Bill Aitken. I understand that committee member Jackie Baillie may have to leave on other business, but we hope that she will be able to return at the earliest opportunity.

For item 1 on our agenda, I ask committee members to agree that item 4—which is consideration of a list of candidates for the post of adviser on a piece of legislation—be taken in private.

**Members** *indicated agreement*.

# Legal Profession and Legal Aid (Scotland) Bill: Stage 2

13:36

**The Convener:** Item 2 is the third day of stage 2 of the Legal Profession and Legal Aid (Scotland) Bill. We will consider amendments to the bill from section 34 onwards, and will go no further than section 43.

I welcome Hugh Henry—the Deputy Minister for Justice—and his officials. Members should have the following documents in front of them: the bill as introduced; the marshalled list of amendments; and the groupings of amendments.

### Section 35—Conduct complaints: duty of relevant professional organisations to investigate etc

**The Convener:** Amendment 301, in the name of the minister, is grouped with amendments 302 to 306, 346 to 348, 352 and 353.

**The Deputy Minister for Justice (Hugh Henry):** I apologise at the outset and say that there is a technical problem with the numbering of the various new sections after section 35. As a result, amendment 301 would be defective if accepted at stage 2 and would have to be corrected at stage 3. I therefore do not intend to move amendment 301 at this stage. It is a technical amendment anyway, and we will return to it at stage 3.

The rest of the amendments in the group have three main purposes. First, they will empower—

**The Convener:** You have not moved amendment 301, so we have now to proceed to the question on section 35. At the appropriate point, we will come back to what you were about to say.

*Amendment 301 not moved.*

*Section 35 agreed to.*

**The Convener:** I thank the minister for his clarifying comments of a moment ago.

### After section 35

**The Convener:** Amendment 264, in the name of the minister, has been debated previously.

*Amendment 264 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 302, in the name of the minister, is grouped with amendments 303 to 306, 346 to 348, 352 and 353.

**Hugh Henry:** The amendments in the group have three main purposes. First, they seek to

empower professional organisations to obtain the documents and information that they need to investigate conduct complaints, or to review their decisions about such complaints. The proposed provisions mirror the powers that sections 13 and 13B will give to the Scottish legal complaints commission. Secondly, they will enable the professional organisations to freeze bank accounts when they have reasonable cause to believe that a practitioner has been guilty of financial impropriety. Thirdly, they will allow the professional organisations to recover expenses that they have incurred in obtaining court orders for the production of documents and explanations, and for freezing bank accounts. Under section 13A of the bill, the proposed commission already has that power.

Amendment 302 seeks to give powers to the professional bodies to examine documents and to demand explanations from a practitioner when they are satisfied that that is necessary for a conduct complaint to be investigated effectively, or for their decision on such a complaint to be reviewed. The professional bodies must give to the practitioner notice that requires them either to produce or deliver documents that are relevant to the complaint, or to explain matters to which the complaint relates. Those bodies may also give to complainers notice that requires them to produce or deliver documents in their possession or control, or to explain matters to which the complaint relates.

In addition, amendment 302 seeks to introduce a schedule that will set out the further powers of relevant professional organisations for which amendment 306 provides. That schedule will allow professional bodies to obtain documents by court order when a practitioner or a complainer has refused, or has failed, to produce or deliver them. When such an order has been granted and the professional organisation takes possession of the documents, it must serve a notice in which it gives relevant particulars and the date on which it took possession of the documents. The practitioner or complainer may apply to the court for an order for the documents to be returned.

Amendment 303 will enable a professional body to apply to the court for an order to freeze bank accounts that are held in the name of a particular practitioner or firm when it has reasonable cause to suspect financial impropriety. If the order is granted, the leave of the court will be needed for any payment to be made from such a bank account. The amendment will thus extend to all the relevant professional bodies a power that the Law Society of Scotland has under section 38 of the Solicitors (Scotland) Act 1980.

Amendment 304 seeks to permit the professional bodies to recover from practitioners any expenditure that they might reasonably incur in obtaining court orders for the production of documents or explanations, and to freeze bank accounts.

In circumstances in which a third party refuses or fails to produce documents or information following a request for it to do so, amendment 305 will allow a professional body to apply for a court order. An order is to be granted only when the court considers that the material is relevant to the investigation or report concerned, and that disclosure would be in the public interest. Legal professional privilege would continue to apply, so a third-party lawyer would not be forced to disclose confidential communications with a client unless the client consented.

Amendments 346 to 348, 352 and 353 seek to insert further amendments to the Solicitors (Scotland) Act 1980 into schedule 4 to the bill. Amendment 346 will repeal section 38 of the 1980 act as it relates to any element of dishonesty in relation to devolved advice, services or activities. It is intended that the repeal of section 38 will be completed by legislation in the United Kingdom Parliament that will repeal section 38 as it relates to the reserved matters that are referred to in section 47(2) of the bill. Section 38 will be replaced by the provisions in amendments 302 and 303.

Amendments 347 and 348 seek to amend sections 45 and 46 respectively of the Solicitors (Scotland) Act 1980 and are consequential on the repeal of section 38 of that act. They will simply replace references to provisions in that section with the full detail of those provisions. In that way, the repeal of section 38 of the 1980 act will not result in any change in the content of sections 45 or 46 of that act.

Amendment 352, which is also consequential, will extend the requirement for the Law Society's council to serve notice of its intention to recover expenses from a solicitor or an incorporated practice to circumstances in which it has taken action under sections 45 and 46 of the 1980 act.

Amendment 353 is a consequential and technical amendment that will ensure that the provisions of part II of schedule 3 to the 1980 act will continue to apply to circumstances in which action is taken under sections 45 and 46 of the 1980 act.

I move amendment 302.

*Amendment 302 agreed to.*

*Amendments 303 to 305 moved—[Hugh Henry]—and agreed to.*

13:45

**The Convener:** Amendment 221, in the name of Colin Fox, was debated with amendment 66. I ask Colin Fox whether he wishes to move that amendment.

**Colin Fox (Lothians) (SSP):** I am afraid that I am at a loss, convener. I do not have the amendment in front of me and I was not aware that it was coming up.

**The Convener:** The solution to the quandary is as follows: the amendment was debated in your absence. Of course, it was not moved when it was debated as part of a group of amendments. We must now make a decision on how to dispose of it.

**Colin Fox:** In that case, I move amendment 221.

**The Convener:** The question is, that amendment 221 be agreed to. Are we all agreed?

**Members:** No.

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

**FOR**

Fox, Colin (Lothians) (SSP)

**AGAINST**

Baillie, Jackie (Dumbarton) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Davidson, Mr David (North East Scotland) (Con)
Macmillan, Maureen (Highlands and Islands) (Lab)
Maxwell, Mr Stewart (West of Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

**The Convener:** The result of the division is: For 1, Against 6, Abstentions 0.

*Amendment 221 disagreed to.*

### After schedule 3

*Amendment 306 moved—[Hugh Henry]—and agreed to.*

### Section 36—Unsatisfactory professional conduct: solicitors, firms of solicitor, incorporated practices or certain limited liability partnerships

*Amendments 128 to 133 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 307, in the name of the minister, is grouped with amendments 308 to 312, 316, 325 to 327, 331, 332, 334 to 337, 340, 349 and 351.

**Hugh Henry:** The amendments concern payment of fines or compensation. Amendments 307, 308 and 312 will adjust the position in cases in which the council of the Law Society of Scotland upholds a complaint of unsatisfactory professional conduct and considers directing the practitioner to pay a fine of up to £2,000.

Amendments 307 and 312 seek to avoid inappropriate double jeopardy for the practitioner. They require the council not to impose a fine where, in relation to the subject matter of the complaint, the solicitor has been convicted by any court of an act involving dishonesty and has been given a substantial term of imprisonment of not less than two years. Amendments 308 and 312 will require the fine to be payable to the Treasury, instead of to the council, as was originally provided for by the bill. That will bring the provision on fines into line with similar provisions in the Solicitors (Scotland) Act 1980.

Amendments 309, 310, 311 and 316 will modify the power of the council of the Law Society to direct a practitioner to pay compensation of up to £5,000 when upholding a complaint of unsatisfactory professional conduct. They will bring the power into line with other compensation provisions in the bill. Amendments 309 and 310 will permit the council to award compensation only if it considers that the complainer has been directly affected by the conduct. They will replace the original reference to the "client" with a wider reference to a "directly affected" complainer, which will allow for third-party complaints. Amendment 316 will remove the definition of "client" from proposed new section 42ZA of the 1980 act as it will no longer be required. Amendment 311 explains that compensation is to be made available to the complainer

"for loss, inconvenience or distress resulting from"

the unsatisfactory professional conduct.

Amendments 325 to 327 will adjust section 38, which would currently enable the Scottish Solicitors Discipline Tribunal to direct a solicitor or conveyancing or executry practitioner who was found guilty of professional misconduct to pay compensation of up to £5,000 to any person whom the tribunal considered to have suffered "loss, inconvenience or distress" as a direct result of the professional misconduct. Amendments 325, 326 and 327 will permit the tribunal to award compensation only where it considers that

"the complainer has been directly affected by the misconduct"

of a solicitor. They provide for compensation to be paid to the complainer

"for loss, inconvenience or distress resulting from the misconduct".

The wording of the paragraph that is to be inserted into section 53 of the Solicitors (Scotland) Act 1980 will thus be brought into line with that of similar provisions in the bill that relate to the award of compensation. Amendment 331 will apply to that paragraph the definition of "complainer" in section 42ZA to be inserted into the 1980 act, which is:

"the person who made the complaint and, where the complaint was made by the person on behalf of another person, includes that other person."

Amendment 332 will insert new provisions into section 55 of the Solicitors (Scotland) Act 1980 that set out the powers of the court in a case of professional misconduct by a solicitor. Where the court considers that the complainer has been directly affected by the misconduct, the amendment will empower the court to direct the solicitor to pay compensation to the complainer of up to £5,000 for consequent "loss, inconvenience or distress". The amendment will also provide a power for Scottish ministers to revise the maximum level of compensation by affirmative order after consulting the council and such groups of persons who represent consumer interests as ministers consider appropriate.

Amendment 351 is technical and will provide that the new power to award compensation applies only in relation to devolved advice, services and activities. It is intended that UK legislation will apply that power in relation to reserved advice, services and activities.

Amendment 334 will add to the steps that the council of the Law Society of Scotland may take when it is satisfied that a conveyancing or executry practitioner has been guilty of professional misconduct or where such a practitioner has been convicted of a criminal offence. The additional steps are, first, to direct the practitioner to pay the complainer compensation of up to £5,000 for loss, inconvenience or distress resulting from the misconduct or the offence where the council considers that the complainer has been directly affected by either, and secondly, to impose a fine of up to £2,000 on the practitioner.

To avoid inappropriate double jeopardy, amendment 334 will prevent the council from imposing a fine where, in relation to the subject matter of the complaint, the conveyancing or executry practitioner has been convicted by any court of an act involving dishonesty and has been sentenced to a term of imprisonment of not less than two years. Like amendments 308 and 312, amendment 334 will provide for the fine to be payable to, and recoverable by, the Treasury.

Amendment 340 is a consequential amendment that will extend the powers of Scottish ministers in section 38(2)(b) of the bill to revise the maximum compensation level to include the new compensation power that will be given to the council by amendment 334.

Amendments 335, 336 and 337 will permit the tribunal to award compensation only where it considers that the complainer has been directly affected by the misconduct, and will provide for compensation to be paid to the complainer for consequent "loss, inconvenience or distress". The wording of the paragraph that will be inserted into section 20 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 will thus be brought into line with that of similar provisions in the bill on the awarding of compensation.

Amendment 349 will restrict the powers of the tribunal as provided for in section 53 of the 1980 act to impose a fine of up to £10,000 on a solicitor or incorporated practice. The purpose of the restriction is to avoid double jeopardy. Its effect will be that the tribunal may not impose such a fine where the solicitor, in relation to the subject matter of the tribunal's inquiry, has been convicted by any court of an act involving dishonesty and sentenced to a term of imprisonment of not less than two years. In addition, the tribunal may not impose such a fine when it is proceeding on the ground that a solicitor has been convicted by any court of an act involving dishonesty, and has been sentenced to a term of imprisonment of not less than two years. Again, the amendment will apply only in relation to devolved advice, services and activities; UK legislation will extend that application.

I move amendment 307.

**Bill Aitken (Glasgow) (Con):** Amendments 312, 334 and 349, which deal with double jeopardy, are the principal amendments in the group. To be fair, in lodging them, the minister has sought a solution to a problem that frequently arises in the criminal courts. An individual who has been sentenced to a lengthy period of imprisonment may come before a court on another matter that dates from earlier than the matter that resulted in his conviction and which would normally result in a monetary penalty. In such cases, the court would not impose a monetary penalty because it would recognise that the accused would have no earnings as a result of their being in prison. The amendments should be supported.

**The Convener:** As no other members wish to comment, I ask the minister whether he wishes to wind up.

**Hugh Henry:** I have nothing to add.

*Amendment 307 agreed to.*

*Amendments 134, 308, 309, 135, 310, 311, 136 and 312 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 313, in the name of the minister, is in a group on its own.

**Hugh Henry:** Section 36 of the bill seeks to insert proposed new section 42ZA into the Solicitors (Scotland) Act 1980 to give the council of the Law Society of Scotland powers in relation to unsatisfactory professional conduct. Amendment 313 will adjust those provisions. Where the practitioner who is the subject of a

complaint is employed by another practitioner, subsection (6) of proposed new section 42ZA would require the council to make directions that apply to both the employee practitioner and the employer practitioner. The directions in question cover such matters as the payment of compensation to the complainer. We want to delete that provision because it would be inequitable for an employing practitioner to be held responsible for unsatisfactory professional conduct on the part of an employee practitioner.

The position that we propose on conduct complaints is thus different from the position that the committee agreed on service complaints. Where the commission upholds a service complaint, it may make a direction to pay compensation to both the employing and employee practitioners, for the reasons that were given when the committee considered amendment 53. However, I argue that the considerations in this case are different, because unsatisfactory professional conduct is very much a question of individual behaviour, whereas the provision of inadequate professional services could, for example, be due to management failings on the part of a firm.

I move amendment 313.

*Amendment 313 agreed to.*

*Amendments 137 and 138 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 314, in the name of the minister, is grouped with amendments 315, 317 to 322 and 350.

**Hugh Henry:** The bill already provides powers for the council of the Law Society of Scotland in relation to unsatisfactory professional conduct on the part of a solicitor. The group of amendments provides for appeals against findings of unsatisfactory professional conduct by the council and gives the Scottish Solicitors Discipline Tribunal and the court appropriate powers to deal with such appeals.

Amendment 314 is a minor technical amendment that will ensure consistency of language.

Section 36 of the bill already provides a right of appeal for the solicitor to the tribunal against a finding by the council of unsatisfactory professional conduct. Amendment 315 will create rights for the complainer to appeal to the tribunal where the council determines not to uphold a complaint about unsatisfactory professional conduct, or decides not to direct a solicitor to pay compensation. The complainer may also appeal to the tribunal against the amount of compensation that has been awarded by the council.

Section 36 of the bill also enables the council to require a solicitor to explain the steps that he or she has taken to comply with a direction to undertake education or training as regards the law or legal practice, or to pay a fine of up to £2,000, or to pay the complainer compensation of up to £5,000. The bill already provides for notice in writing from the council for those purposes to cease to have effect pending the outcome of an appeal by the solicitor. Amendment 317 provides for such a notice to cease to have effect, pending the outcome of an appeal by the solicitor or complainer to the tribunal or the court.

The Scottish Solicitors Discipline Tribunal will be given powers in relation to appeals—amendment 318 seeks to insert new sections in the Solicitors (Scotland) Act 1980 that will give the tribunal powers in relation to appeals that are made to it by solicitors or complainers against council determinations or directions. Proposed new section 53ZA of the 1980 act will give the tribunal powers where a solicitor appeals a council determination upholding a conduct complaint or a consequent direction requiring remedial education or training or the payment of a fine or compensation.

14:00

The new powers are for the tribunal to quash or confirm a determination that is being appealed against, including a power to quash any related censure; to quash, confirm or vary a direction being appealed against; to fine the solicitor; or, where the tribunal considers the complainer to have been directly affected by the conduct, to direct the solicitor to pay compensation of up to £5,000 in respect of resulting loss, inconvenience or distress.

Where a complainer appeals a council determination not to uphold a conduct complaint, the tribunal will be able to quash the council determination and uphold the complaint; direct the solicitor to pay compensation of up to £5,000 to a complainer who has been directly affected by the conduct; or confirm the determination.

Where a complainer appeals against a decision by the council to uphold a conduct complaint but not to award compensation, the tribunal will be able to direct the solicitor to pay compensation of up to £5,000 for loss, inconvenience or distress when it considers that the complainer has been directly affected by the conduct.

Where a complainer appeals to the tribunal against the amount of compensation that the council has directed a solicitor to pay, the tribunal may quash, confirm or vary the direction that is being appealed against.

To avoid inappropriate double jeopardy, the tribunal will not be able to fine a solicitor who, in

relation to the subject matter of the complaint, has been convicted of an act involving dishonesty and has been given a substantial term of imprisonment of not less than two years.

Any fine that is imposed by the tribunal is to be payable to and recoverable by the Treasury.

Where a solicitor fails to comply with a direction from the council of the Law Society, proposed new section 53ZB of the 1980 act will provide for the direction, as confirmed or varied on appeal by the tribunal or court, to be enforced in like manner as an extract decree arbitral in favour of the council bearing a warrant for execution that is issued by a sheriff court.

Amendments 319 to 322 will provide rights of appeal to the court against tribunal decisions and give the court the necessary powers in respect of such appeals.

Amendment 319 will insert into the 1980 act proposed new section 54A, which provides a right of appeal to the court for a solicitor or complainer in respect of decisions that are made by the tribunal.

A solicitor is provided with a right to appeal to the court against the following decisions by the tribunal: to confirm a council determination upholding a conduct complaint and the censure that accompanied it; to quash, confirm or vary a council direction; to fine a solicitor; or to direct the solicitor to pay compensation of up to £5,000.

A complainer is given the right to appeal to the court against certain decisions that are taken by the tribunal on appeal. The tribunal decisions in question are decisions to quash the council's determination upholding a conduct complaint; to quash or vary a direction by the council that the solicitor pay compensation; to direct a solicitor to pay compensation of up to £5,000 or not to award any compensation; to confirm the council's decision not to uphold the complaint; to confirm the council's decision not to direct the solicitor to pay compensation; or to quash the council's direction that the solicitor pay compensation or vary the amount of compensation awarded.

Having heard an appeal by the solicitor or complainer, the court will be able to give such directions in the matter as it thinks fit and its decision will be final.

Amendment 320 will provide the court with the following powers in respect of unsatisfactory professional conduct: to fine the solicitor; where the court considers the complainer to have been directly affected by the conduct; to direct the solicitor to pay compensation of up to £5,000 for loss, inconvenience or distress resulting from the conduct; and to find the solicitor liable in any expenses that may be involved in the proceedings that are before the court. The decision of the court will be final.

Amendments 321 and 322 will delete from the bill sections 36(4) and 36(5), which would have empowered Scottish ministers to make regulations to modify any enactment for the purpose of giving the council, the tribunal or the court further powers in respect of conduct complaints. Sections 36(4) and 36(5) were marker provisions on introduction and are no longer required because the aforementioned amendments, if agreed, will complete the powers that the council, tribunal and court will require in respect of conduct complaints.

Amendment 350 will amend the 1980 act to clarify the rights of appeal that are available to a solicitor, firm of solicitors or incorporated practice against a decision of the tribunal to quash, vary or confirm a decision by the council to suspend, withdraw or restrict an investment business certificate.

Both the council and the solicitor, the firm of solicitors or incorporated practice are to have a right of appeal to the court against the decision that is taken by the tribunal. The court may give such directions in the matter as it thinks fit, and its decision will be final.

I move amendment 314.

**Jackie Baillie (Dumbarton) (Lab):** I am not sure whether I picked you up correctly, minister—although I listened avidly to what you said. I think that, when you referred to the tribunal or court being able to award up to £5,000 as compensation for unsatisfactory professional conduct, I heard you say that it would take into account any fees and outlays. I am keen to hear you confirm that because I previously moved amendments that would ensure that that happened, but with a slightly different set of issues.

**Hugh Henry:** The context to which Jackie Baillie refers is slightly different and we have not mentioned it in the amendments. The fees and outlays relate to defective service, which is a different issue. I am just going back over what I said.

**Jackie Baillie:** I am happy to study the *Official Report* and then get back to the minister.

**Hugh Henry:** If anything that I have said requires clarification, I will give it, but I do not think that it does.

**The Convener:** It would be helpful if we had clarification, because we will have to vote on the amendments. If you wish to take a minute to discuss the matter with your officials, feel free to do so.

**Jackie Baillie:** I can reflect on the *Official Report*, convener. That would be more than adequate for my purpose.

**Hugh Henry:** I am struggling to find the form of words with which Jackie Baillie is concerned. I do not think that they were said. In any case, the context is slightly different.

**The Convener:** Ms Baillie seems to be satisfied, minister.

*Amendment 314 agreed to.*

*Amendments 315, 316, 139, 317 to 320, 140, 141, 321 and 322 moved—[Hugh Henry]—and agreed to.*

*Section 36, as amended, agreed to.*

### Section 37—Unsatisfactory professional conduct: conveyancing or executry practitioners etc

**The Convener:** Amendment 323, in the name of the minister, is grouped with amendments 344 and 345.

**Hugh Henry:** The amendments introduce the concept of unsatisfactory professional conduct on the part of conveyancing and executry practitioners and set out in detail the applicable procedures, which are broadly similar to those that are proposed for solicitors.

Amendment 323 will make the necessary changes by inserting new provisions into the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Amendments 344 and 345 are minor consequential amendments.

Section 37 of the bill provides the Scottish ministers with a power to make regulations in respect of unsatisfactory professional conduct by conveyancing and executry practitioners. Amendment 323 will delete that section, because it also inserts the required provisions into the 1990 act.

Amendment 323 will provide the council of the Law Society of Scotland with powers in relation to unsatisfactory professional conduct by conveyancing or executry practitioners. Amendments 344 and 345 will amend schedule 4 to the bill to add to the list of functions that the council of the Law Society may not delegate to an individual by virtue of section 3A(5) of the Solicitors (Scotland) Act 1980. The functions in question are the council's determination of a complaint that suggests unsatisfactory professional conduct by a conveyancing or executry practitioner, and its determination of what steps to take when upholding a conduct complaint against a conveyancing or executry practitioner.

I move amendment 323.

*Amendment 323 agreed to.*

*Section 37, as amended, agreed to.*

### After section 37

**The Convener:** Amendment 324, in the name of the minister, is in a group on its own.

**Hugh Henry:** Amendment 324 follows amendment 52, which the committee passed on 26 September. Amendment 52 empowers the legal complaints commission, when upholding a service complaint, to make a report to the relevant professional organisation, if it considers that the practitioner concerned might lack competence in a certain area of law or legal practice. It was agreed that decisions on whether remedial education or training are required should rest with the professional bodies that are responsible for legal education and training.

The purpose of amendment 324 is to give the council of the Law Society of Scotland the power, on receipt of such a report, to direct the solicitor to undertake such education or training as regards the law or legal practice as it considers appropriate. The scope of the council's power of direction is narrower in respect of conveyancing or executry practitioners. As regards conveyancing law or legal practice or, as the case may be, executry law or legal practice, it relates only to education or training.

The procedural provisions that are to be inserted in the Solicitors (Scotland) Act 1980 and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 are, in essence, the same for solicitors and conveyancing or executry practitioners. The council of the Law Society must intimate a direction to a solicitor or practitioner by notice in writing, and is to require the solicitor or practitioner to give an explanation within 21 days of the steps that should be taken to comply with that direction. The notice is to cease to have effect pending the outcome of any appeal against the direction.

Solicitors or practitioners are to have a right of appeal to the Scottish Solicitors Discipline Tribunal against such a direction within 21 days. The tribunal may quash, confirm or vary the direction, and the solicitor or practitioner will be able to appeal to the court against the tribunal's decision. The court will be able to give such directions on the matter as it thinks fit, and its decision will be final.

I move amendment 324.

*Amendment 324 agreed to.*

**Section 38—Power of Tribunal to award compensation for professional misconduct**

**The Convener:** Amendment 293, in the name of Bill Aitken, is grouped with amendments 287 and 294 to 296. I ask Mr Aitken to speak to the group of amendments and to move amendment 293.

**Bill Aitken:** It is not my intention to move amendment 293 or any of the other amendments in the group.

*Amendment 293 not moved.*

*Amendment 325 moved—[Hugh Henry]—and agreed to.*

*Amendment 287 not moved.*

*Amendments 326 and 327 moved—[Hugh Henry]—and agreed to.*

*Amendments 294 to 296 not moved.*

14:15

**The Convener:** Amendment 328, in the name of the minister, is grouped with amendments 329, 330 and 355.

**Hugh Henry:** The amendments in this group are minor technical amendments. Section 38 of the bill will insert proposed new subsections (7A) and (7B) into section 53 of the Solicitors (Scotland) Act 1980. In fact, there is already a subsection (7A). The new subsections need to be renumbered as (7B) and (7C), and references to them need to be adjusted accordingly.

I move amendment 328.

*Amendment 328 agreed to.*

*Amendments 329, 330, 355, 331 and 332 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 333, in the name of the minister, is grouped with amendment 354.

**Hugh Henry:** Amendment 333 will amend a reference in section 38 to the section title of section 20 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Section 20 of that act currently covers service complaints against conveyancing and executry practitioners, which is reflected in the section title. Section 20 of the 1990 act will, however, be confined to conduct matters by the bill, so the section title will be amended to reflect that. The reference in section 38 of the bill to "inadequate professional services" in the title of section 20 of the 1990 act should therefore be removed.

We originally thought that it would be necessary to preserve provisions in the 1990 act about service complaints against conveyancing and executry practitioners, in so far as they applied to reserved matters. Lines 13 to 24 of page 46 of the bill, in schedule 4 will, accordingly, restrict those provisions to those matters. We had been intending complete repeal to follow either in UK primary legislation or by means of an order under section 104 of the Scotland Act 1998. However, we have now established that those practitioners do not provide any reserved services, so amendment 354 will remove the provisions concerned from schedule 4. An amendment that will be lodged in time for the committee's next stage 2 meeting will repeal the definition of "inadequate professional services" in the 1990 Act.

I move amendment 333.

*Amendment 333 agreed to.*

*Amendments 334 to 337 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 338, in the name of the minister, is grouped with amendments 339, 341, 356 and 342.

**Hugh Henry:** Amendment 342 will deliver the Executive's policy of introducing appeal rights for complainers in professional misconduct cases to the extent that they could be affected by decisions relating to compensation. It will introduce a right of appeal from decisions of the Scottish Solicitors Discipline Tribunal to the Court of Session in such cases. It also clarifies the existing appeal rights that are set out in the Solicitors (Scotland) Act 1980.

At the moment, section 54(1) of the 1980 act provides that "any person aggrieved" may appeal to the court against a decision of the tribunal that relates to discipline. However, that has been interpreted in practice as meaning the practitioner and the council of the Law Society, whose fiscal had prosecuted the case before the tribunal. It has not been interpreted as including the original complainer. The intention is to repeal the vague wording in section 54(1) of the 1980 act, although that cannot be done in the bill because of the application of the provision to reserved as well as devolved legal services. Repeal will ultimately be achieved either through legislation from the UK Parliament or by an order under section 104 of the Scotland Act 1998.

In the meantime, subsection (1)(c) of the proposed new section that will be inserted by amendment 342 will restrict section 54(1) of the 1980 act to cases relating to reserved legal services and activities. For all professional misconduct cases relating to devolved services and activities, subsection (1) of the proposed new section sets out clearly and specifically the rights of the different parties involved to appeal from decisions of the tribunal to the court. Like the practitioner, the council of the Law Society is able to appeal, although not against any award of compensation to the complainer.

If the practitioner believes that compensation should not have been awarded or is too high, the onus should be on him or her to appeal that decision, rather than the society perhaps being seen as protecting its own on consumer-redress issues. The complainer may appeal against a decision not to award compensation or to award an amount of compensation that the complainer regards as insufficient.

Subsection (1) of the proposed new section that amendment 342 will insert also provides for appeals against a finding that an incorporated practice has failed to comply with provisions under the 1980 act. Subsection (2) makes corresponding provision in relation to professional misconduct appeals involving conveyancing and executry practitioners. It also makes such provision in relation to findings that a person is no longer fit and proper to offer conveyancing and executry services, which is a peculiarity of the 1990 act.

Amendments 338, 339, 341 and 356 are minor technical amendments that are consequential on amendment 342's insertion of new subsections (11B) to (11E) into section 20 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

I move amendment 338.

*Amendment 338 agreed to.*

*Amendments 339 to 341 and 356 moved—[Hugh Henry]—and agreed to.*

*Section 38, as amended, agreed to.*

**After section 38**

*Amendment 342 moved—[Hugh Henry]—and agreed to.*

**Section 39—Constitution of Scottish Solicitors' Discipline Tribunal**

**The Convener:** Amendment 297, in the name of Bill Aitken, is in a group on its own.

**Bill Aitken:** Amendment 297 would enable the Scottish Solicitors Discipline Tribunal to appoint a committee to discharge its functions subject to a specified exception. As things stand, the SSDT can deal with prosecutions only when they are heard in a plenary session, which can be ponderous and unmanageable. In particular, it seems to be a waste of time in cases of low-level professional misconduct that have resulted in no great loss or inconvenience to the complainer. It would be far more efficient to discharge that duty by means of a committee.

In amendment 297, I seek to underline the fact that a solicitor could not be struck off the roll by a committee, but that such a case would have to go before the whole plenary session. However, it is a waste of time and unmanageable for fairly minor matters in which the penalty would be restricted to a suspension, a fine or even censure to be dealt with in a full plenary session.

I move amendment 297.

**Hugh Henry:** I have a number of concerns about amendment 297. Bill Aitken makes the case that it would assist the efficient discharge of tribunal business if the tribunal did not have to sit in plenary session to hear every prosecution that relates to professional misconduct. The amendment suggests that the tribunal should instead be required to hold plenary hearings only in relation to excepted functions, which are defined as the making of an order to strike a solicitor's name off the roll or to revoke an investment business certificate. However, we must bear it in mind that professional misconduct at any level must fall within the case-law definition of conduct that any competent and reputable solicitor would regard as serious and reprehensible: I therefore have difficulty in accepting the concept of what Bill Aitken euphemistically calls "low-level professional misconduct".

Amendment 297 suggests functions that a committee of the tribunal should not be able to deal with. That suggestion has some logic, because striking off a solicitor or revoking an investment business certificate are severe sanctions that directly affect solicitors' livelihoods, but the exceptions are tightly drawn so that a tribunal committee would be able to exercise other significant disciplinary sanctions. Those could include imposing a fine of up to £10,000, restricting a solicitor's practising certificate or suspending or censuring a solicitor.

I am concerned that amendment 297 does not specify a quorum for a committee, which could mean that a committee that dealt with such matters—which are significant—would need to have only one lawyer and one non-lawyer member for it to be properly constituted. I do not believe that the current statutory requirement that a plenary session of the tribunal must involve a minimum of four members is by any means onerous.

It may be that the purpose of the amendment is to save on the tribunal's running costs, but I doubt whether the delegation of tribunal business to committees would be particularly effective if that were the purpose. [*Interruption.*]

**The Convener:** I ask you to pause at that point, minister.

I suspend the meeting until we get clarification from the security staff that it is safe to proceed. I ask all the people who are in the room to remain seated. If there is an emergency and we are required to evacuate, you must follow instructions from the security staff.

14:26

*Meeting suspended.*

14:36

*On resuming—*

**The Convener:** I call the meeting back to order. We have received a report that some people were evacuated as a routine safety measure. The fire doors must be checked because they close automatically—that happened in one section of the building; the doors have been reopened but are being checked to confirm that they are in operational order. The fire brigade has suggested that we can continue, but I will keep everybody informed should the situation change.

I take us back to where we were in our discussions. Mr Aitken had spoken to and moved amendment 297 and the minister had started to respond to his points. I ask the minister to continue.

**Hugh Henry:** I will take up the debate at the point at which I left off, which is whether amendment 297 would bring about any saving in the annual running costs of the Scottish Solicitors Discipline Tribunal. I doubt whether delegation of tribunal business to committees would be particularly effective, if that is the amendment's purpose.

Prosecutions for professional misconduct deserve to be heard by the tribunal in plenary session, and it is not clear how well delegation would work in practice. How would the tribunal be able to anticipate whether the hearing of a complaint might lead to a solicitor being struck off the roll before it hears the evidence? It would be necessary to devise a procedure for determining in advance whether a complaint should be heard by the full tribunal or a committee. That procedure would have to include a mechanism for moving cases from committee to tribunal or vice versa. For example, if a committee were to hear a complaint that it concluded was sufficiently serious to merit striking off, the complaint would have to go to the full tribunal. There is a risk that delegation to a committee could prove difficult to operate in practice.

Notwithstanding our disagreement in principle, another issue is that the amendment is defective, as it relates only to solicitors and does not cover conveyancing and executry practitioners.

For those reasons, I hope that Bill Aitken will not press the amendment; if he does, I hope that the committee will reject it.

**Bill Aitken:** The minister's political pedigree is not dissimilar to mine, in that he came to the Parliament after a long and—dare I say it—distinguished career in local government. He is well aware that, in local government, the procedure for dealing with someone who had been dismissed or disciplined by a department would be that they would have the right to appeal and that the appeal would be heard by a sub-committee of the personnel committee—or whatever the council called it—which would, of course, be comprised of only a fraction of the members of the local authority. What I am seeking in the amendment—namely, that a sub-committee be appointed—is no different from that.

It would be fairly obvious from a complaint submitted to the prosecutor whether there was any prospect of striking a solicitor off the roll. If the degree of misconduct or loss that was referred to in the complaint was minor, there would be no question of striking off. Such apparently mundane complaints would be referred to a committee to deal with in a satisfactory manner.

I do not accept the minister's arguments and I will press amendment 297.

**The Convener:** The question is, that amendment 297 be agreed to. Are we agreed?

**Members:** No.

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

**FOR**

Davidson, Mr David (North East Scotland) (Con)

**AGAINST**

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

**The Convener:** The result of the division is: For 1, Against 6, Abstentions 0.

*Amendment 297 disagreed to.*

*Section 39 agreed to.*

*Section 40 agreed to.*

**Section 41—Safeguarding interests of clients**

**The Convener:** Amendment 357, in the name of Bill Aitken, is in a group on its own.

**Bill Aitken:** Amendment 357 is a probing amendment. I seek clarification from the minister that the existing legislation covers the issue raised in amendment 357—in other words, the effect of an order of the tribunal is covered in the primary legislation.

I move amendment 357.

**Hugh Henry:** On the face of it, Bill Aitken's proposals are sensible, but the problem is that amendment 357, if agreed to, would have unintended consequences. It makes sense to seek

to make section 45(1) of the Solicitors (Scotland) Act 1980 comprehensive in respect of the various circumstances that that section covers. However, the problem is that, if agreed to, the amendment would distort the policy underpinning certain provisions in section 45.

Amendment 357 would mean that section 45(1) of the 1980 act would apply the safeguarding provisions in that section in three circumstances, namely a solicitor whose name is struck off the roll, a solicitor who is suspended from practice, or a solicitor who is

"restricted by an order of the Tribunal under section 53(5) from acting as a principal".

Section 45(2)—[*Interruption.*]

**The Convener:** It is not often that security staff give the minister permission to do something. I ask the minister to proceed.

**Hugh Henry:** I did not quite hear that announcement, convener. Perhaps you should have a word with them about the volume.

Section 45(2) of the 1980 act requires solicitors who have been struck off or suspended to satisfy the council of the Law Society of Scotland that they have made suitable arrangements to safeguard their clients' interests. Section 45(3) sets out what is to happen if they fail to satisfy the council. Section 45(4) applies to solicitors who are sole traders. When they are suspended or struck off, the client account is to vest in the Law Society.

Proposed new section 45(4A) of the 1980 act, to be inserted by section 41 of the bill, introduces a new category—that of solicitors who are sole traders when they are restricted by the tribunal from acting as principals. Where they are so restricted, the client account is to vest in the Law Society.

The effect of amendment 357 would be that subsections (2) and (3) of section 45 of the 1980 act would apply to solicitors who were restricted from acting as principals regardless of whether or not they were sole traders, but there is no need for alternative arrangements to be made where the demoted solicitor is not a sole trader, as there will be other partners who can take over the relevant responsibilities. Restriction from practising as a principal is, after all, less serious than suspension or being struck off. I think that the amendment has an unintended consequence—it is certainly one that does not correspond to any policy intention of the Executive.

However, there is a case for reviewing section 45(1) of the 1980 act so that the application of the provisions in that section is clear. I propose that my officials should discuss the case for a stage 3 amendment with the Law Society.

For those reasons, and having given that undertaking, I hope that Bill Aitken will withdraw amendment 357.

**Bill Aitken:** Having heard the minister's remarks, I still think that there is a problem with the bill in its current form, but I concede that perhaps amendment 357 does not fully address that problem. Although I reserve my position at stage 3, I will not press the amendment now.

*Amendment 357, by agreement, withdrawn.*

*Amendment 142 moved—[Hugh Henry]—and agreed to.*

*Section 41, as amended, agreed to.*

*Sections 42 and 43 agreed to.*

**The Convener:** We will proceed no further with the bill today. I thank the minister for coming along and invite him to come back to face yet another round of stage 2 debate on the bill.

14:45

*Meeting suspended.*

14:52

*On resuming—*

# Custodial Sentences and Weapons (Scotland) Bill: Stage 1

**The Convener:** Item 3 is the Custodial Sentences and Weapons (Scotland) Bill. Members should have the bill and accompanying documents together with the two Scottish Parliament information centre briefings on the bill.

I welcome the Scottish Executive officials who have joined us. We allocated an hour for this agenda item—we will still have an hour, despite the fire alarm. Different officials are working on different elements of the bill. First, there will be a short presentation on the custodial sentences element, followed by questions. After that, the officials will swap over and we will follow the same format for the weapons element of the bill.

I welcome Jane Richardson, Rachel Gwyon, Annette Sharp, Brian Cole and Charles Garland, who I think are all from the Scottish Executive Justice Department. I invite Jane Richardson to give her presentation.

**Jane Richardson (Scottish Executive Justice Department):** As you can see, there are quite a few of us here. Given that the custodial sentences element of the bill is about the management of sentences from beginning to end, we thought that it would be helpful to the committee if we were all represented. Rachel Gwyon is from the Scottish Prison Service; Brian Cole is from the Justice Department's community justice services division; Annette Sharp and I deal with the parole aspects and general planning of the custodial sentences element of the bill; and Charles Garland is our legal adviser.

I will give a brief presentation to set the context, touching briefly on the background to where we are and giving an overview of the main measures in the bill. I will try to explain and put in context how the plans are intended to fit with the measures that are already in operation and working.

In early 2005, Scottish ministers gave a commitment to end the arrangements for the early release of offenders, which are set out in the Prisoners and Criminal Proceedings (Scotland) Act 1993. Ministers stated clearly that they wanted arrangements that allowed a structured management approach to sentences so that the risks presented by offenders, and offenders' needs, could be catered for more appropriately and more proportionately. Ministers also wanted the effects of sentences to be clearer so that the public, victims and offenders could understand them from when they were imposed.

Scottish ministers asked the Sentencing Commission for Scotland to examine early release and supervision of offenders as one of its early tasks, and it proceeded to do that. It consulted in June 2005 and produced its report in January 2006. The report set out a series of recommendations, but the underlying findings were that any new measures should contribute to promoting public confidence in the criminal justice system and provide clear statutory provisions that are easily understood by all. They should enable offenders to be punished proportionately, but they should also promote, as far as possible, the rehabilitation and resettlement of offenders. The commission also recommended that any new measures should improve public protection and, perhaps aspirationally, that they should deter would-be offenders.

Scottish ministers welcomed the report and said that they would consider those important core objectives when they planned the new measures. The plans were published on 20 June in the publication "Release and Post Custody Management of Offenders".

I will outline the key measures in the bill that are designed to manage the sentences of all offenders. It is important to stress that the measures are about sentence management. They will come into play when the judge has decided on the appropriate disposal—custody—and the length of the sentence. In other words, the measures will not change the courts' sentencing powers. The measures deal with life-sentence prisoners and those who are given a determinate custody sentence by the courts. The life-sentence measures in the 1993 act will not change, but for ease we are re-enacting all the measures in one bill.

The key feature of the provisions is that all offenders will be under some form of restriction for the entire period of the sentence. Sentences of 15 days or more will be subject to a combination of custody and community parts. The community part will be on licence and will often include supervision. One objective is to make sure that there is a clearer split between punishment and risk. The provisions allow the court to set what might be described as a punishment part, which is called a "custody part" in the bill. That will be a minimum of half the sentence but it can increase to three quarters. The bill explains the circumstances in which the court might find it appropriate to increase the custody part to three quarters of the sentence.

The effect of the sentence will be explained in court when the sentence is imposed. When the custody part is set, a risk test will be applied throughout the stages of the sentencing process. The risk test is explained in the bill as being concerned with the

"likelihood of offenders causing serious harm to members of the public".

During the custody part, the risk presented by the offender will be assessed using up-to-date sentence management information. There will be input from the relevant bodies that are responsible for managing the offender both while the offender is in custody and when they proceed to the community part of the sentence. Joint working is therefore a key feature of the proposals and there is explicit provision in the bill for joint working arrangements between Scottish ministers—in practice, the Scottish Prison Service—and local authorities. The idea is to enable risk assessment and risk management processes to be set up and to continue throughout the sentence.

15:00

The outcomes of the risk assessment while the offender is in custody will determine whether consideration should be given to keeping them in custody beyond the period imposed by the court on the ground of risk. The Parole Board for Scotland will still be the body responsible for finally deciding whether the individual poses an unacceptable risk. Offenders so assessed will be referred to the Parole Board so that it can take that decision. If the Parole Board concludes that the risk test has been met, it will direct Scottish ministers to keep the offender in custody for up to a maximum of three quarters of the total sentence. Depending on the length of the sentence, the bill allows for a continuous review process by the Parole Board in the event that the risk posed by the offender reduces during the work done with them while they are in custody. That will be considered by the board with a view to moving the individual to the community part of the sentence.

Once the offender has completed the custody part of the sentence, they will move to the community part and spend the rest of the sentence on licence in the community. Conditions will be attached to the licence that will be proportionate to the risk presented by the offender and the offender's needs. Again, the aim is to try to ensure better reintegration into the community, enhance public protection and reduce reoffending. The conditions will include mandatory supervision for a number of offenders, but that does not prevent supervision from being made available to any offender in appropriate circumstances. The offender will remain on licence for the duration of the sentence, but, with public protection in mind, will be subject to recall to custody for a serious breach of any of the licence conditions.

To help the committee to put the new provisions in context, Scottish ministers have said that they should not be viewed as standalone provisions; they will build on provisions already in place and structures that have already been set up, primarily under the Management of Offenders etc (Scotland) Act 2005. The community justice authorities established under the 2005 act will play a significant role at the local level.

An important aspect of the planning for the new arrangements will be the Prison Service's integrated case management system, which will be an essential part of the new support framework that will allow appropriate work to be done with the offender in custody with a view to their benefiting from that work and to moving it into the community.

Work is in hand to construct an appropriate operational framework for the new measures to build on the integration work started under the 2005 act. We have set up a planning group made up of all the various interests—the key organisations—involved in delivering that part of the criminal justice system. We hope that, by doing that, we will be able better to target available resources and to channel them in a way that enhances public protection, benefits the offender and assists in reducing reoffending.

**The Convener:** Thank you. That was very helpful, particularly your clarity about the process of handling the chain of measures, if I may put it that way.

To help with the management of the meeting, I suggest that the committee divide its questions into two sections. We will ask questions that are relevant to the officials who are before us; we will then invite the other panel of officials to give a presentation and answer questions.

What are the resource implications of the demands that the bill will place on the Parole Board? What preparatory work is being done to ensure that the Parole Board can meet those demands?

**Jane Richardson:** We acknowledge that a significant burden will be placed on the Parole Board, which, along with the whole system, will have a period of dual running while the current arrangements are phased out and the new arrangements are phased in. We have already started planning for that. The Parole Board participates fully in the planning group that I mentioned. The appropriate resources and structure will have to be in place before the Parole Board takes on the new functions.

**The Convener:** Several other issues arise. It would be helpful for the committee to have details about the changing rules of engagement for the Parole Board. We note the move from three-member tribunals to two-member tribunals. If the two members fail to come to an agreement, another loop will obviously have to be brought into play. Will you give a little more detail on the

reasons behind that change and how effective you think that it will be? What will happen if the two members of a tribunal cannot reach a unanimous decision?

**Jane Richardson:** I will answer the practical part of the question and my colleague Charles Garland may want to confirm the thinking on the legal aspects. We have had discussions with the Parole Board on that. The Scottish ministers obviously want to ensure that the board is fit for purpose, which means ensuring that sufficient resources and the appropriate operational framework are in place before the new arrangements are introduced. We want to ensure that the board is as efficient and effective as possible. In coming to the conclusion that a two-member panel—always with one legally qualified member—is appropriate, our view was that such a practice is operational in England and Wales and seems to work effectively. In consultation with the Parole Board, we decided that the practice may be appropriate for Scotland.

To summarise the decision about what will happen if the two members cannot agree and there is no unanimous decision, the view is that the individual will not be released.

**Charles Garland (Scottish Executive Legal and Parliamentary Services):** That is my understanding, too. As Jane Richardson explained, the intention is to create under section 2 new Parole Board rules that will set out the ways in which the board will consider cases for release. The intention is to draft those rules as the bill is in progress, as they are an important aspect of the measures and will need to be in place when the legislation is commenced. With existing cases, the intention is that, broadly, those will continue to be dealt with under the Parole Board rules as they stand now.

**The Convener:** Forgive me for being simplistic, but I am not a lawyer and I have not been involved in the Parole Board system. You seem to be saying that, if the tribunal is not satisfied that there are grounds for release—which includes cases in which one member is satisfied but the other is not, so there is no unanimous decision—release will not be granted. The fixed situation is that nobody will be released until a tribunal agrees unanimously that release is suitable for the individual.

**Jane Richardson:** Under the framework for release, individuals will always be released on licence at the 75 per cent point of the sentence. The Parole Board will have the power to direct the Scottish ministers to keep an individual in prison until that point of the sentence, after which they will be released on licence. If an individual is detained until the 75 per cent point, a fairly robust framework of licence conditions will be put in place to support the individual during the period of the sentence that they spend in the community, which will include appropriate measures for public protection.

**The Convener:** Thank you for that clarity.

Did anything go wrong with the three-member tribunal? Was there a particular reason for the change, or was it simply a question of efficiency and the fact that the new system has worked elsewhere?

**Jane Richardson:** It was a question of efficiency and effectiveness elsewhere. We looked to other models for some assistance.

**Mr Stewart Maxwell (West of Scotland) (SNP):** I want briefly to follow your questions, convener.

Having read the bill, I came to the conclusion, which has just been confirmed, that somebody would be released after 75 per cent of the sentence. A Scottish Parliament information centre briefing on the custodial sentences part of the bill says on page 18:

> "Offenders who present as a high risk of re-offending and/or who pose an unacceptable threat to public safety will be referred to the Parole Board by the Scottish Ministers with a recommendation that the custody part of the offender's sentence should be extended beyond the minimum term set down by the court at time of sentence"—

in other words, towards 75 per cent of the sentence.

**Jane Richardson:** The minimum referred to in that briefing is the 50 per cent minimum, which—I say this without pre-empting any sentencing decisions by courts—may be seen as the norm for the punishment part.

**Mr Maxwell:** I accept that, but the question is whether offenders who present as a high risk of reoffending and/or who pose an unacceptable threat to public safety will be released after 75 per cent of their sentence.

**Jane Richardson:** Yes.

**Mr Maxwell:** Why?

**Jane Richardson:** Good question. Ministers have considered the point, and the debate has run for a considerable time. As the committee may have noticed, there is a slight departure from the Sentencing Commission's recommendations. The issue is whether an individual is either kept in custody for the full period of the sentence—obviously, that is the ultimate way of protecting the public—or kept under supervision in the community for a period of the sentence. In other words, the question is whether the sentence ends, the prison doors open and the individual walks away, or the work done in the prison setting is taken forward to the community part of the sentence.

There is also an issue of incentive for the offender to work with the authorities to address their risks and needs. If the individual knows that the sentence will be whatever the court imposes, with no incentive to get conditional liberty in the community, it is difficult to motivate them. My colleague from the Scottish Prison Service might want to say more about that.

**Mr Maxwell:** I accept everything that you say. I support alternatives to custody and I think that the idea of an incentive is great. However, do you think that it is reasonable to release an individual who completes 75 per cent of the sentence but has been assessed and identified all the way through as presenting a high risk of reoffending and/or posing an unacceptable risk to public safety? Twenty-five per cent of their sentence, which could be in custody, still remains. I accept the other points, but I am curious why a line in the sand has been drawn at 75 per cent, with no flexibility to keep someone in custody for 100 per cent of the sentence.

**Jane Richardson:** As I said, after thinking through the options, the Scottish ministers have decided that it would be appropriate to deal with offenders by managing them both in custody and in community settings in all circumstances.

**Mr Maxwell:** I still do not understand why. You say that the Scottish ministers have decided that, but why?

**Cathie Craigie (Cumbernauld and Kilsyth) (Lab):** You need to ask the ministers.

**Mr Maxwell:** This is the bill team. I am sure that they have some knowledge of what has been going on in the Executive.

**Jane Richardson:** I am sorry—I might not be making myself very clear. The policy is that the individual, even when they are high risk, should be managed in the community rather than disappearing at the end of the sentence. As I mentioned, they would be subject to a full package of measures, including restrictive conditions if necessary. The licence conditions would be made clear to the individual, and if they breached the conditions—or any one of them—seriously, the Scottish ministers could recall the individual to custody for the full period of the sentence.

It is a balancing act between providing an incentive for people to do something while they are in custody to address their offending behaviour and not reoffend when they are in the community, and just locking up an individual for the full period with no prospect of release. It would prove quite difficult for the prison service and the local authorities to work with such an individual and better manage their risk.

15:15

**The Convener:** In fairness to the officials who are here today, the committee is taking evidence from several agencies and the minister, and I am sure that we will take that issue further.

**Cathie Craigie:** It seems to me that if someone comes before the board after 50 per cent of their sentence is served, there is not really much incentive to change their behaviour and come back when 75 per cent of their sentence is served. There is not much of an incentive to redress the imbalance. What consultation responses did you get to that particular part of the bill? What did members of the Parole Board, the public and other interested parties say?

**Jane Richardson:** First, the bill sets out provisions for a continuous review of the individual's detention and custody beyond the minimum period imposed by the court. Of course, that would depend on the length of the sentence. However, the broad rule of thumb is that individuals who are given a fairly lengthy sentence could be seen as more risky, if I can describe it like that. Individual offenders will be assessed throughout the period of their custody. If the risk assessment test shows them to be high risk, they will be referred to the board, but that referral will not be automatic; it will be only for those who are assessed as high risk. If the board agrees with the Scottish ministers' recommendation and directs that the individual is not released at that point, then depending on the time they have left to serve—and if it is a long sentence, 50 per cent or 75 per cent of it could be a quite considerable time—the offender will be referred back to the board. The board might therefore direct the individual's release before the 75 per cent point in the sentence if the individual has been working to address their offending behaviour or particular needs. I think that that answers your question about how an incentive is provided.

**Cathie Craigie:** Okay. So what were the responses to the consultation?

**Jane Richardson:** The consultation on the measures was done through the Sentencing Commission for Scotland's work. The Scottish ministers then took the recommendations of the Sentencing Commission and published the white paper containing the plans in June. That was the publication of the plans; it was not the consultation. Although it would have been welcome, we did not receive much in the way of comment on the plans. What we did receive was broadly favourable, but more general than the specific issues about which you have asked.

**Colin Fox:** A very general question leaps out at me when I read the bill and explanatory notes. Will the commitment of the Scottish Executive Justice

Department and this Parliament to reducing the overall numbers of people in prison be compromised by the measures in the bill that seek to put people in jail and make them stay there, so that more people will be in jail for longer? What consideration have you given to the impact that this bill might have on that commitment?

**Rachel Gwyon (Scottish Prison Service):** The Scottish Prison Service has considered the proposals and the objectives to improve clarity of sentencing and integrated management. We have also had to model the impact of the proposals. In the financial memorandum is a collection of numbers where we have tried to set out assumptions of the percentage of people who might trigger assessment beyond the 50 per cent point in their sentence, and the assumptions that we have had to make in estimating how many people might breach their conditions of release and be recalled. I am happy to talk members through those figures subsequently, if they would like. The measures in the bill will have quite a sizeable impact on the daily prison population, because a proportion of the people who have been given sentences will stay with us longer. The financial memorandum looks complicated because different paragraphs refer to different numbers. I have a chart that may help.

**The Convener:** We would be grateful if after the meeting all of you, including your colleagues on the other panel, would review the questions that have been asked. If you believe that it is appropriate for you to send short notes to the committee to clarify some points, that will be helpful. You may take our queries away with you and send something back in. I am conscious of the time and members would like to raise a number of issues.

**Colin Fox:** I am grateful for your clarification and for the figures that you are able to send us. I do not have the financial memorandum to hand, but can you give us an estimate here and now?

**Rachel Gwyon:** In short, the proposals will add between 700 and 1,100 prisoners every day to the prison population.

**Colin Fox:** I look forward to seeing the chart later.

**Maureen Macmillan (Highlands and Islands) (Lab):** I want to follow up on the previous questions about release after 75 per cent of a sentence has been served. I understand the reason for that provision—you want offenders to be integrated into the community by the time that their sentences come to an end. However, I note that if the approach is not successful an offender can be recalled into custody, presumably for the rest of his or her sentence, so it is possible for an offender to be in custody for more or less 100 per cent of his or her sentence. In that situation, how will the offender be integrated into the community? Is it proposed that there should be some kind of integration after 100 per cent of the sentence has been served?

**Brian Cole (Scottish Executive Justice Department):** Because it is essentially a determinate sentence, there will be no statutory requirements after 100 per cent of the sentence has been served. We anticipate that local authorities will offer voluntary assistance to offenders in that situation, but there will be no statutory hold over such offenders. Anyone who is currently released from a determinate sentence is eligible for voluntary assistance from local authority criminal justice social work. Individuals in the situation that we are discussing would qualify for such assistance.

**Maureen Macmillan:** Do you think that a voluntary arrangement with criminal justice social work is sufficient?

**Brian Cole:** Because it is a determinate sentence, there is no statutory requirement on the various agencies concerned after the sentence has been served. That is why we are requiring people to be released after they have served 75 per cent of their sentence, if they have not been released at an earlier stage.

**Maureen Macmillan:** However, it is possible for an offender to spend more or less 100 per cent of their sentence in prison, if they are recalled from the community because of their bad behaviour.

**Brian Cole:** Yes.

**Jane Richardson:** It is worth bearing it in mind that the court has the power to impose an extended sentence—in other words, an extended period of supervision can be retained. That only half-answers your question, because a determinate sentence will end at some stage. However, the judiciary has welcomed the fact that we have retained the power for the court to extend sentences for particularly risky offenders.

**Maureen Macmillan:** Will it be able to do that while the sentence is being served?

**Jane Richardson:** There will be a custodial period and then extended extension, if that makes sense, of sentences for up to 10 years for sexual and violent offences.

**Brian Cole:** That extension is imposed at the point of sentence.

**Maureen Macmillan:** How does the court get involved?

**Jane Richardson:** It is a sentence, so the court would—

**Maureen Macmillan:** I am trying to work out what will happen at the end of the sentence if almost 100 per cent of it has been served. How will we put in place an arrangement that provides for extended supervision of an offender after release? When an offender has used up their sentence, is there any way for the case to be referred back to the court?

**Jane Richardson:** No, as Brian Cole explained.

**Maureen Macmillan:** So it would fall to criminal justice social work, using whatever resources it had.

**Jackie Baillie:** Am I right in saying that ministers would not be able to set any licence conditions, because 100 per cent of the sentence had been served?

**Jane Richardson:** Yes.

**Jackie Baillie:** The exception being sex offenders, for whom ministers retain that right.

**Jane Richardson:** Sex offenders would be subject to registration, which is a slightly different arrangement. When a sentence of whatever length comes to an end, any conditions imposed during the period in the community on licence will also come to an end.

**Maureen Macmillan:** I want to explore a little further the workings of the Parole Board. Who will give evidence to the Parole Board when somebody comes up for parole? Where is the evidence gathered from?

**Jane Richardson:** I will explain the present arrangements and then explain how we think the new provisions will work. As my colleague said, we are presently drafting the rules.

At the moment, the law says that anyone who receives a determinate sentence of four years or more will have their case reviewed at the halfway point, to see whether they will be considered for parole. The case is referred to the Parole Board, which will consider it at a meeting and determine whether the individual will be released on licence.

If the individual received a life sentence, the review is carried out by a tribunal—a court-like body that will consider the risk posed by the individual and consider whether it would be appropriate to release them on life licence. Under the new arrangements, that is the system that we want to apply to all cases that are referred to the Parole Board.

**Maureen Macmillan:** Will having only two members on the Parole Board offer a wide enough range of experience?

**Jane Richardson:** Yes. We want the board to be fit for purpose, but we have to be aware of the legal and human rights requirements. We have therefore considered how things work elsewhere. There will always be a legal member.

**Maureen Macmillan:** Once the tribunal has made its decision, how will information be disseminated to victims? Will victims be able to give a statement to the tribunal?

**Jane Richardson:** The arrangements for victim representation will obviously continue, but they will be adapted to take account of the new circumstances. Any member of the public can make representations, and the victim notification scheme will continue.

**Maureen Macmillan:** And people with a need to know will be informed of the outcome.

**Jane Richardson:** Yes. Indeed, we are taking steps in the legislation to ensure that the Parole Board includes someone with experience of working with victims, or with experience of actually being a victim. We will enshrine that requirement in the legislation.

**Maureen Macmillan:** Such a person would be able to inform their colleagues, even if they did not sit on every tribunal.

**Jane Richardson:** Yes.

**Cathie Craigie:** There will be a significant increase in the number of cases going before the tribunal of the Parole Board. How will risks be assessed? What role will the new proposals give to the Risk Management Authority?

**Jane Richardson:** The bill contains the risk test, as it were, but obviously we have to build a structure below the risk test, to give a framework for assessing risk and for referring cases to the Parole Board. Earlier, I mentioned the planning group that has been set up to consider the diverse work streams that will have to be set in place before we can implement the new arrangements. The Risk Management Authority is involved in that work and will advise on the tools and the structure that will enable proper risk assessments.

My colleagues might want to say something about the work that local authorities and the prison service are doing on assessing risk.

15:30

**Brian Cole:** The risk assessment process will involve a joint approach by the SPS and local authorities. However, the SPS, acting on the Scottish ministers' behalf, will make the final decision on whether to refer a case to the Parole Board. The joint approach will use the tools that the RMA recommends.

**Cathie Craigie:** Who will make up the Risk Management Authority?

**Jane Richardson:** It already exists.

**Cathie Craigie:** Yes, but who makes up the RMA?

**Jane Richardson:** It is a non-departmental public body that has a board that comprises a number of public appointments from various disciplines. It is supported by a management structure and operates under a clear, three-pronged remit that was set out in the Criminal Justice (Scotland) Act 2003 to provide, broadly speaking, a centre of excellence for risk assessment and risk management.

**Cathie Craigie:** The offender's response in custody will be an important part of the risk assessment process. Are you confident that offenders will have access to appropriate rehabilitation opportunities?

**Rachel Gwyon:** A lot will depend on the length of the sentence. Somebody who qualifies for the combined sentence with a 16-day sentence will need to be inducted into prison, be risk assessed and go to a tribunal by day 8. It is not as feasible to do as much programme work with somebody in that period of time as it is if their sentence is four years. On a four-year sentence, the assessment of whether the offender represented a risk of harm would be made at the two-year point.

We will develop our integrated case management system, which started earlier this year and aims to get much better information from a range of sources, including risk assessment, psychological assessment, social work input, drug and rehabilitation input and all the work that we already do on offender outcomes, such as housing, employment, family relationships, health and drug work. In preparation for the bill's implementation, we have started to work with other agencies, such as the Parole Board and the Risk Management Authority, on an appropriate risk assessment tool for risk of harm. We had to use a proxy measure for our estimates for the bill and we are working with those agencies on what the actual risk assessment tool will look like.

**Cathie Craigie:** Have the resource implications for the organisations that are responsible for rehabilitation and throughcare been considered? Can you cope?

**Rachel Gwyon:** Yes. We have included in the financial memorandum the costs for the extension of the integrated case management system, which will need to go from applying to about 3,000 prisoners to applying to between 9,000 and 12,000 every year. It will cost us between £5 million and £6 million per annum for the extra staffing to roll out that increased service. I ask Brian Cole to respond on throughcare.

**Brian Cole:** We have done similar calculations for the bill's impact on criminal justice social work services and related agencies for offenders who are released on licence. Our current estimate for the cost of supervision in the community plus the contribution to the risk assessment process, which is in the financial memorandum, is somewhere in the region of £7.95 million.

**Colin Fox:** I will focus on the community part of sentences. The explanatory notes to the bill talk about the different levels of supervision that an offender may expect when serving their sentence in the community, such as the licence restrictions and the intervention that they could anticipate. Will you elaborate on what that intervention will mean in practice and who will carry out the supervision?

**Brian Cole:** In the bill, we propose a cut-off point of six months for supervision intervention to kick in. It is recognised that those who are serving sentences of six months or less—and of course 15 days and more—will be subject to licence, but given the short duration of the sentence, the maximum period will be no more than three months. Professional opinion suggests that not a great deal can be done in terms of supervision for a period as short as three months or less. For those serving more than six months, we anticipate that supervision will be undertaken by local authority criminal justice social workers. The intensity of the supervision will be informed by the risk assessment undertaken during the course of the sentence. For those who present a higher risk, the level of supervision will be more intensive. That supervision will not just involve the work done by local authority social workers; it is the extent to which people can be plugged into services, for example treatment services for those with a drug problem.

**Colin Fox:** What does that supervision entail, for example for somebody who has been sentenced to a year, who has done half in custody and who has another six months under licence or restriction? What is the nature of the programmes in which they would be involved with criminal justice social workers?

**Brian Cole:** Again, it depends on the nature of the offence for which they were convicted. It will be a combination of reporting requirements to the supervising officer—in certain instances, the supervising officer will be undertaking home visits to the offender—and consideration of the circumstances of the offender, for example the extent to which they may need to undertake other work. It could be work in relation to their offending behaviour; for example, we are at the early stages of rolling out an accredited general offending programme. It would be a 26-week programme, in which various aspects of the offending behaviour would be considered with the offender. It could be plugging into Alcoholics Anonymous groups or it could be treatment services and so on. Basically, it will be informed by the risk assessment.

**Colin Fox:** At the other end of the scale, so to speak, the bill proposes that those offenders who are sentenced to fewer than 15 days will spend their entire sentence in custody. What consideration has been given to the impact on those offenders, considering that early release is to do with managing them in prison and encouraging them not to reoffend? Has there been any examination of the impact of the fact that that has been taken away and that those offenders will face the whole 15 days in custody?

**Jane Richardson:** It is fair to say that the number of individuals who get a sentence of fewer than 15 days is small. They tend to be fine defaulters, who have gone through all the alternatives available to the court, such as helping the individual to pay the fine or giving them a supervised attendance order. My colleague will correct me if I have gone off script here—

**Colin Fox:** We like it when you go off script.

**Brian Cole:** Supervised attendance orders in respect of fine defaulters have been available nationally since 1998. They offer an alternative to courts to the custody approach. We are piloting provisions in Glasgow district court and Ayr sheriff court whereby those prescribed courts which would otherwise have the option of custody for those who are fine defaulting on less than £500, do not have the ability to sentence such fine defaulters to custody and have a mandatory requirement to make use of SAOs. That does not mean to say that those fine defaulters may not ultimately end up in custody; for example, if they have breached the SAO, the court, in dealing with that breach, may decide on custody. However, certainly at the first cut, it avoids custody for those fine defaulters.

**Colin Fox:** It is curious that someone who has been sentenced to 14 days will serve 14 days but that someone who has been sentenced to 21 days will serve 10 or 11 days. If a judge ever sentences me to 14 days, I must remember to ask him for an extra week.

**The Convener:** I do not think that Mr Fox is seeking legal representation at this stage.

**Jackie Baillie:** I want to ask specifically whether you have carried out any gender analysis of the proposal, as I am genuinely worried about the disproportionate impact that we know there is on women and their families when women default on fines. Have you considered that? Have you done any research into how often supervised attendance orders are used and in what context? I think that the proposal will have unintended consequences.

**Brian Cole:** We have not conducted research in the context of the bill, but we have examined carefully the role and position of supervised attendance orders. In addition to the pilot schemes in Glasgow district court and in Ayr sheriff court, we are running separate pilot schemes in Dumbarton and Paisley, which provide the courts with the option of using supervised attendance orders as a disposal of first instance. That is to say, when one of those courts is disposed to impose a fine but believes that the offender does not have the means to pay, the court has the option of imposing a supervised attendance order in the first instance instead of imposing a fine and going through the business of the person defaulting.

Both sets of pilot schemes are well under way, and ministers will want to think carefully about the impact of those schemes in addressing the issues in relation to women offenders who find themselves defaulting on fines. One of the considerations in selecting Glasgow district court for the pilot scheme was the large number of women fine defaulters who were appearing before that court and then finding themselves in Cornton Vale.

**Jackie Baillie:** I take it that, although there is work in progress, no specific gender analysis of the proposal has been carried out.

**Brian Cole:** That is correct.

**Rachel Gwyon:** When we gave evidence on the Criminal Proceedings etc (Reform) (Scotland) Bill about the fine enforcement officers that are being introduced, the Justice 1 Committee asked us the same question. I sent a written response a few months ago, which we can dig out. We found that having fine enforcement officers was likely to have a beneficial impact on the number of women who are with us each day, but that at a couple per year the figure was not large enough to be statistically significant. I do not know whether that helps. We would be happy to make that answer available in writing as well.

**Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD):** I have two brief questions. The first is of a more general nature. Paragraph 163 of the explanatory notes to the bill states:

> "For supervision to have any meaningful impact existing social work practice experience suggests that a minimum supervision period of 3 months in the community is essential."

However, the preceding paragraph states clearly that more than 50 per cent of those who serve sentences are sentenced to less than six months; therefore, the licence period is between eight days and three months. The bill will place Scotland third behind Russia and America in respect of the proportion of the country's population that is in prison, and it will make our prison population by far the biggest in the European Union, yet if we are to believe what paragraph 163 says about the

conditions to ensure a meaningful impact, the bill will have no impact on rehabilitation for more than half the prison population.

**Brian Cole:** Yes. Paragraph 163 refers to a minimum period of three months' supervision for it to have any effective impact. Those who serve sentences of six months or less will, of course, still be subject to licence, and the licence will be fairly minimal, stating that they shall be of good behaviour. That is not to say that such individuals may not be plugged into services if that is achievable, but they will not be subject to the supervision requirements that apply to those who serve sentences of more than six months.

15:45

**Jeremy Purvis:** So it is fair to say that there will be no meaningful impact for more than 50 per cent of the record prison population—which, with the bill, will top 9,000.

**Brian Cole:** As I said, attempts will be made to get those who are serving sentences of less than six months into services. The issue is the extent to which supervision, as offered by local authority criminal justice social work departments, will be possible and effective during that period.

**Jeremy Purvis:** The bill states that Scottish ministers—I understand that, in practice, it will be the Scottish Prison Service—and local authorities must establish arrangements for the assessment of prisoners. That will apply whether or not the inmate comes from the local authority area or intends to go to there. They might not indicate that they intend to go there, but that is a matter to be discussed further down the line; the local authority must be involved in the assessment. However, the financial memorandum does not seem to mention the costs of local authorities taking part in that. It seems to mention only SPS costs.

**Rachel Gwyon:** An extra £500,000 per year will be added for the social work input to increased integrated case management. The cost is currently £5 million to £6 million, so the new total will be £5.5 million to £6.5 million. That is covered in paragraph 158 of the financial memorandum.

**Jeremy Purvis:** So that is included. It looked as if the Scottish Prison Service was saying that its additional costs would be £5 million to £6 million, but the bill says that the risk assessment is joint and the cost to local authorities will be about a tenth of that. I thought that the split would probably be 50:50, but perhaps you can come back to us with a bit more detail.

**The Convener:** Perhaps the panel could send us a note on that.

**Jeremy Purvis:** On the non-recurring capital costs, the financial memorandum mentions "the new prison/s". Can we have a bit more detail on the forecast? Obviously, we are talking about a new prison, but the phrase "the new prison/s" is slightly broader. Surely there must be a bit more detail on how many more prisons we will need in Scotland to lock up our record number of people.

**Rachel Gwyon:** At the moment, we have an assessment of the number of additional prisoners per night whom we expect to be in our care as a result of the measures in the bill. In addition, the projections are increasing in any case. Some 700 to 1,100 additional prisoner places will be required, but that does not necessarily translate into the number of prisons. I am not trying to avoid your question, but there are different ways of providing accommodation. Sometimes it comes in chunks of a few hundred places in house blocks.

As a rough rule of thumb, when we are considering the number of whole prisons, we tend to say that 700 places is equivalent to approximately one prison. That would cost about £100 million if it was built in the public sector. We have given the capital reversion rates that would apply if it was built in the private sector. However, the figure of 700 to 1,100 places does not translate into a number of whole prisons. We have to examine the number of additional places and start working through how those people should be accommodated. That will have to be worked through further down the track.

**Jeremy Purvis:** So, at this stage, the financial memorandum can only be extremely broad.

**Rachel Gwyon:** It gives the most precise estimates that we can produce, given the number of underlying assumptions that we have to make.

**The Convener:** We will leave it there. As I said earlier, if anyone on the panel wishes to send us more information on the issues that arose today, they are welcome to do so. Similarly, if members have further questions, they can submit them to the clerk, who will write for further clarification on behalf of the committee.

I thank the panel. I am sorry that we were a little pressed for time—I want to ensure that we have time to hear from the next panel—but I thank you for coming along. The committee appreciates the offers that you made.

I welcome the lady and gentlemen from the Scottish Executive Justice Department: Andrea Summers, Gery McLaughlin and Paul Johnston. I invite Mr McLaughlin to make an opening statement.

**Gery McLaughlin (Scottish Executive Justice Department):** I am here to talk about part 3 of the bill, which deals with weapons and provides for restrictions on the sale and availability of swords and non-domestic knives. The objective of part 3

is to put in place safeguards to help to prevent such potentially dangerous weapons from falling into the wrong hands. The provisions form part of the Executive's reform of knife-crime law and are a vital component of the wider package of measures to tackle not only knife crime but violence more generally. I should emphasise that they are not the only component, although they are the only one that is dealt with in the bill.

The committee may be familiar with the background to the measures, but the stark facts on knife crime bear repeating. The homicide stats show that knives and other sharp items continue to be the most common method of killing in Scotland. In 2004-05, 72 of the 137 homicides were committed with knives. Those figures are comparably much higher than those in England and Wales and among other, international comparators.

On swords, the available data do not allow us to identify how common the use of such implements is, but swords are designed as deadly weapons and are likely to result in serious injury if so used. From police and hospital reports, it is clear that swords are being used to commit crimes and inflict injury. Advice from the police is that the use of swords is becoming more common.

On knives, the breakdown of data for Strathclyde shows that, in 2004-05, there were 1,301 knife attacks. Of those, 1,100 were in a public place and involved a non-domestic knife.

As the review of knife crime underlined, tackling knife crime is a priority for the Executive. The partnership agreement, in the section on supporting stronger, safer communities, makes a commitment that the Executive will

"review the law and enforcement on knife crimes."

The outcome of the review was announced in November 2004, when the First Minister presented a five-point plan on knife crime. Three of the five points were legislated for in the Police, Public Order and Criminal Justice (Scotland) Act 2006, which came into force at the start of last month. The act doubled the maximum sentence for carrying a knife in public or in a school from two to four years. It also removed limitations on police powers of arrest for those offences and increased the minimum age of those to whom non-domestic knives may be sold from 16 to 18.

The Custodial Sentences and Weapons (Scotland) Bill will implement the final two points of the five-point plan. The bill will ensure that the Scottish ministers have appropriate powers to ban the sale of swords, with exceptions, and to require businesses that sell swords and non-domestic knives to be licensed. The provisions in the bill were developed after consideration of the responses to "Tackling Knife Crime: A Consultation", on which I can give further details if the committee so wishes.

The first element of the weapons provisions in the bill is a general ban on the sale of swords. Section 141 of the Criminal Justice Act 1988 provides for a ban on offensive weapons generally. Section 45 of the bill will provide for the creation of exceptions to those offensive weapon provisions through a general method. Those exceptions could include some uses of swords. However, section 46 is more specific and will enhance ministers' existing powers by enabling them to introduce a ban on the sale of swords and to make the prohibition subject to specified defences. Those defences will be the use of swords for legitimate religious, cultural and sporting purposes.

As I said, the bill builds on the model of the ban on offensive weapons in section 141 of the 1988 act, but it will adapt the application to swords to allow for legitimate uses. Exceptions will be made for religious purposes, for cultural purposes, including Highland dancing, theatre, film, television, antique collecting, re-enactment and living history, and for sporting purposes, including fencing and martial arts activities that are organised on a recognised sporting basis. Exceptions will also be made for antique swords in line with the current provisions in firearms legislation. Finally, there will be an exception for other activities that are carried out with the authority of the Scottish ministers, after application to them. The aim is to deal with any exceptional cases that have not been provided for.

The bill also deals with the licensing of sellers of non-domestic knives and other items. The bill provides for the introduction of a new mandatory licensing scheme for the commercial sale of those items. The scheme will apply to people who carry out the business of dealing in those items. It will be a criminal offence for businesses to sell swords or non-domestic knives to members of the public without a licence. The framework on which the provisions build is the Civic Government (Scotland) Act 1982, which deals with licensing generally. Local authorities will act as licensing authorities for the knife licences, as they do for other licensing schemes. The bill will apply to those who run a business in Scotland, including those who sell over the internet.

The requirement for a licence will apply to the sale of swords, knives and knife blades other than those that are designed for domestic use, which is the same approach that was taken in the Police, Public Order and Criminal Justice (Scotland) Act 2006, which changed the age at which people can buy such items. Dealers that sell only domestic knives such as cutlery or do-it-yourself products will not need a licence. Also, auction houses that

sell items on behalf of others will not have to be licensed, unless they wish to sell such items on their own behalf. Businesses that sell exclusively to other businesses or professionals—sorry, professions—will not have to be licensed.

The requirement for a licence will not apply to those who are engaged only in private transactions and who are not involved in a business. A licence will not be required to sell small folding pocket knives, sgian dubhs or kirpans if the blade is no longer than 7.62cm or 3in. A licence will be required to sell any other articles that have a blade or a sharp point and those that are made or adapted to cause injury, such as arrows or crossbow bolts. As well as the requirement for a licence to sell such items, a licence will be required for businesses that hire, lend, give, offer or expose them for sale. The intention is to cover all the territory and close any loopholes.

The bill will provide powers, which ministers intend to use, to set strict licence conditions and to specify types of licence conditions that must be attached to all knife dealers' licences. That will leave open the possibility that the type of condition may be specified by ministers, while the details are set by individual local authorities. As is the case with other licensing schemes, local authorities will be able to determine the details of any conditions not specified by ministers and impose additional licence conditions suitable for their locality or appropriate for the individual business, should they see the need.

It will be a criminal offence for the licence holder to break the conditions of the licence. It will also be an offence for a person knowingly to provide false information to a seller in connection with the purchase of such items when the seller is required to collect the information as a condition of the licence.

The bill will confer powers on local authority trading standards officers and the police, upon attaining a warrant, to enter premises where unlicensed dealing in knives is suspected of taking place or where a dealer is suspected of breaching the conditions of their licence. The bill will allow articles to be seized in such searches, with the prospect of the dealer forfeiting any knives or swords seized or in stock should he or she be convicted of an offence.

16:00

**The Convener:** Thank you for that. I ask members to be as tight with their questioning as possible, and I will try to demonstrate how to do that.

One or two issues come out of what you said, including the need for a licence for retail sales of knives. As you said, retailers of knives that are designed for domestic use will not need a licence, but the bill does not appear to contain a definition to clarify the difference between a domestic and a non-domestic knife. You have mentioned one or two DIY products that are not domestic but have blades and could be modified simply. If there is no definition, how can a retailer know exactly where it stands on what it wishes to sell and whether it needs a licence?

**Gery McLaughlin:** Ultimately, the definition will be a matter for the courts, but the bill says that a licence will be needed except for knives that are designed for a domestic purpose. Cutlery and DIY products are clearly designed for a domestic purpose, but if retailers are in doubt, we could offer guidance. The same approach was taken in the Police, Public Order and Criminal Justice (Scotland) Act 2006, under which the age of sale was increased to 18 for such items other than domestic knives but remains at 16 for domestic knives so that young people or couples setting up house can still obtain DIY products or sets of cutlery.

**The Convener:** I am not aware that stores challenge someone who buys a bread knife, for example, but will that become an obligation?

**Gery McLaughlin:** If a retailer sells only bread knives, it will not need a licence. If it sells a wider range of products, it will be required to satisfy itself that they are only for domestic purposes, and if that is so, it will not need a licence. If the retailer is uncertain or thinks that the products are for purposes other than domestic, it will require a licence. Guidance will be issued through the licensing scheme, and as trading standards officers become experienced in the scheme, local authorities will no doubt be able to give retailers a view on whether they need to be licensed.

**The Convener:** It sounded from what you said a moment ago that the courts will define. That is usually a bit too late, as people will want to know in advance whether they need a licence. Is there any intention in the Scottish Executive Justice Department to define more clearly exactly what a domestic knife is? If you need to write to us on that question, that is fine, but I have seen blades from hunting knives that, with a different handle, would look exactly the same as those used in domestic situations—some butchery knives for example. Is there a move to have a clearer definition?

**Gery McLaughlin:** The definition that we are proposing and that Parliament will vote on is the one in the bill. We can provide guidance to supplement that definition, but the law will be the wording in the bill. Therefore, ultimately it will be a matter for the courts. However, it will be down to individuals to exercise common sense on whether something is for use around the home.

I do not know how many committee members were present at the recent demonstration on knife safety—I think that it was in this committee room.

**The Convener:** I was there.

**Gery McLaughlin:** There was a clear distinction between the domestic knives and the ones that were not designed for domestic purposes. It is that categorisation that we are attempting to capture in the legislation.

**Maureen Macmillan:** It was as a result of that demonstration that I wanted to ask you about screwdrivers. We were told that a large Phillips screwdriver was a favoured weapon. I note what you said about under-16s not being allowed to be sold domestic knives. Will that provision in any way prevent under-16s from being sold such screwdrivers?

**Gery McLaughlin:** The licensing scheme will cover knives, knife blades and any other sharp, pointed objects that are designed to injure people. It will not cover screwdrivers as such. I would take issue with some of the information that was provided in the demonstration. It gave the strong impression that a number of crimes are committed with normal domestic knives, screwdrivers and so on. As I have said, the statistics from Strathclyde on stabbing attacks show that of 1,300 incidents, 1,100 were in a public place and committed with a non-domestic knife. Of the other 200, I am not sure how many were committed in a domestic situation where we would expect it to be more likely that a domestic knife would be used. In the vast majority of cases, the problem is caused by the type of knives that we are seeking to regulate.

**Maureen Macmillan:** Thank you—that is helpful.

**Mr Maxwell:** You mentioned that a business selling to a business will be exempt and that a business selling to a profession—first, you used the word "professional" but changed it to "profession"—will be exempt. Will you clarify what you meant by a business selling to a profession?

**Gery McLaughlin:** The example I would give is a company selling medical knives—scalpels—to hospitals. Such a company will be exempt from the legislation; that will also be the case if the company is selling to individual surgeons who have a professional need for such knives. If, however, such a company were to make a habit of selling medical knives to the general public—to someone coming in off the street—it would require to be licensed. The objective of the legislation is to regulate when we feel we have to, but to try to avoid regulating when we think that there is no need. We consider that there is no need to regulate businesses selling to businesses or to professions who may have a use for such knives.

**Mr Maxwell:** I accept that, and I agree with you on the business-to-business aspect; I was just trying to clarify what you meant when you said "profession". You gave a good example. What if somebody was a butcher—would that be defined as a profession? Boning knives are a lethal weapon, but they are a legitimate part of a butcher's profession.

**Gery McLaughlin:** I shall ask one of my legal colleagues for their view on that.

You pointed out my change of wording from "professional" to "profession". I was trying to stick to the wording in the bill; in section 43, which inserts section 27A into the 1982 act, subsection (3) talks about

"persons not acting in the course of a business or profession".

Paul Johnston will deal with the question about butchers.

**Paul Johnston (Scottish Executive Legal and Parliamentary Services):** If a butcher was seeking to purchase a knife for use in their shop, they would be acting in the course of their business or profession, so the seller would not require a licence.

**Mr Maxwell:** So butcher-supplies companies would be exempt, even though any member of the public could walk in—

**Paul Johnston:** No. They would not be exempt if there was any prospect of them selling those butchers' knives to persons other than butchers. If they were possibly going to be selling them to private individuals, they would require a licence. They would have to be clear that they were selling knives only to persons who were acting in the course of their business or profession.

**Mr Maxwell:** So it would be their responsibility to identify whether the individual was a bona fide butcher.

**Paul Johnston:** Yes.

**Gery McLaughlin:** It is more a question of businesses that operate as suppliers to the trade not needing a licence. Businesses that do that but which also open their doors to the general public—or advertise to the general public—will require a licence.

**Mr Maxwell:** Perhaps I misheard you, but you said that sports would be exempt. Is that correct?

**Gery McLaughlin:** Exemptions would be made for sporting purposes.

**Mr Maxwell:** Would that include fishing knives?

**Gery McLaughlin:** No. I referred specifically to fencing and martial arts organised on a normal basis.

**Mr Maxwell:** I know that you specifically said that, but most of us would define fishing as a leisure pursuit or a sport.

**Gery McLaughlin:** The exemptions that I was talking about related to the prohibition on the sale of swords.

**Mr Maxwell:** Fishing knives would not be exempt.

**Gery McLaughlin:** They are not covered by the ban on the sale of swords. We are licensing sellers of knives that are not intended for use at home. Fishing knives are not intended for use at home, so people or businesses selling those knives would require a licence.

**The Convener:** In other words, somebody who was carrying a shotgun would have to have their licence on them and the situation would be the same for a ghillie or for someone who does a lot of offshore fishing, for example for large coarse fish, and who would come and go carrying one of those knives.

**Gery McLaughlin:** We have moved to a separate issue. We are talking about licensing the sellers rather than the carriers. There is a distinction between those approaches.

**The Convener:** You gave figures for offences that are committed with non-domestic knives. Is there any evidence, or has any research indicated, that the bill might lead to people purchasing a domestic knife or implement and using it as an alternative to whatever it is that they use and commit crime with now?

**Gery McLaughlin:** That is perhaps a risk, but we are attempting to deal with the risk that we know exists. As I said, non-domestic knives were used in 1,100 out of 1,300 attacks. Those knives tend to be folding or locking knives. Someone can slip a folded knife in their pocket and there is no chance of them stabbing themselves, but when the knife is open and locked, there is no risk—unlike a penknife—that it might bend when they try to use it forcibly so they are sure of injuring the other person. Such knives and the much larger combat-style knives are what we are dealing with in the bill.

**Colin Fox:** COSLA's submission suggests that anyone who really wants to buy a knife will always find a way round any licensing restrictions. What consideration has been given to the possibility that the proposals in the bill will lead to more illicit trading in knives or that people will get knives from abroad via the internet or magazines?

**Gery McLaughlin:** On the suggestion that people who want a knife will always be able to get one, we are attempting to regulate the sale of knives through imposing licence conditions rather than to stop it absolutely. I do not think that what we are doing will lead to the development of a black market in knives. If people operate as knife sellers without a licence, the proposals in the bill will ensure that by doing so they are committing a criminal offence and can be arrested for it. Currently, if the police come across people selling knives in what could be regarded as an irresponsible manner, there is nothing that they can do about it. In the future, the police will be able to check that the person has a licence and if they do not they will be subject to penalties through the courts.

**Colin Fox:** I take that point, which is interesting. You mentioned that 1,100 of the 1,300 attacks in Strathclyde were carried out with non-domestic knives. Do you have an idea of where those 1,100 knives were purchased? How many of them were obtained via sales internationally or might, following the application of the provisions in the bill, still find their way to offenders?

**Gery McLaughlin:** I do not know the origin of the 1,100 knives because such information is not part of the data, but I assume that most of them were bought in Scotland.

**Colin Fox:** Given that 200 attacks were carried out using domestic knives, would it be fair to say that you hope that the bill will address the 1,100 non-domestic knives that were used in the assaults that you mentioned?

**Gery McLaughlin:** The bill will certainly do something about the sale of those knives. We know that the 200 other attacks did not occur in a public place. A number of assaults might have taken place in non-public places with non-domestic knives, so the number of assaults carried out with non-domestic knives might be more than 1,100.

**Colin Fox:** The licence conditions are fairly strict. A number of responses to the committee, particularly from retailers, flagged up concerns about conditions such as requiring a retailer to keep records of everybody that it sells a knife to and to obtain photographic evidence of every purchaser's identity. Retailers have asked us whether the Executive has thought about putting restrictions on the sale of knives without licensing conditions, such as not allowing them to advertise either in their windows or at all. In other words, could restrictions have been levied without a strict licensing scheme such as that which is in the bill?

16:15

**Gery McLaughlin:** That was certainly considered, because questions about the licence conditions were covered in the consultation. I accept that retailers objected to the conditions as making them do something more than they do at present, but a number of other consultation

respondents supported the conditions strongly and suggested that we go further. Restricting display is intended to be one licence condition that will be imposed.

**Colin Fox:** So your view is that the licensing scheme in the bill will bring a number of advantages that can be achieved only through such a scheme.

**Gery McLaughlin:** Yes, it means that the provisions apply to businesses that deal in the items.

**Mr Maxwell:** I want briefly to follow Colin Fox's point about buying knives on, for example, the internet. International purchases had not really crossed my mind, but there seems to be a large trade in knives through magazines and mail order. Many companies are not based in Scotland—they may be based elsewhere in the UK or perhaps even Ireland. Did you consider any ways of trying to tackle the problem of supply through mail order or magazines? A lot of so-called hunting and pseudo-military magazines sell the items.

Supplementary to that, I note that all the offences are about the sale of knives. There is no offence on the individual who does not have a legitimate use for the knives that they buy. Have you had any discussions or thoughts about offences on the individual purchaser?

**Gery McLaughlin:** I will start with your second point on the offences on individuals. Ministers have decided to adopt an approach that concerns restrictions on sale rather than purchase. However, individuals purchasing a sword or knife who knowingly provide the seller with false information would commit an offence, so there would be a penalty for someone not having a legitimate purpose for buying a sword.

On sales to Scotland from elsewhere, as I said in response to a previous question, I imagine that most swords that are bought here are purchased from a retailer in Scotland. We have discussed the issue with the police, and their view is that the majority of problem knives—as they see them—tend to be owned and bought by people who, generally speaking, do not have access to the internet or credit cards, which are the usual ways of acquiring goods from elsewhere. Having said that, the powers in the bill would provide us with the means to limit imports if it was chosen to use them in that way. Ministers are considering that, and perhaps the Deputy Minister for Justice will want to say more on that when he appears.

**Jeremy Purvis:** I want to ask just one question, although I have probably not noticed the answer when reading through the bill. What would be the grounds for a local authority to refuse a licence? Are they the same as under the 1982 act for window cleaners?

**Gery McLaughlin:** Indeed they are, and perhaps that is why they are not obvious when reading through. The provisions on knife licensing build on the provisions in the 1982 act that deal with the application procedure for a licence and the local authority consideration of it. The provisions include phrases such as "fit and proper person". Do you want me to go into more detail about that?

**Jeremy Purvis:** No, if the grounds are identical to those in the 1982 act under which a local authority can refuse a licence for a window cleaner, I am familiar with them.

**Cathie Craigie:** Mr McLaughlin reminded us that those who sell swords on a commercial basis will be required to take steps to confirm that a person who wishes to purchase a sword wants to do so for a legitimate purpose. How will that work in practice?

**Gery McLaughlin:** The general sale of swords will be banned—it will be an offence to sell a sword, other than for the accepted legitimate purposes that I set out. Sellers will be asked to get confirmation that the sword will be used for one of the legitimate purposes. For commercial sellers, the measure will be reinforced through the licensing scheme. The licensing conditions will require sellers to take details of the intended use and to take down the information that was given that convinced them of the intended use. That might be a membership card from a society or a letter from a Scottish country dancing teacher. The licensing scheme will reinforce the requirement for commercial sellers. Individual sellers will be subject to the same requirement, although not to the licensing scheme. We imagine that most individuals will sell to people whom they know and who are part of the same club or society or to people who respond to an advert in a specialist magazine.

**Cathie Craigie:** You mentioned that a buyer might provide a letter from a dance teacher or a club membership card. Nowadays, it is easy to produce letters and membership cards on computers. Will individuals be required to provide some form of identification?

**Gery McLaughlin:** Sellers will be required to take down identifying details of individuals to whom swords are sold. Although you did not say so, the point that lies behind your question is that people may provide wrong information. That is why it will be an offence to do so. We cannot reasonably expect sellers to conduct extensive background checks on individuals every time that they make a sale. However, we can ensure that, if the police find someone who has a sword and who seems to have had no good reason for buying it, the person would be guilty of the offence of

acquiring the sword in that way and, presumably, of using it in the wrong way.

**Cathie Craigie:** Did you consider introducing a requirement for people who want to purchase a sword for a legitimate reason to provide photographic identification?

**Gery McLaughlin:** Photographic identification may be required. Paragraph 114 of the policy memorandum states that the conditions that are set by ministers will require retailers

"to keep records of those to whom they sell swords or non-domestic knives".

We did not state specifically that photographic ID will be required, but I understand that several local authority licensing schemes require photographic ID. For instance, in Edinburgh, photographic ID is required to purchase some second-hand goods. The requirement is increasingly common, so some local authorities may well add it to their schemes. As I said, they will be able to add to the base conditions that the ministers set.

**Cathie Craigie:** Would it not be sensible for the Scottish Executive to add that condition to give uniformity of process throughout local authorities, rather than leave the matter up to each local authority?

**Gery McLaughlin:** I understand your point, but in striking a balance between what should be set centrally and what should be set locally, ministers decided that that matter will be set locally. However, the ministers have said that they will review the provisions in the light of experience of the operation of the licensing scheme, so, in due course, photographic ID may become a central requirement.

**Mr Maxwell:** I was interested in the suggestion that people might need to prove membership of a society by showing a membership card. How would that work? How would the retailer determine whether a society or organisation was legitimate? Will there be a list of approved organisations? Could I set up an organisation called the west of Scotland sword appreciation society and allow all my pals to be members of it? Would that be legitimate? Will such organisations need to be approved?

**Gery McLaughlin:** The idea of requiring specific organisations to be authorised was one option on which we consulted. However, ministers have decided not to go down that route, so we are not proceeding with that option.

**Mr Maxwell:** How would the retailer know whether the membership card that I presented was legitimate?

**Gery McLaughlin:** That comes back to the issue of what we can reasonably expect retailers to do. That is why it is an offence for someone to give false information.

**Mr Maxwell:** However, if I set up such a society along with six pals, the information that I gave would not be false. It would be true.

**Gery McLaughlin:** It depends on what the society is, what its objectives are and whether they fall within one of the legitimate exceptions. For example, a fencing society would come within one of the legitimate exceptions. Presumably, the person would explain that to the retailer. Specialist retailers have a general knowledge of the background to their activities. Although a retailer might not be able to spot a particularly good forgery or misinformation, a person who turned up with a rather less believable story than that of an MSP with a membership card might be turned away.

**Colin Fox:** Stewart Maxwell's stories are always unbelievable.

**Mr Maxwell:** I have a final small question. There is a trade and export market that sells Scottish replica swords and weapons to tourists and collectors. How will that trade be affected?

**Gery McLaughlin:** Our intention is that exports would be an exception. It would be unreasonable to require tourists who happen to be in the country to provide the membership evidence that we have discussed. Therefore, swords that are for immediate export would fall within one of the exceptions to the general ban on the sale of swords. However, such sales would continue to be covered by the licensing scheme.

**Maureen Macmillan:** How dangerous are the swords that are used for Scottish highland dancing and re-enactments? Surely they cannot be too sharp, given that dancers will not want to get their feet cut. What swords are we talking about here?

**Gery McLaughlin:** You are right that Scottish country dancing swords are probably the least dangerous. Re-enactment swords also tend to be blunt, although that is not always the case. However, such swords can be sharpened.

**Maureen Macmillan:** Okay, that is fair enough.

**The Convener:** I thank the panel very much. As I mentioned to the previous panel, if after reviewing what has been said this afternoon the witnesses want to make additional points, they can send those to the clerks and we will be happy to consider them.

As agreed earlier, we move into private session. I thank our panels of witnesses and members of the public for attending.

16:28

*Meeting continued in private until 18:20.*

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