JUSTICE 2 COMMITTEE

Tuesday 13 February 2007

Session 2

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JUSTICE 2 COMMITTEE
4th Meeting 2007, 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)
*Michael Matheson (Central 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)
Johann Lamont (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Tracey Hawe

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Steven Tallach

LOCATION

Committee Room 5

Scottish Parliament

Justice 2 Committee

Tuesday 13 February 2007

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

Custodial Sentences and Weapons (Scotland) Bill: Stage 2

The Convener (Mr David Davidson): Good afternoon, ladies and gentlemen, and welcome to the fourth meeting in 2007 of the Justice 2 Committee. No apologies have been received so far. I ask everyone in the room kindly to switch off mobile phones and pagers.

Item 1 is day 2 of stage 2 of the Custodial Sentences and Weapons (Scotland) Bill. Following a decision of the committee, we will today consider sections 6 to 20. Last week we dealt with sections 43 to 46 on weapons, section 1, schedule 1 and sections 2 to 5. Members should have the marshalled list and groupings for today's consideration of amendments, and the letter from the Deputy Minister for Justice and the summary description of the Executive amendments.

I welcome once again the deputy minister and her colleagues from the Executive. I also welcome Bill Aitken, who has come along to speak to the amendments that he has lodged.

After section 5

The Convener: Amendment 43, in the name of Colin Fox, is grouped with amendment 44. If amendment 13 in group 2 is agreed to, amendment 44 will be pre-empted.

Colin Fox (Lothians) (SSP): The purpose of amendment 43, on short-term prisoners, is to apply the specific provisions on risk assessment and the licensing supervision requirements of the community part of the sentences where they would do the most good. In other words, the amendment would change the threshold at which the provisions on sentence management would kick in. It focuses on the offenders whom we all know pose the greatest risk to the community. In addition, it offers a much more honest and realistic approach to the use of relatively scarce resources and would give greater reassurance to the public. In my opinion, it has the advantage that it would prevent a most unwanted potential explosion in our prison population.

I turn to the part of the amendment to do with risk assessment. Short-term prisoners represent the overwhelming majority of the average daily prison population in Scotland. On the one hand, such prisoners pose much less of a threat to public safety, but on the other hand, they are a much greater challenge to us all in dealing with repeat offending. One witness put it evocatively when he told us that that group of prisoners are

"serving life sentences by instalment".—[*Official Report*, *Justice 2 Committee*, 14 November 2006; c 2956.]

That brings its own challenges.

I hope that members accept that we received a welter of evidence that highlighted the current difficulties and failings in the system in dealing with short-term prisoners. Despite the huge cost of incarceration, the Scottish Prison Service admits to being incapable of doing much during their time in custody to help people in this category to turn around their offending behaviour. That is an area on which the committee could focus its attention.

Under the bill, all short-sentence prisoners serving between 15 days and six months are to be risk assessed. I have seen nothing in evidence that leads me to believe that the resources exist to enable that, or that it would be the best use of the existing resources. The minister and the Executive gave us figures that showed that 4,800 prisoners would fall into the category of requiring a risk assessment. That would be a huge increase on the numbers that we deal with currently.

On amendment 43, I argue that the bill's provisions on supervision, risk assessment and extending periods in custody should really kick in at 12 months, not 15 days. To my mind, that would ensure better use of relatively scarce resources in the Scottish Prison Service and criminal justice system. It would give the professionals involved the opportunity to engage, to assess risk and to prepare offenders for release.

The Executive's acceptance that the licence conditions that apply to short-term prisoners, such as a promise of good behaviour and—I noticed at the weekend—an additional promise not to leave the country, are appropriate serves to illustrate the risk that is posed by short-term prisoners, as the Executive sees it. The distinction that amendment 43 tries to draw is between licence requirements on the one hand and the need for statutory supervision of this category of prisoners on the other hand. The bill provides for statutory supervision on release for the community part of the sentence to be applied to all prisoners who are sentenced to six months or more. The Executive suggests that the effect of dealing with that would be to almost triple the workload of criminal justice social workers, who would go from dealing with 1,500 cases to nearly 3,500. I do not think that that is realistically manageable, given that—as we know—that profession already has chronic recruitment difficulties. Furthermore, it would divert existing staff resources away from areas that

involve greater dangers to the public. That is a key issue that must be addressed.

Professionals have told the committee that there is a need to stress greater intervention in the wider life circumstances of short-term prisoners rather than simply issuing more restrictive and punitive measures. I agree with that. I also agree with the criminal justice forum on short-term prison sentences, which said that the bill should better reflect the need to move away from concentrating on prisoners who pose a risk of serious harm towards a focus on the risk of reoffending, which would involve needs-based interventions such as housing, health, employment and relationship counselling.

I move amendment 43.

The Deputy Minister for Justice (Johann Lamont): The Executive has been clear that the fundamental purpose of the bill is to put an end to the current discredited system of automatic unconditional early release, which we believe is a blanket approach. Colin Fox's amendments, if supported, would cause that blanket approach to be applied to a range of individuals.

Amendments 43 and 44 seek to introduce a new category of prisoners, to be known as "short-term prisoners", who would be offenders who were serving sentences of between 15 days and 12 months. Right away, that would add an unnecessary tier to a system that is designed to make sentencing easier to understand. Of far more concern than that, however, is the fact that amendment 43 would cause a large number of offenders to be released automatically at the halfway point of their sentence, subject only to a good behaviour condition on their licence.

Colin Fox referred to basic conditions, but our plans are to allow for more conditions to be imposed to suit personal circumstances and to allow conditions to be attached to the individual rather than to use a category-based approach. It will of course be argued that, in practice under the Executive's proposals, that is what will happen to the vast majority of offenders in that sentence range. However, that is a one-dimensional view because it does not acknowledge what would not be available if amendment 43 were successful. If the amendment is agreed to, the courts will not be able to reflect a serious offence or a string of serious offences when setting the custody part of sentences. The sentence-management process will not be able to take account of a particular case when the indications are that the offender should be referred to the Parole Board for Scotland on ground of risk.

Finally, amendment 43 would remove from Scottish ministers the power to insert additional licence conditions, such as electronic monitoring, where they would be considered appropriate.

The provisions in section 27 will require offenders who are sentenced to six months or more to be subject to supervision while on licence during the community parts of their sentences. Amendment 43 would remove that support for the six-month to 12-month group. That group will include sex offenders and people serving sentences for violence. The measures that we introduced in the Management of Offenders etc (Scotland) Act 2005 requiring supervision for short-term sex offenders took effect on 8 February 2006. Since that date just over a year ago, 33 sex offenders who were sentenced to between six and 12 months have been released on licence and subject to supervision. If amendment 43 were to succeed, such offenders would not be supervised. Removing that element of supervision will not go very far towards protecting the public or reducing reoffending.

I accept that our proposals will place demands on the system and that amendment 43 seeks to address that. However its consequences would be unacceptable. The custodial sentence planning group, which has been set up to work on implementation of the measures, is actively engaged in developing a model that will ensure that there is a proportionate approach to risk assessment and that there is support in the community, including managing risk, by making the most effective and efficient use of the resources to hand. The group involves those who will be most directly affected: the courts, the Scottish Prison Service, criminal justice social workers, the community justice authorities and the voluntary sector.

It is through our measures—which will assess the risk and needs of individual offenders in order to inform a programme of support that begins in custody and is carried through into the community—that we will better protect the public and reduce reoffending. As has already been indicated, amendment 44 is a consequential amendment. I urge the committee not to support amendments 43 and 44.

Bill Aitken (Glasgow) (Con): I have listened carefully to Colin Fox's arguments and there is some merit in his initial statement that the process would be resource intensive and devoted to short-term prisoners. We would probably all agree that resources might be better directed at longer-term prisoners. The minister is correct to say that what Mr Fox is proposing is prescriptive. The vast majority of cases will not be subject to any particularly onerous conditions, apart from the condition that the individual must behave. If we were to accept amendment 43, there would be no way of applying conditions for the minority of

prisoners for whom it would be necessary. I recommend that the committee reject amendment 43.

Colin Fox: I agree with the minister that the current system is discredited. Amendment 43 would replace it with a better one that would have the faith and the trust of the public. My fear about the bill is that we are offering the public pie in the sky and that, based on the available provisions and resources, there is no chance of providing what the bill contains. It comes down to resources. Rather than be overwhelmed by a burden that they cannot live up to, it would be preferable for the progressive and decent parts of the bill regarding community sentences—with which I think we all agree—to be given an adequate chance to succeed. The resource implications are clear to the committee. That is the fundamental issue behind amendment 43. The amendment is of value and would be a better approach.

The Convener: The question is, that amendment 43 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)
Butler, Bill (Glasgow Anniesland) (Lab)
Davidson, Mr David (North East Scotland) (Con)
Macmillan, Maureen (Highlands and Islands) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

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

Amendment 43 disagreed to.

Section 6—Setting of custody part

The Convener: Amendment 13, in the name of the minister, is grouped with amendments 15, 19 to 23, and 33. If amendment 13 is agreed to, amendment 44 will be pre-empted.

Johann Lamont: As the committee is aware, the provisions in section 6 are key to the new regime. They set out what the court must do once a custodial sentence has been imposed. What happens at that point will impact on how long the offender will be in custody before being considered for release on licence. It is also the point at which the offender, the public and the victim will know the minimum time the offender should expect to spend in prison. What section 6 does not do is interfere with the court's sentencing discretion. Matters that a judge currently takes into account when deciding on a sentence and, if imprisonment is imposed, on the length of sentence, will still be taken into account under the new measures. Those include the need for public protection.

We have heard the case made that offenders who would currently receive short sentences should not be sent to prison in the first place. That is an interesting proposition which is worthy of debate, but it is not the context of the bill. In considering what the bill seeks to do we must remember that we start from the point at which the court has decided—having had regard to all the options that are available to it, including a menu of non-custodial disposals—that imprisonment is the appropriate option. That said, the Executive recognises that community sentences can also make a valuable contribution to tackling reoffending, so we continue to consider ways of enhancing that option.

The committee will recall that section 6 prompted substantial debate during stage 1. We are grateful for that debate and for the committee's helpful comments in its stage 1 report. We said in response to those comments that we would present changes at stage 2 that we believe will further clarify the purpose of section 6 and put it beyond doubt that the section is about sentence management and not sentencing. The amendments will deliver that commitment.

14:15

Members of the judiciary have expressed concerns about the effect of section 6 on sentencing. We have stressed many times that the measures in the bill are about sentence management, not sentencing. In addition to clarifying that section 6 applies to custody and community prisoners, amendment 13 makes it clear beyond doubt that the requirement to strip out the question of public protection from the court's consideration of the custody part will apply after the court has set the length of sentence. At that stage, the court will consider what proportion of the sentence the custody part should comprise. Amendment 13 will separate the sentencing and sentence management functions by making it clear that the custody part of the sentence will be set after the court has imposed the sentence.

Amendment 15 will clarify the court's power to increase the proportion of the sentence that is to be served in custody. In that context, section 6(4) sets out matters that the court should take into account when it decides whether to increase the custody part of the sentence. Amendment 15 will make it clear that the list is not exhaustive—the court may have regard to other matters that it considers appropriate to the circumstances of a case.

A key aim of the bill is that what a sentence will mean should be clearly set out at the time of

sentencing. Amendment 19 will ensure that when the court sets the custody part of the sentence, it says what that means in actual time—two years and six months, for example.

Amendment 20 will require the court, after it has decided to extend the custody part of a sentence, to give reasons for its decision in open court.

The expansion of section 6 will make for a lengthy section, so amendments 21 to 23 will remove subsections of section 6 and reproduce their provisions in new sections after section 6. We hope that that will improve the bill's readability.

Amendment 33 will ensure that the amendment that will be made to section 6 by amendment 13, on custody and community prisoners, will where appropriate apply to offenders who are given life sentences. Amendment 33 provides that section 15 will apply when a life sentence is imposed and will require the court to make an order that specifies the punishment part after it has passed sentence.

I hope that my explanation of our package of amendments reassures the committee that we have taken on board comments that were made during stage 1, which will produce a much-improved bill. I stress the importance of the measures that deal with setting the custody part in the combined structure. We want to take the opportunity that is afforded by the parliamentary process to continue to review the provisions in order to ensure that we get them absolutely right. We are still in discussion with the judiciary: if it transpires that further refinement is required, we will lodge necessary clarifying amendments at stage 3. We will ensure that the committee is kept informed on such matters.

I move amendment 13.

Bill Aitken: It will come as no surprise to the minister that the approach that has been taken to the combined sentence structure is one of the aspects of the bill that troubles the Conservative group. It would have been much more sensible to have extended existing legislation to allow the court to impose a custodial sentence and thereafter to extend the sentence for a particular period, subject to conditions that were appropriate to the case. The bill is flawed—it might be argued that it is fatally flawed—by the failure to take that approach.

I have other reservations about the bill, but it might be more appropriate to highlight them later. For what it is worth, I recommend that the committee reject amendments 13 and 15, and that it accept the other amendments in the group for the time being. The minister said that there might be a need to clarify the position at stage 3. I understand that and I look forward with interest to the lodging of more amendments.

Colin Fox: I have a couple of questions for the minister. I presume that she accepts that most of the witnesses who gave evidence to the committee anticipated that the bill would have an inevitable impact on the time that offenders serve. Does the minister accept—notwithstanding her comments in the past and today about there being a genuine attempt to separate sentencing from sentence management—that most expert witnesses think that the bill will have a knock-on effect on sentencing?

Amendment 19 will provide that

"An order specifying a custody part must specify the custody part by reference to a fixed period of time."

Does the minister envisage that the "fixed period of time" might vary between the minimum period of 50 per cent of the sentence and the maximum period of 75 per cent of the sentence? In other words, there could be a range of possible times. It could be perfectly legitimate for two thirds of the sentence to be accepted. It would depend on what the judge or the sentencer said at the time. I see one of the minister's advisers nodding.

The Convener: Would you like the minister to answer that question before you ask any more?

Johann Lamont: I will answer when summing up.

Colin Fox: That is fine. My third question relates to amendment 13. I want to ask for the minister's view of the conundrum—which I would describe as a nonsense—that the committee has previously considered, that someone who is sentenced to 14 days will serve longer in jail than someone who is sentenced to 30 days. For sentences of 14 days or less, is there a case for leaving the provisions as they are?

The Convener: As no other member has questions to ask, I invite the minister to sum up.

Johann Lamont: I will start with Colin Fox's questions. First of all, it is acknowledged in the financial memorandum that there will be an impact on the prison population. The way in which we deal with offenders—or people who might fall into offending behaviour—will have an impact over time on the credibility of the justice system and sentencing. I hope that people will pay attention to such things. We have a whole range of social measures and we should not consider this bill in isolation.

Colin Fox's second question was on whether the custody part of a sentence could be set between 50 per cent and 75 per cent of the total sentence. I believe that the answer is that it could.

I will come back to Colin Fox on his third question, because I cannot read my own handwriting. It was obviously a devastating

response; I will try to interpret it in a moment and come back to him.

As a Conservative, Bill Aitken has a great deal of experience of "fatally flawed" legislation, which is what we are trying to deal with in this bill. I do not accept his contention that this bill is fatally flawed. He referred to extended sentences. Such sentences will not be abolished by the bill. In fact, the bill will still permit a court to impose longer periods of supervision on particular offenders.

In the amendments in this group, we were keen to deal with—if not the scaremongering—the anxiety that has been expressed by some people that public protection could not be considered by the courts. In establishing the headline sentence, the courts can take into account whatever factors they consider relevant. Members of the judiciary have stressed to me the importance of their still being able to do so. Our amendments will make an important clarification.

Bill Aitken implied that my indication that we continue to review such issues was a sign of weakness. In my view, it is a sign of strength. I met representatives of the Sheriffs Association yesterday to explore the issues. If at stage 3 it were possible for us to lodge further amendments to make things absolutely clear and to give people confidence and comfort, it would be foolish in the extreme not to do so just because Bill Aitken might consider it a sign of weakness.

We will want to consider some issues further, but what we do will be very much in line with what we have already said; it will be about giving people further comfort on the practicalities of delivering our policies.

I say to Colin Fox that we do not underestimate the challenge that the bill presents. Dealing with offending behaviour in communities is a challenge and we all have a responsibility to rise to it. I said that I would come back to Colin Fox on another question. I think that we have already agreed that, wherever the threshold number of days had fallen, there could have been what has been called a conundrum. However, there is a danger. To imply that a 15-day sentence in custody is a harder sentence than a 30-day sentence with a community part and a custody part is to fall for the view that the community part is not part of the sentence. We have to be careful about that. It is possible for people to be punished within the community. We should not allow ourselves to think—in shorthand, if you like—that a sentence means only the custody part and that any other stuff will not entail any restriction or control and will not have any impact on the offender. That would be to take quite the opposite view from one that I think Colin Fox has articulated in the past.

I hope that committee members will support the amendments.

The Convener: The question is, that amendment 13 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

FOR

Baillie, Jackie (Dumbarton) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

AGAINST

Davidson, Mr David (North East Scotland) (Con)
Fox, Colin (Lothians) (SSP)

The Convener: The result of the division is: For 5, Against 2, Abstentions 0.

Amendment 13 agreed to.

The Convener: Amendment 14, in the name of the minister, is grouped with amendments 45, 18, 34, 51, 52 and 35.

Johann Lamont: Amendment 13, from the previous group, will clarify the question of when to take account of public protection, which has been of particular concern to sheriffs. Amendment 14 and the consequential amendment 18 complement that measure. Amendment 14 will clarify and consolidate the measure specifying the purpose of the custody part. As a consequence, amendment 18 will remove section 6(5). Amendments 34 and 35 will make corresponding amendments to section 15 of the bill, which deals with life-sentence prisoners. Amendment 45 seeks to add the consideration of public protection to the factors that are to be taken into account when setting the custody part. As we have said all along—I said it earlier and have now clarified it—public protection should be taken into account when the court is considering the appropriate length of the total sentence. The custody part is for the purposes of retribution and deterrence; for punishment, in other words. It forms at least 50 per cent of the overall sentence. Any extension by the court is because of factors such as the circumstances of the offence or of the offender's previous convictions. We are seeking to include in that reoffending while on licence.

It is right that those factors should influence punishment, but once a judge has fixed the headline sentence, having taken account of the information that is available, it is not right to expect him or her to look into the future and try to assess what an offender's risk might be at the end of the custody part. The on-going assessment of risk and needs by Scottish ministers through the Scottish Prison Service and local authorities will form part of the sentence-management process, with measures being taken as appropriate within a custodial setting. That will allow decisions about

risk to take account of all relevant factors, many of which will have transpired during the custody parts, and of which the court could not possibly have been aware when passing sentence.

If public protection remains a factor in setting the overall sentence, it becomes absolutely key in determining whether an offender should move to the community part of the sentence. For those reasons, there is no need for amendment 45, in the name of Mr Aitken, or consequential amendments 51 and 52, which would apply the same test to life-sentence prisoners. I urge the committee to reject those amendments.

I move amendment 14.

Bill Aitken: The Executive has changed its attitude. Initially, it was clear to any sensible observer of the process that there was going to be a requirement to ignore the potential of the accused person to cause harm to the public. I am tempted to say that not since Saul went on his celebrated excursion to Damascus has there been such a change in outlook.

Everyone round this table would agree that any sentence must have a number of components, such as punishing the offender, deterring others, marking society's disapproval and protecting society, particularly in the case of violent or sexual offenders. I hear what the minister said and, as I said, the Executive's intention is now much clearer. It had mystified not only me but others who were looking at the proposals. However, I still believe that my amendments would mean a much more satisfactory situation. If amendment 45 were agreed to, it would be quite clear that sentencers should take into consideration the potential risk from the offender. There would be no dubiety about it. I therefore recommend in the strongest terms that the committee agree to amendment 45. Amendments 51 and 52 are, of course, consequential on amendment 45 and do not require debate.

14:30

Colin Fox: Given that we are discussing section 6, which deals with setting the custody or punishment part of a sentence, I hope that the convener will indulge me in my asking about the amendment that the Executive has lodged under which it will be possible for the court to seek to extend the proportion of a sentence that an order specifies to be the custody element. Will the minister spell out for us whether that power is distinct from the power that we have already discussed, whereby Scottish ministers will be able to return to custody a person who reoffends when out on licence or under supervision? My impression is that we are talking about an extra power.

Johann Lamont: I am not sure that that point relates to one of the amendments in the group that we are discussing, the intention behind which I have outlined.

Colin Fox: Perhaps you could remind me of the intention.

Johann Lamont: I would have to repeat what I have already said and I am not quite sure what the point at issue is. If I have missed it, I will ensure that we clarify it before stage 3. I have outlined our desire to clarify what has to be taken into account by the sentencer. That is an issue for the sentencer; I am clear that we are talking about sentence management. In all the discussions that I have had with the judiciary, it has been evident that public protection is the central consideration. The custody part of the sentence is about punishment. Subsequently, when risk factors are identified, the custody element could be extended.

The Convener: The question is, that amendment 14 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Baillie, Jackie (Dumbarton) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Fox, Colin (Lothians) (SSP)
Macmillan, Maureen (Highlands and Islands) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

AGAINST

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

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

Amendment 14 agreed to.

Amendment 15 moved—[Johann Lamont].

The Convener: The question is, that amendment 15 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Baillie, Jackie (Dumbarton) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Fox, Colin (Lothians) (SSP)
Macmillan, Maureen (Highlands and Islands) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

AGAINST

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

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

Amendment 15 agreed to.

The Convener: Amendment 16, in the name of the minister, is in a group on its own.

Johann Lamont: One of the key aims of the bill is to contribute to our goal of tackling reoffending. That is why most offenders will be subject to the custody and community regime. We have made it clear that the community part of the sentence will serve a dual purpose: it will enhance public protection and build on work that is begun in prison and which is aimed at helping offenders who are willing to take the opportunity to turn their lives around and stop offending.

Swift action will be taken against offenders who flout their licence conditions, and serious breaches of licence will result in recall to custody. We believe that people who reoffend while they are out on licence should be dealt with severely. Amendment 16 will allow the court, when considering whether to extend the minimum custody part of the sentence, to take account of the fact that an offence was committed while the offender was serving a sentence of imprisonment for another offence. In other words, offences that are committed following release on licence will be covered.

I move amendment 16.

Bill Aitken: Amendment 16 is acceptable. It manages to get round the conundrum that is posed by the European convention on human rights whereby a prison governor, for example, was considered not to be an independent tribunal, with the result that remission under the existing system could not be forfeited in respect of bad behaviour that was committed while the offender was serving a prison sentence. Amendment 16 is worth our while and should be agreed to.

Johann Lamont: I welcome Mr Aitken's support and urge the committee to support the amendment.

Amendment 16 agreed to.

The Convener: Amendment 17, in the name of the minister, is in a group on its own.

Johann Lamont: As part of the package of changes to section 6, we promised to clarify the factors that are to be taken into account when the custody part of a sentence is set. Concerns were voiced that section 6 would require early guilty pleas to be taken into consideration twice—when the overall sentence was set and again when extension of the custody part of the sentence beyond the minimum of 50 per cent was considered. We agree that that would have been inappropriate, so amendment 17 will remove the apparent double counting. No account is to be taken of an early guilty plea when the custody part of a sentence is set.

I move amendment 17.

Bill Aitken: Amendment 17 is a worthwhile amendment. Since the implementation of the Bonomy proposals in the High Court and the subsequent Du Plooy judgment, there has been considerable discounting of sentences. As it stands, the bill would result in duplication of discounts. Amendment 17 seeks to remedy that and so should certainly be agreed to.

Amendment 17 agreed to.

Amendment 45 moved—[Bill Aitken].

The Convener: The question is, that amendment 45 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)
Butler, Bill (Glasgow Anniesland) (Lab)
Fox, Colin (Lothians) (SSP)
Macmillan, Maureen (Highlands and Islands) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

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

Amendment 45 disagreed to.

Amendment 18 moved—[Johann Lamont]—and agreed to.

The Convener: Amendment 46, in the name of Colin Fox, is grouped with amendments 47, 26A to 26J and 48 to 50. Amendments 49 and 50 are direct alternatives. If the committee agrees to amendment 49 and then to amendment 50, the latter decision will stand. If amendment 31, which is to be debated in a later group, is agreed to, amendment 48 will be pre-empted.

Colin Fox: Amendment 46 seeks to address two issues that came up in stage 1. I did not see the other amendments in the group until after I had lodged amendments 46 and 49. I am struck by the distance between my approach and Mr Aitken's and I take comfort in the fact that they are diametrically opposed.

Jackie Baillie (Dumbarton) (Lab): You have been voting with him.

Colin Fox: No—he is nearer to you than he is to me.

I highlight the fact that the bill puts greater faith in community sentences. That commitment is welcome and it will put the right emphasis on an area in which we can reasonably expect progress in reducing reoffending. However, if the consequence of increasing the custody part of the sentence is that the likelihood of reducing

reoffending by reducing the time that is spent on turning around the offending behaviour will be lessened, the bill will work in a perverse manner.

On a much more practical point, amendment 46 seeks to reduce the upper limit of the custody part of a sentence while maintaining an increase on the tariff behind bars that we have at the moment. It is intended to allow the system to work by accepting that time is needed to prepare someone for release back into the community whence they came. Such time will be cut if we extend the time an offender spends behind bars; that would, in effect, reduce their post-release supervision and integration back into the community and offer the public less protection.

Amendment 46 has the advantage of offering the community greater protection. It also has the advantage of lessening the likelihood of an unwelcome rise in the prison population as the length of sentences rises and the proportion of time offenders spend in custody increases dramatically. I am sure that the minister will, at this time, when we have record numbers of people in prison, accept that a potential increase by as many as 1,100 prisoners at a cost of as much as £200 million while offering the public less protection is not to be welcomed.

Amendment 49 is consequential on amendment 46.

I move amendment 46.

Bill Aitken: We are having this debate because there is widespread public and parliamentary dissatisfaction with the existing system. The system has descended into farce as a result of the operation of the ECHR, which means, in effect, that a six-year sentence means four years and that a four-year sentence means two years. There was unanimous agreement that that simply could not be allowed to continue.

The Executive, in particular, has come in for severe criticism because of the number of offenders on early release who have committed serious offences during the unexpired period of their sentences. It is often said that hard cases make for bad law, but in this instance, it is certainly apparent that something had to be done. To that end, the Executive has made a number of proposals, some of which are acceptable and some of which are not.

I repeat what I said in response to a previous amendment. I understand the value of monitoring some offenders after their release from prison. As I have already said this afternoon, members will be aware that there is, under existing legislation, provision for extended sentences. The minister stated correctly that what she proposes today will not change that position, which adds strength to the argument that the correct way to deal with the matter is simply to make the bill state that there will be an end to early release. Thereafter, the court could, in certain cases, order a subsequent period in which the offender would be monitored within the community. I have been inhibited by the wording of the bill, which does not allow for such an amendment to be lodged, although it would have been a much simpler way of dealing with the problem. However, I must accept the decisions that were made. The end to early release would have been the answer to the existing problem and would have assisted the Executive in its no doubt sincere attempts to end the revolving-door situation.

At present, we all agree that the sentencing system in Scotland is dishonest, but the bill will not alter that. The public perception of a sentence is that it is a period spent in custody. I know that that perception is wrong, but the sentences that are passed by the Scottish courts range from admonition to life imprisonment. The public think that a sentence is time spent behind bars, as Colin Fox put it, but that is not what will happen under the bill. The public do not understand the nuances of the system. When a sheriff or judge says that the sentence is four years, six years or whatever, the victim of the crime wants to know that the offender will spend that time in custody. The complainer or victim may take some comfort from the fact that when released, the offender will be kept under supervision. That would be a much more honest way of doing it and a much more transparent approach.

The committee received evidence from the Sheriffs Association. In its conclusion, we were told what will happen when sentences are passed: it is a long and convoluted process, which ends with the words to the accused, “I hope that the sentence of the court is clear to you.” As things stand, sentencing will not be clear to the accused nor, which is more important, to the public. At the end of the day, there is nothing to suggest that people will spend more time in prison. The more I look at the bill and the financial memorandum, the more I think that it is all smoke and mirrors.

Obviously—or hopefully—Parliament will in the future spend less time legislating and more time reviewing what has been legislated upon. We would then have some interesting answers. If that were to happen and in five years or so we were to look back on the effects of the bill, we would see that there had been no significant increase in the prison population, but there would have been a significant increase in the costs to local authorities and other agencies that are involved in monitoring. We will have failed to take a unified approach to cutting crime. The bill is not the answer.

Jackie Baillie: I was going to sit quietly, but the prospect of following Bill Aitken was just too much

to resist. It is as well that the committee is factual about such matters, because I seem to recall that the system that Bill Aitken described as being "discredited" was set up by the Tories. However, I will let that stick to the wall because I understand that Bill Aitken said previously that he requires clarification on a number of points and that he is easily mystified, and clarity is a commendable thing. However, I must take issue with him when he says that the Executive's position is "dishonest"—it is far from it. The Executive is trying to introduce the clarity that the member so rightly seeks, so the bill clearly sets a custody and community part of a sentence.

14:45

I think that Bill Aitken would acknowledge that the community part of the sentence is essential if we want to reduce the risk of reoffending, because we want to resettle people appropriately in communities. We need time to do that and resources must be devoted to it. The community part of a sentence is not an added option; it is very much an integral part of the sentence.

Secondly, in contrast to the position under the current system, which the Tories gave us, a minimum sentence will mean a minimum sentence and ministers will be able, through the powers that will be available to them, to increase the custody part to 75 per cent of the sentence. Having studied the detail of the bill, I think that that is a vast improvement on the current situation.

Bill Aitken, if he were honest about the matter, would welcome the amendments from the Executive and the thrust of the bill as a whole.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): Bill Aitken is asking us to replace an arbitrary approach with another arbitrary approach. Neither is acceptable.

Bill Aitken accepts that within any sentence there needs to be a period of rehabilitation—in fact, one tenth of a sentence. That is a shift in Conservative party policy—from five sixths a year ago—so they have obviously been doing their maths. They have accepted a point of principle, which is that during a headline sentence there would be a period of rehabilitation for an individual. Therefore, the debate is over what the appropriate period is, what the appropriate conditions are when an offender serves the sentence in the community and what supervision and support are available to them. That is where the 25 per cent comes in. The debate about the discretion in relation to that period during the serving of a sentence is a separate debate from saying that nine tenths of a sentence should be served within custody alone with no community element of rehabilitation.

The irony of the amendments in the name of Bill Aitken is that they would create far more bureaucracy because a 100-day sentence would include a 10-day period in the community, risk of harm to the public having been assessed. If Mr Aitken seeks clarity within the bill, the amendments in his name are certainly not the right way to achieve that.

There is also a point of principle. Bill Aitken's position is very frustrating. He is saying that offenders' offending during the community part of their sentence is the definition of a failing system, but that situation would continue if his amendments were agreed to. He should be honest enough to say that. If his amendments were passed, any offender serving a 200-day sentence would serve 20 days in the community. He is a very brave man if he is saying to Parliament that his amendments would guarantee that no offender would commit any offence within the 20-day period. I do not think that he is doing that, so if there is dishonesty and a discredited position, they are Bill Aitken's.

Bill Aitken: I was careful to clarify the point and to put it on the record that my preferred amendment would have been quite different; it would not have included the 90 per cent provision and it would have written off the period of the sentence within the community, subject—of course—to the availability of the extended sentence, which exists under the current legislation and is continued into this legislation.

Johann Lamont: Bill Aitken cannot have it both ways. He cannot acknowledge honest endeavour by the Executive and at the same time say that it is all smoke and mirrors and dishonesty. He must decide what he is attacking us for: he must attack us either for being honest and useless or for being dishonest. We are neither, but he should perhaps reflect on his position.

He also managed to roll up into his argument the suggestion that we are legislating too much. I do not think that anyone in Parliament or beyond does think that we do not need to deal with unconditional automatic early release; indeed, the Executive has been criticised for not doing so. I do not know whether the Tories' new position is that we should remain with the current legislation, which is clearly ineffective, rather than pass the bill. It would be curious if that were the case.

Amendment 46, in the name of Colin Fox, seeks to reduce the maximum custody period that the court can set from three quarters to two thirds of the sentence, while amendment 49 would mean that all offenders were released—as they are now—after two thirds of the sentence. The effect of the amendments would be to render the provisions as a whole unworkable without further changes. However, that is not the key point.

The basic principle of our policy is to ensure that sentence management is carried out in a joined-up way so that work that is started during the custody part of a sentence can be taken forward and developed during the community part in order to maximise the effects on public safety and rehabilitation. I accept that there is scope for a debate on what the right threshold should be to achieve that objective fully. In our view, setting the threshold at 75 per cent strikes the right balance. It will allow for exceptional cases in which the court needs to reflect publicly that a crime is particularly heinous or that an offender is so persistent in his or her offending that the minimum custody period is not enough. It will also allow the Parole Board to deal properly with offenders who are assessed as being a high risk so that there is reasonable time for restrictions to be effective and for rehabilitative work to continue in the community.

Amendment 47 and the other consequential amendments, in the name of Bill Aitken, would result in all those who are sentenced to 15 days or more spending nine tenths of their sentences in custody regardless of the risk that they posed. The consequential amendments would make the processes unworkable. The amendments would still require Scottish ministers to undertake risk assessments. In all cases in which an offender was assessed as presenting a risk of causing serious harm, the case would still be required to be referred to the Parole Board before the nine-tenths point of the sentence. The offender would also be required to be released at the same point. Amendments 26A to 26J would require the board to review such cases despite the fact that the offender could not be released before expiry of the custody part and could not be detained beyond that.

The key point, however, is not the accuracy of the amendments but whether they would create a system that, for each case, would allow the right mix of punishment, risk assessment and management, joined-up working and the opportunity to break the cycle of reoffending. In my view, simply locking up offenders for what is effectively their entire sentence would not go anywhere near achieving the sentence-management framework that the bill seeks to bring about. There is a place for custody—of course there is—but for custody to be effective, there needs to be an incentive for offenders to make something of their time in prison rather than just sit it out.

I accept Bill Aitken's point that people see the custody part as being the sentence, so perhaps we need to be tougher about what happens in the community part of a sentence. It should be more visible so that people have a greater sense that the offender is in some way restricted for the whole sentence. However, at the point when the sentence is announced, there will be clarity about how much time the offender can expect to spend in custody. If Bill Aitken's argument is that people are concerned because they do not know for how long the offender will be in prison, I point out that the court will be given the responsibility to clarify the minimum length of the custody part. That is fair.

The requirement to serve part of the sentence in the community is not a soft option. As has already been said, it is a smart option. Evidence shows that we have a much better chance of stopping many offenders returning to crime if we tackle the underlying causes of their criminality. That can be done best through a planned and joined-up combination of a custody part that recognises the seriousness of the crime, and a community part. That would simply not be possible if the amendments in the name of Bill Aitken were agreed to.

For the reasons that I have explained, I urge members to support neither the amendments in the name of Mr Fox nor the amendments in the name of Mr Aitken.

Colin Fox: I must confess that, despite the fact that our amendments are at variance with one another, we are all unanimous in saying that the current system is discredited. The question is how we make it credible. The minister has outlined the Executive's position. That position is not dishonest, but the Executive's position is not to provide greater clarity than is currently provided in the bill. Jackie Baillie made the pertinent point that it is possible to offer greater support for resettlement in the community. The fact that the bill tries to do that is welcome, but all that it seeks could be achieved without increasing the custody part. Certainly, it could be achieved without increasing the minimum custody part to 75 per cent.

Jeremy Purvis's criticism of Bill Aitken's position had a certain salience. Under Bill Aitken's proposals, there would be insufficient time for people to serve the community part of, for example, a 20-day sentence. That is precisely the second point that I make in my amendments. If the minimum proportion is set at 75 per cent, we will still run the risk that there will be insufficient time available to ensure that the bill's important provisions on the community part of sentences will be implemented fully. However, I accept that there is a discussion to be had—of course there is—about whether the threshold should remain at the current level of 50 per cent or whether it should be set at 66 per cent or 75 per cent.

In speaking to the amendments in his name, Bill Aitken clarified that he would, if he had been left to his own devices, have sought to ensure that offenders spend 100 per cent of their sentences in

jail. That is a reprehensible position, but it is at least honest. However, such a proposal rules itself out because it includes no remission for good behaviour, which is a standard penal policy that we have had for a long time. Bill Aitken's proposal would lead to a colossal increase in the jail population, so for that reason I do not find it attractive.

With amendment 46, I want to make it clear that making two thirds of the sentence the threshold is a better place to start and offers the greatest opportunity for the community part of the sentence to be successful. As a result, I will press the amendment.

The Convener: The question is, that amendment 46 be agreed to. Are members agreed?

Members: No.

The Convener: There will be a division.

FOR

Fox, Colin (Lothians) (SSP)

AGAINST

Baillie, Jackie (Dumbarton) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Davidson, Mr David (North East Scotland) (Con)
Macmillan, Maureen (Highlands and Islands) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

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

Amendment 46 disagreed to.

Amendments 19 to 21 moved—[Johann Lamont]—and agreed to.

Amendment 47 moved—[Bill Aitken].

The Convener: The question is, that amendment 47 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)
Butler, Bill (Glasgow Anniesland) (Lab)
Fox, Colin (Lothians) (SSP)
Macmillan, Maureen (Highlands and Islands) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

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

Amendment 47 disagreed to.

Section 6, as amended, agreed to.

After section 6

Amendment 22 moved—[Johann Lamont]—and agreed to.

Amendment 23 moved—[Johann Lamont].

The Convener: The question is, that amendment 23 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Baillie, Jackie (Dumbarton) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Davidson, Mr David (North East Scotland) (Con)
Macmillan, Maureen (Highlands and Islands) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

ABSTENTIONS

Fox, Colin (Lothians) (SSP)

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

Amendment 23 agreed to.

The Convener: Amendment 24, in the name of the minister, is the only amendment in the group.

Johann Lamont: Issues that emerge during a trial provide vital information about the nature of the offence and the offender. At the moment, trial judge reports can provide useful input into the Scottish Prison Service's offender screening and assessment process and provide information for the Parole Board when assessing the offender's suitability for release on licence. Currently, judges informally produce reports on cases involving those who have been sentenced to four years or more—indeed, to life imprisonment—that are referred to the Parole Board to determine the prisoner's suitability for release. Amendment 24 seeks to formalise that arrangement by requiring a judge to produce a report for all cases that attract the custody and community sentence.

We believe that through this provision operational arrangements can be put in place to enable the preparation of proportionate and appropriate reports. However, as we want to ensure that we are not too prescriptive and do not inadvertently place an undue burden on the court process, we continue to work with the judiciary to ensure that the statutory requirement and its underpinning administrative process are appropriate and effective.

I move amendment 24.

Jeremy Purvis: I am sympathetic to this amendment, which represents a step forward, but I wonder whether the minister will respond to three specific points.

First, is it intended that the period of reasonable practicability should come in advance of the offender's reception into an institution if they are sentenced? If I understand it correctly, the judge's report will not only assist the agencies that will provide the individual with support and information on their reception but help to balance the criteria for judging whether someone will pose a risk to the public. Will the report come with the offender when he or she arrives at jail?

Secondly, how will the Scottish ministers use the report? Will the information be shared with other agencies? It may well include information that is not open to other agencies. Although the Scottish ministers may use the report and the information about the individual in a positive way, there may be a negative if it is shared with other agencies, such as the police or the voluntary sector.

Finally, how long will the information be kept? Is the report with the individual for the duration of his time in custody, or is it appended to any other records that the offender has in the criminal history database? If the minister could reply to those questions, it would be helpful.

15:00

The Convener: Do you wish to deal with those points before we deal with other members' points?

Johann Lamont: I do not know whether anyone else has any questions—I could roll them up together.

The Convener: Mr Aitken wants to contribute.

Bill Aitken: The minister will be pleased to hear that I support amendment 24. It introduces a statutory requirement that was not in the initial draft of the bill but clearly should have been, and I welcome the fact that an amendment has been lodged. The minister is also correct in saying that we cannot be too prescriptive. I think that further work needs to be done. If she lodges further amendments at stage 3, we will look at them sympathetically.

I am intrigued by Mr Purvis's request for immediacy. Let us picture the scene—someone is locked up at 3 o'clock in the afternoon by a particular judge or sheriff, who then proceeds to another case. Does the guy have to hang around the confines of the court until the judge has finished with the subsequent case so that the report can be prepared? That would not be practical. I can see what Jeremy Purvis is asking, and the judge's report might be relevant to the regime under which the prisoner is kept in custody, but the suggestion that the report should accompany the prisoner's arrival is hopelessly impractical.

Johann Lamont: The issue is important, so we have to get it right. We do not want courts to be swamped by a requirement to write unduly long and convoluted reports about every individual, using information that is in the public domain anyway. Basic information ought to go with a prisoner on reception. If that is not happening now, we can explore the issue.

We cannot make blanket assumptions about risk on the basis of the length of sentence; it might be based on the individual, on any previous convictions or on the nature of the offence and how it impacted on a family, for example. The report has to be appropriate to the individual. We are working closely with the judiciary to ensure that.

The report is effectively a screening and flagging up of issues that the Scottish Prison Service will find useful when it determines how to work with someone who is in custody. It will be a helpful aid to the Prison Service, but we have to balance that against its not being too onerous. There are some questions, such as whether the report basically provides a narrative of the trial. The answer to that is no—we are working on the basis that the trial happens, a decision is made and the report flags up critical issues that may give the Prison Service further information.

We need to examine the information that is available on reception. Further information will inform what the SPS does with someone when they are in custody, but we are anxious that pulling that information out of the judge's report should not be too burdensome on the court.

My instinct is always for people to share information in a positive way if it is in the interests of the system and the individual concerned. There are sufficient safeguards around that to ensure that it could not be abused, and I am sure that there are constraints and rules that would allow positive information sharing without its being detrimental.

I will probably have to seek technical advice on how long the information will be kept, although I am not sure that that is constrained by legislation. As the focus of the report is to try to inform the SPS so that it can meet the needs of the individual prisoner and to flag up risk, I cannot imagine that it would be a particular concern, but I can come back to the committee on the specifics.

It is suggested that we consider the issues at stage 3. I emphasise that the provisions are about ensuring that the prison system has sufficient information about the different aspects of an individual—instead of blanket information—without putting unnecessary and burdensome pressure on our court system. We have to look at that through the planning group and elsewhere, and we will

ensure that the committee is kept fully informed of any amendments ahead of stage 3.

The Convener: Will you notify the clerks and use them as a vehicle to distribute information if you find anything when you refer to technical advisers?

Johann Lamont: I am more than happy to do that. After the meeting, I will reflect on the points that members have made on which it would be helpful to draw up a note that the clerks can distribute to members. Before stage 3, we will ensure that we provide the kind of information that we provided before stage 2—a brief note on the purpose and effect of stage 3 amendments.

Amendment 24 agreed to.

Sections 7 to 11 agreed to.

Section 12—Determination that section 8(2) applicable: consequences

The Convener: Amendment 25, in the name of the minister, is grouped with amendments 26 to 29 and 36 to 42.

Johann Lamont: Amendments 25 to 28 clarify the processes for referring cases to the Parole Board and the subsequent review of those cases by the board. They make the operational process clearer by spelling out the requirements that are placed on the board and the offender's rights with regard to the review.

Section 12 provides for further consideration by the Parole Board following a decision on the ground of risk to detain an offender beyond the court-imposed custody part. The board will set community licence conditions at that time or set a forward date at which it will consider suitability for release before the three-quarter point or set community licence conditions. That depends on the timings that are involved, which I will clarify shortly.

Amendments 25 and 26 deal with the consequences of the Parole Board directing the Scottish ministers to detain an offender on the ground of risk. They replace the provisions from section 12(2)(b) to section 12(8) with more straightforward provisions, which describe more clearly the arrangements that are to be followed when the Parole Board has assessed a custody and community offender as posing a risk of causing serious harm, so they should not be released at the end of the custody part. Under new subsection (3), an offender who has less than four months to serve before reaching the three-quarter point of the sentence will remain in custody until the three-quarter point and the board will set licence conditions.

Under new subsections (4) to (6), when an offender has between four months and two years to serve before the three-quarter point, the Parole Board can set a date in that period for a further review. If no such date is set, the offender will remain in custody up to the three-quarter point and the board will set a date for specifying community licence conditions.

Under new subsections (7) and (8), when the offender has more than two years to serve before reaching the three-quarter point, the board must set a date for a further review, which must take place in the period that begins four months after the date of the previous review and before the second anniversary of that review.

Amendment 26 also makes it clear that when an offender serves more than one sentence, the point at which he or she must be released is the date on which the last of the 75 per cent points of the sentences is reached.

Amendment 27 inserts a new section to replace provisions in section 12 that deal with a prisoner's right to request earlier consideration of his or her case by the Parole Board. The new section will apply to offenders who have been detained in custody following a review by the board. It will allow offenders to request an earlier date for a further review. That might be appropriate when the offender feels that he or she has made faster progress than was envisaged or that circumstances have changed—for example, suitable accommodation might have become available.

Amendment 28 inserts a further new section that sets out the arrangements for the Scottish ministers to refer cases to the Parole Board to enable it to set community licence conditions. It refers to offenders with between four months and two years to serve before reaching the three-quarter point and whom the board had directed should remain in custody to the three-quarter point.

Amendment 29 is consequential on the changes that amendments 25 and 26 will make and will change the reference in section 13 to section 12.

Amendments 36 to 42 make similar amendments to sections 19 and 33. They clarify the processes for referring cases to the Parole Board and the subsequent review of those cases by the board. They make the operational process clearer by spelling out the requirements that are placed on the board and the offender's rights with regard to the review process.

I move amendment 25.

Bill Aitken: I am minded to support the amendments, subject to clarification from the minister about an issue that is encapsulated by amendment 27. As we know, part of the reason why we are here is that the application of the

ECHR meant that all remission might have been earned. As Jackie Baillie says, it is true that the Conservative Government dealt with the matter wrongly in about 1995, but the Labour Government has frustrated our efforts to remedy matters from 1997 onwards.

Jackie Baillie: And we will continue to frustrate you, Mr Aitken.

Bill Aitken: What we require to do now is ensure that, as far as amendment 27 is concerned, there will be no comeback if the Parole Board refuses to bring forward a review date for any particular prisoner. Under the bill, is the Parole Board considered an independent tribunal in terms of the ECHR? If it was held not to be such, we could find ourselves in all sorts of difficulty if the bill is passed with this amendment. I am not being negative; I am simply trying to ensure that we have every possible safeguard.

Johann Lamont: I would not like to see you when you are being negative, then. Nevertheless, the point you make is fair.

To comply with the ECHR, decisions about whether prisoners are suitable for release must be made by an independent, court-like body. In Scotland, that is the Parole Board for Scotland. It is equally important that, when it directs that a prisoner should be detained beyond a court-imposed custody part, that same independent body fixes the date on which it will next consider the prisoner's case.

If the timings for further review by the Parole Board were not set out in the bill, the Scottish ministers would have to decide whether the offender's case should be referred to the board for further review and, if so, when. There is not a change of policy in any way; it is a matter of clarifying the role of the Parole Board as a court-like body.

Bill Aitken: And it is totally ECHR compliant.

Johann Lamont: Yes—well, I am sure that the parliamentary system would not have accepted it if it were not compliant. It simply reflects the current position regarding requests for an earlier date, and it is related to the Prisoners and Criminal Proceedings (Scotland) Act 1993.

The Convener: I selected the amendment on the basis of advice that it is ECHR compliant.

Johann Lamont: I was making a general point about the role of the Parole Board. The bill would have to pass that test before it was laid before Parliament.

Amendment 25 agreed to.

Amendment 26 moved—[Johann Lamont].

Amendments 26A to 26J not moved.

Amendment 26 agreed to.

Section 12, as amended, agreed to.

After section 12

Amendments 27 and 28 moved—[Johann Lamont]—and agreed to.

Section 13—Further referral to Parole Board

Amendment 29 moved—[Johann Lamont]—and agreed to.

Section 13, as amended, agreed to.

After section 13

15:15

The Convener: Amendment 30, in the name of the minister, is grouped with amendments 31 and 32. If amendment 31 is agreed to, I cannot call amendment 48, which was previously debated with amendment 46, because of a pre-emption.

Johann Lamont: We continue to consider ways to make the custodial sentence provisions as clear as possible. Amendments 30 to 32 take section 14 and split it into two sections, to be helpful and to make the bill more readable and understandable.

Section 14 deals with offenders who are given the maximum 75 per cent custody part of their sentence by the court at the time of sentencing. As such, there is no requirement on the Scottish ministers to apply the risk of serious harm test under the terms of section 8. Instead, those offenders' cases will be referred to the Parole Board prior to their reaching the 75 per cent point for the board to specify the community licence conditions. As currently drafted, section 14 does two things. It explains the process that is to be followed in the setting of community licence conditions prior to the offender's release and it explains the procedure for releasing the offender. We are separating those elements to make the procedure as clear as possible. The new section that amendment 30 inserts deals with the requirement for the Scottish ministers to refer those cases to the Parole Board and for the board to specify the conditions. As such cases must be referred to the Parole Board, ministers do not need to make a risk assessment as set out under section 8(1).

Amendments 31 and 32 remove the relevant subsections from section 14, which, as amended, will set out the arrangements that the Scottish ministers will have to follow in releasing the offender once the 75 per cent custody part of their sentence has been served. However, those release arrangements do not apply in the case of offenders who have been recalled to custody for breach of their licence conditions.

I move amendment 30.

Jeremy Purvis: I seek clarification on a point that concerns prisoners who have had the custody part of their sentence set at three quarters and who are on licence with conditions. As I understand it, if that licence is revoked, the Parole Board has to apply a test of serious harm. The person will not necessarily be confined for the entire length of the headline sentence if that rather high test of serious harm to the public is not met. We are not simply talking about their breaching their licence conditions—even if those conditions had been set by the Parole Board as being below those that would apply in the case of a risk of serious harm to the public. Is that indeed the case? If so, can you understand that there could be a potential difficulty if a prisoner is recalled but there is effectively a higher threshold that must be set for that person to be confined for the remainder of the headline sentence?

Bill Aitken: As the minister says, the amendments in this group have been lodged for the purpose of clarification, and they are largely cosmetic. Some clarification is obviously necessary, and Mr Purvis did not feel constrained in asking his question. He was quite right to do so. On the basis of what the minister has said, however, the amendments are acceptable.

Johann Lamont: Jeremy Purvis's point is really a separate issue, which is not dealt with by the amendments in this group. We will come to it later in stage 2. The issue has been highlighted by a number of people. Someone could be called in on one test but re-released only on an easier test. Under a harder test, they would be retained in prison.

The very process of somebody being called in might concentrate their mind. As we have indicated, we wish to examine this matter again. We do not want to have another potential revolving door. As I say, we have reflected on the issue, and it will be discussed later in stage 2.

Amendment 30 agreed to.

Section 14—Release on community licence on completion of custody part

Amendment 31 moved—[Johann Lamont]—and agreed to.

Amendment 49 not moved.

Amendments 50 and 32 moved—[Johann Lamont]—and agreed to.

Section 14, as amended, agreed to.

Section 15—Setting of punishment part

Amendment 33 moved—[Johann Lamont].

The Convener: The question is, that amendment 33 be agreed to. Are we agreed?

I asked a question of the committee.

Jackie Baillie: Sorry, convener. Could you repeat your question?

The Convener: Thank you for coming back to life, Ms Baillie. The question is, that amendment 33 be agreed to.

Amendment 33 agreed to.

Jackie Baillie: I advise the convener that listening to his colleague perhaps deadens the senses.

The Convener: I did not ask for an explanation.

Jackie Baillie: Indeed, but you got one. [*Interruption.*]

The Convener: Order. He was very good. However, we are dealing with a piece of legislation.

Amendment 34 moved—[Johann Lamont]—and agreed to.

Amendment 51 moved—[Bill Aitken].

The Convener: The question is, that amendment 51 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)
Butler, Bill (Glasgow Anniesland) (Lab)
Fox, Colin (Lothians) (SSP)
Macmillan, Maureen (Highlands and Islands) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

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

Amendment 51 disagreed to.

Amendment 52 moved—[Bill Aitken].

The Convener: The question is, that amendment 52 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)
Butler, Bill (Glasgow Anniesland) (Lab)
Fox, Colin (Lothians) (SSP)
Macmillan, Maureen (Highlands and Islands) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

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

Amendment 52 disagreed to.

Amendment 35 moved—[Johann Lamont]—and agreed to.

Section 15, as amended, agreed to.

Sections 16 to 18 agreed to.

Section 19—Determination that section 17(3) applicable: consequences

Amendment 36 moved—[Johann Lamont]—and agreed to.

Section 19, as amended, agreed to.

Section 20 agreed to.

The Convener: Apparently, I made a slip of the tongue and attributed an amendment to the wrong person. I apologise to the committee. I am referring to the clerks to find out what happened.

Maureen Macmillan (Highlands and Islands) (Lab): That is why we were distracted.

The Convener: Apparently there was a technical hiccup with the brief.

After amendment 49, I called amendment 50 in the name of the minister, but it is in fact in the name of Bill Aitken. The minister kindly moved it but there was no division. I will call the amendment again—correctly, this time.

I call amendment 50, in the name of the minister—

Members: No, no.

The Convener: Just checking. I call amendment 50, in the name of Bill Aitken.

Amendment 50 moved—[Bill Aitken].

The Convener: The question is, that amendment 50 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)
Butler, Bill (Glasgow Anniesland) (Lab)
Fox, Colin (Lothians) (SSP)
Macmillan, Maureen (Highlands and Islands) (Lab)
Matheson, Michael (Central Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)

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

Amendment 50 disagreed to.

Jackie Baillie: For the record, convener, that is what I and my colleagues were discussing when we were distracted.

The Convener: I appreciate that.

For clarity, section 14 was agreed to.

Members: Yes.

The Convener: Thank you.

I thank the minister and her colleagues for coming along today. We look forward to seeing you next week.

Johann Lamont: Not nearly as much as I look forward to seeing you.

Bill Aitken: According to my notes, we have not dealt with amendment 53.

The Convener: We are going up to section 20 today; we will deal with amendment 53 next time.

Bill Aitken: That means that I get to come again next week.

The Convener: Amendment 53 is to section 36, which we will deal with the week after next. Thank you for coming along, Mr Aitken.

Subordinate Legislation

Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2007 (SSI 2007/14)

15:26

The Convener: We have two negative instruments to consider. First, members will note that the Subordinate Legislation Committee drew the regulations to the attention of the Justice 2 Committee and the Parliament. Do members have any comments?

Jackie Baillie: I am content with the explanation that the Executive gave the Subordinate Legislation Committee. On that basis, I am happy to accept the regulations.

The Convener: Are members content with the regulations?

Members *indicated agreement*.

Police Grant (Variation) (Scotland) Order 2007 (SSI 2007/24)

The Convener: There are no comments. Are members content with the order?

Members *indicated agreement*.

The Convener: The next meeting is on 20 February. In addition to having day 3 of stage 2 consideration of the Custodial Sentences and Weapons (Scotland) Bill, we will take evidence from the Deputy Minister for Justice on the legislative consent memorandum on the Serious Crime Bill. I remind members that the deadline for amendments to sections 21 to 35 of the Custodial Sentences and Weapons (Scotland) Bill is noon on Thursday 15 February. The clerks would be grateful for early notification of lodging.

Meeting closed at 15:28.

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