JUSTICE 2 COMMITTEE

Tuesday 20 February 2007

Session 2

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CONTENTS

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JUSTICE 2 COMMITTEE
5th 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)

THE FOLLOWING GAVE EVIDENCE:

George Burgess (Scottish Executive Justice Department)
Jill Clark (Scottish Executive Justice Department)
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 20 February 2007

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

Subordinate Legislation

Police, Public Order and Criminal Justice (Scotland) Act 2006 (Modification of Agency's Powers and Incidental Provision) Order 2007 (Draft)

The Convener (Mr David Davidson): Good afternoon, ladies and gentlemen, and welcome to the fifth meeting of the Justice 2 Committee in 2007. No apologies have been received from committee members—that is obvious, because they are all here. I welcome Bill Aitken, who has joined us. I remind all present—that includes members of the public—to switch off mobile phones, pagers and anything that goes "ping".

We are grateful that the Deputy Minister for Justice has come along with her officials to help us out with item 1. There are two affirmative instruments for consideration. The first is the draft Police, Public Order and Criminal Justice (Scotland) Act 2006 (Modification of Agency's Powers and Incidental Provision) Order 2007. I ask the minister to make a brief opening statement. If it would be helpful, minister, we can deal with the two instruments separately.

The Deputy Minister for Justice (Johann Lamont): That would be helpful. I will speak first to the Police, Public Order and Criminal Justice (Scotland) Act 2006 (Modification of Agency's Powers and Incidental Provision) Order 2007, which makes three minor correctional and technical drafting changes that amend three incorrect cross-references. Although it would have been preferable to avoid having to make them, there is a risk of confusion to the user if we leave the act as it stands. Therefore, it is sensible to use the modification powers that the act provides for to correct the text in time for the coming into force of the relevant provisions on 1 April 2007.

The Convener: We have had no comments from the Subordinate Legislation Committee on the order. No members wish to ask questions or seek clarification, so I invite the minister to move the motion to open the formal debate.

Motion moved,

That the Justice 2 Committee recommends that the draft Police, Public Order and Criminal Justice (Scotland) Act 2006 (Modification of Agency's Powers and Incidental Provision) Order 2007 be approved.

The Convener: I invite members to speak in the debate.

Bill Butler (Glasgow Anniesland) (Lab): It seems sensible for the Scottish Executive to tidy up the act and correct the incorrect cross-references. The order is entirely appropriate and we should approve it.

Motion agreed to.

Sexual Offences Act 2003 (Notification Requirements) (Scotland) Regulations 2007 (Draft)

The Convener: The Subordinate Legislation Committee has advised us that no points arise on the regulations. I invite the minister to make an opening statement.

Johann Lamont: In the past few years, the Executive has introduced a wide range of practical and legislative measures to improve the public's protection from sex offenders, including commissioning Professor Irving to undertake a review of the operation of the sex offenders notification requirements in Scotland to ensure that they are as robust as they can be.

Professor Irving considered the original requirement that sex offenders who are subject to the notification scheme—"relevant offenders"—must furnish their name, address, date of birth and national insurance number to be basic and inadequate. We agreed with his view. We have already legislated to include some of the additional information that he thought should be provided to the police as part of the notification regime. The Police, Public Order and Criminal Justice (Scotland) Act 2006 amended the Sexual Offences Act 2003 to require relevant offenders to provide the police with their passport details.

A second important measure was the creation of a regulation-making power in the 2003 act, which enables the Scottish ministers to make regulations that are subject to the affirmative procedure to require relevant offenders to provide to the police specified information about themselves or their personal affairs. For reasons that I will outline, we have decided to use the regulation-making power to require relevant offenders to notify the police of certain financial information.

The draft regulations contain detailed provisions. Regulation 3 requires all relevant offenders to notify the police as to whether they hold a bank or building society account, a debit card for such an account, or a credit card account and credit cards. A relevant offender must notify the police if he or she holds joint accounts and debit and credit cards and, if so, whether such accounts and cards are

held in respect of self-employed unincorporated businesses, such as a partnership or sole-trader business. If a relevant offender holds a bank, building society or credit card account, they must also notify the police of the name and address of the account provider, the bank or building society sort code and the account number for each account. Furthermore, if the relevant offender holds a self-employed business account, they must provide the name of the business for which the account is held. They must also provide the 16-digit numbers and the valid from and expiry dates of their debit and credit cards. If they hold such cards in the name of a self-employed business that they operate, the name of the business as stated on the card must also be provided.

Regulation 4 provides that where a relevant offender or someone on his or her behalf opens an account or obtains a debit or credit card that has not previously been notified to the police, the offender must notify the police of the new circumstances. Relevant offenders are also required to notify the police if they cease to hold an account or debit or credit card about which the police were notified. Regulation 4 also places an obligation on a relevant offender to inform the police of any change to the financial information that has been provided. In accordance with section 84(1) of the 2003 act, relevant offenders must notify the police of changes to their financial information within three days of the date of the change.

If a relevant offender fails to comply with the regulations and has no good reason for doing so, he or she will be guilty of a criminal offence that could carry a sentence of up to five years' imprisonment—as is the case if there is a failure to comply with other notification requirements.

We decided to impose a requirement on relevant offenders to notify the police of such financial information because bank details were an important element in operation ore. Operation ore was a co-ordinated response from the National Criminal Intelligence Service and police forces in the United Kingdom, which targeted individuals who were accessing and downloading images of child pornography on the internet. Such activity carries a cost and transactions were often confirmed by access to bank account details. Credit card details can also provide valuable information to the police in their attempts to track down missing sex offenders, because offenders use their cards to reserve hotel rooms, rent cars and buy train tickets. Card details can also furnish the police with details of internet transactions. Bank account and credit card account details are also regarded as reasonable proof of identity.

We acknowledge that Professor Irving recommended that offenders should notify the police of other personal details, such as their leisure activities, main associates and telephone numbers. However, we concluded that, at this stage, it is difficult to justify requiring sex offenders to notify the police of such information. People who are convicted of sexual offences are among the most difficult and challenging offenders with whom the criminal justice system deals. They are known to be extremely skilled in avoiding detection and in manipulating situations to their advantage.

As always, it helps to set new regulations in context. These regulations form part of a package of measures that we have put in place to strengthen and extend the requirements that are placed on people who are convicted of a wide range of sexual offences to register with the police their name and address and subsequent changes to their name and address. The strengthened regulatory framework that we are putting in place will also have the potential to further our knowledge of the whereabouts of missing sex offenders and increase our ability to protect children and vulnerable adults.

14:15

The European convention on human rights issues that arise in respect of the regulations have been considered. The key issues are whether imposing additional requirements on relevant offenders is sufficiently burdensome as to amount to a penalty in terms of article 7 of the ECHR, and whether it interferes with the right to private life in a way that cannot be justified, with reference to article 8. It is considered that the regulations are compatible in both respects.

Although the regulations will result in a greater burden being imposed on relevant offenders, it is not considered that the measures in the regulations are any different in principle from the current requirements in part 2 of the 2003 act or in their severity. The requirement in the regulations to provide financial information is directed at public protection and the prevention of reoffending. The information is also useful in confirming the identity of relevant offenders. The measures are considered to be proportionate, particularly when the slight inconvenience caused to relevant offenders by having to notify the required financial information is balanced against the reasons why relevant offenders are required to notify the information.

The regulations provide a reasonable and measured step to reduce further the scope for offenders to engage in child abuse over the internet and will enable the police more effectively and quickly to track down offenders who disappear off the police radar.

With the consent of the Parliament, the Executive is taking a significant step to improve detection and manage such offenders to minimise the trauma of victims, many of whom are children, and to safeguard the public as far as possible. The regulations form another important part of our efforts in pursuit of those overriding objectives.

The Convener: Thank you, minister. There is now an opportunity for members to ask questions or seek clarification while the officials are here.

Jackie Baillie (Dumbarton) (Lab): Minister, at what point do you intend to reflect on the other recommendations in Professor Irving's report, "Registering the Risk", and are we likely to see more regulations? I ask that in the context of the Justice 2 Sub-Committee's report on child sex offenders.

Johann Lamont: I understand that the Minister for Justice, Cathy Jamieson, is coming before the committee shortly. She will be in a better position to respond in detail to the issues that have been flagged up by the Justice 2 Sub-Committee and the broader issue of taking the agenda forward. I am not sure that there are any immediate proposals for secondary legislation. It is relevant to approve these regulations today, but I suspect that further information will be provided at the committee's meeting with the Minister for Justice and by a future Administration.

The Convener: For information, the Minister for Justice is coming to the committee on 6 March.

Maureen Macmillan (Highlands and Islands) (Lab): How easy or difficult will it be to police the system? How easy will it be for a sex offender to keep a secret bank account or credit card? How would the police find out about that?

Johann Lamont: The police were consulted on the detail of the regulations, and they fully support the enhanced provisions contained therein. The committee will know that regulations prescribe a number of police stations in each police area that relevant offenders must attend for the purpose of notification. There is expertise in those stations. The police have supported the new system, and on that basis we can assume that it is not deemed to be overly onerous. Let me say again, however, that in the notification scheme the emphasis is on the sex offender to ensure that they comply.

The Convener: Following that detailed description of what the police will be able to do, can you give us a hint about how the Executive intends to deal with those who act as a proxy on behalf of relevant offenders but who are not relevant offenders themselves?

Johann Lamont: That sounds like a question on the broader agenda of managing sex offenders, which the Minister for Justice will be able to report on in her meeting with you or, whatever the colour of the next Administration, will be wrestled with in the future.

The Convener: Is the Executive currently undertaking any work in that area?

Johann Lamont: Not as far as we are aware. I will ensure either that there is a full response to the committee or that the Minister for Justice is able to deal with that when she comes here.

The Convener: That is helpful.

Bill Aitken (Glasgow) (Con): As the minister rightly says, we are talking about devious, manipulative people. As operation ore proved, the distasteful trade in internet pornography is obviously a lucrative one. I am concerned not just that somebody could act as a proxy for an individual, but that they could, in effect, set up an agency. A bank account would be held by a company and a number of like-minded individuals would subscribe. Someone who sought to access a website would type in the number of a bank account that was held by somebody else, who would then charge the so-called subscriber the appropriate fee. I do not know how the Executive plans to get around that, but it seems fairly obvious that some people would try that approach.

Johann Lamont: I do not want to overstate the importance or significance of the draft regulations, which are part of a far broader programme and approach. Depressingly, we must all be alive to some people's creativity in dealing with the issues. We need to take the problems in the round, to be alive to them and to close down what we can without overstating any individual part of the jigsaw. The draft regulations are one small part. Their implementation might flag up to the police who are monitoring a particular individual that, even though it looks as if the person is settled and conforming, they are engaged in using certain internet sites. In such circumstances, there could be early intervention with people who are perhaps building towards being a greater risk.

However, I do not underestimate the significance of what you say about how people could get around the regulations. They are part of a bigger process. We do not put all our faith in them, but they are an important part of the work that we do.

The Convener: Are there any further questions or comments?

Members: No.

Motion moved,

That the Justice 2 Committee recommends that the draft Sexual Offences Act 2003 (Notification Requirements) (Scotland) Regulations 2007 be approved.—[*Johann Lamont.*]

Motion agreed to.

The Convener: The minister will stay with us for the next item, but I think that she wants to change some of her officials around, in the nicest possible way.

Custodial Sentences and Weapons (Scotland) Bill: Stage 2

14:24

The Convener: Item 3 is day 3 of stage 2 of the Custodial Sentences and Weapons (Scotland) Bill, during which we will consider sections 21 to 35 of the bill.

Colin Fox (Lothians) (SSP): Will the amendments be taken in the order that is shown on the marshalled list?

The Convener: Yes.

Section 21—Referral to Parole Board: postponement

The Convener: Amendment 54, in the name of the minister, is grouped with amendment 81.

Johann Lamont: Section 21 deals with the circumstances in which an offender's case has been referred to the Parole Board for Scotland for review and he or she receives what is, in effect, a second sentence that affects his or her release date. As drafted, the section is inconsistent in how it would deal with this matter. Where the Parole Board has yet to fix a date for considering the prisoner's case, the section, in subsection (2), caters only for the date's being postponed once—because a further sentence has been imposed. However, in cases in which the board has already fixed a date and a further sentence is imposed before that date, the section—in subsection (4)—also covers the situation in which yet another sentence is subsequently imposed.

Amendment 54 will insert into section 21(2) a paragraph that will allow the effects of a third sentence—or, indeed, the effects of any further sentence—to be treated in the way that is detailed in section 21(4). In effect, a loop is created. In practice, the Parole Board will have to postpone the date for reviewing a prisoner's case where he or she receives an additional sentence in the period after the case is referred and before the board has fixed a date for considering the referral. The section will apply where the prisoner would not be eligible for release from the subsequent sentence on the date that would otherwise have been fixed for a hearing. The board will then set an appropriate date for a hearing to take place.

Amendment 81 is a drafting amendment that will remove from section 21(4)(b) the redundant words "the Board must". The Parole Board's requirement to act is already expressed at the beginning of subsection (4).

I move amendment 54.

Amendment 54 agreed to.

Amendment 81 moved—[Johann Lamont]—and agreed to.

Section 21, as amended, agreed to.

Section 22 agreed to.

Section 23—Compassionate release on licence

The Convener: Amendment 55, in the name of the minister, is grouped with amendments 56 and 73.

Johann Lamont: Amendments 55, 56 and 73 are minor drafting amendments. Throughout the bill, we have used the word "prisoner". For the sake of consistency, amendments 55 and 56 will remove from section 23(1) two occurrences of the word "person" and replace them with "prisoner".

A further drafting amendment applies in section 29, where the word "specified" will be changed to "included" to ensure that the section is consistent with the form of words that is used elsewhere in the bill.

I move amendment 55.

Amendment 55 agreed to.

Amendment 56 moved—[Johann Lamont]—and agreed to.

Section 23, as amended, agreed to.

After section 23

The Convener: Amendment 57, in the name of the minister, is grouped with amendments 58 to 72.

Johann Lamont: In its stage 1 report, the committee stated its preference for standard licence conditions to be included in the bill. The Executive's view remains that there is a need to strike a balance between making the process as clear as possible and having a degree of flexibility to attach additional licence conditions if necessary. However, we accepted that there is still scope to clarify the standard conditions, so we agreed to review the relevant provisions in the bill, which is what will be achieved by amendments 57 to 72.

Amendments 57 to 61 will deliver a package that will prescribe in statute the standard conditions that will require an offender to be of good behaviour and not to leave the United Kingdom without permission. Of course, that will not prevent Scottish ministers or the Parole Board for Scotland from imposing other appropriate conditions in individual cases. Amendments 62 to 72 will deliver the same for the supervision conditions for offenders who will be subject to supervision.

Amendment 57 will insert after section 23 a new section that will prescribe the conditions and the offenders to whom those conditions apply—in practice, they will be custody and community prisoners and life sentence prisoners. It will also allow travel restrictions to be suspended with the permission of Scottish ministers, or—in practice—the supervising officer. For example, it might not be unreasonable to allow an offender on life licence, who has been on licence in the community and has stayed trouble-free for a long time, to take a holiday abroad with his or her family. Allowing for travel on compassionate grounds would also be reasonable. Finally, amendment 57 will disapply a travel restriction on people who face deportation.

14:30

Amendments 58, 59 and 60 will amend the provisions for setting licence conditions for custody and community prisoners who are referred to the Parole Board, custody and community prisoners for whom Scottish ministers will fix licence conditions, and life sentence prisoners, in order to provide for standard conditions and, if applicable, supervision conditions to be attached to licences. The amendments will also allow licence conditions on the direction of the Parole Board to be added to, varied or cancelled, where appropriate, with the exception of the standard conditions set by Scottish ministers.

Amendment 61 will insert a new section after section 26, entitled "Compassionate release on life licence: conditions", which will place a requirement on Scottish ministers, when releasing a life sentence prisoner on compassionate grounds, to include the standard conditions and, where appropriate, the supervision conditions.

Amendment 62 will provide that section 27, which deals with supervision, will apply when certain categories of offenders are released on licence. Those categories are life prisoners, custody and community prisoners who are serving a sentence of six months or more, custody and community prisoners who have been detained beyond the court-imposed custody part, custody and community prisoners whose custody part was set at the maximum 75 per cent by the court at the point of sentencing, prisoners who are released on compassionate grounds, extended-sentence prisoners, sex offenders and children.

Amendment 63 is a drafting amendment that will, for the sake of consistency, replace the two occurrences of the word "person" at the beginning of subsection (2) of section 27 with the word "prisoner".

Amendment 64 clarifies that prisoners who have been given the maximum 75 per cent custody part by the court at the point of sentencing are to be included in the supervision requirements.

Amendment 65 is a technical amendment that will alter a reference in order to make it clear that any prisoner who is detained beyond the expiry of the custody part always has the supervision conditions included in his or her licence.

Amendment 66 provides that supervision conditions, in addition to applying to those whom I have mentioned, will not apply to prisoners who are liable to be deported.

Amendments 67 to 69 provide that, in addition to the supervision provisions that are already in the bill, the prisoner will be under the supervision of a relevant officer of the local authority specified in the licence, and that the prisoner must comply with the requirements imposed in relation to supervision by the relevant officer. The prisoner must also maintain contact with the relevant officer as the officer directs, and must inform the relevant officer of any change of address and any change in employment.

Amendment 70 will place a further requirement on the prisoner to comply with all conditions relating to supervision that might appear on his or her licence.

Amendment 71 will delete subsection (4) of section 27, as those provisions will appear in the new section that will be inserted by amendment 57.

Amendment 72 will move section 27 to after section 23 in order to place it in its proper context.

That has been a lengthy explanation, but I hope that it demonstrates our willingness to take account of the committee's helpful suggestions. I also hope that these amendments and others reassure members that the measures for managing offenders in the community and for ensuring that support exists when it is required—while public protection remains paramount—are an integral part of the new sentence-management regime.

I move amendment 57.

Colin Fox: I hope that, in the same spirit in which the minister finished her remarks, she will listen to the committee's helpful comments. As she knows, throughout the bill process my mind has been focused on an anomaly to which we keep returning, which is that people who have been sentenced to 14 days in jail will spend longer in custody than people who have been sentenced to up to 30 days in jail. In looking at amendment 57, I am mindful of the remark that the minister offered to me last week when I asked about the issue. She advised me and the committee that we should not underestimate the fact that somebody serving their community sentence after they have been released from custody is included in the bill.

To the previous standard condition for releasing somebody on community sentence—that they must be of good behaviour—amendment 57 will add the condition that the person is prohibited from leaving the country. I wonder whether the public will accept a person's spending 14 days in jail while an offender who has been given a longer sentence will be released on a community sentence because that person is asked to be of good behaviour and to not leave the country. Will the public have sufficient understanding of that part of a community sentence? As the minister knows, my reading of the situation is that it is far better to keep the current position, whereby people who are sentenced to 14 days spend half their sentence in custody, rather than the full 100 per cent. Amendment 57 jumps out, given the remarks that she made last week on this very anomaly.

Bill Aitken: I am a little concerned about proposed new subsection (4), which amendment 57 would insert. I am clear about the intention, but what would be the position if an appeal process in respect of an illegal entrant to the country had not been exhausted? There might be appeals outstanding under sections of the Immigration Act 1971. There might be a falling between two stools. The prisoner's custody period could be ended and he could be released on licence. He could disappear into the great blue yonder because he could not be held because an appeal process had not been exhausted. I would appreciate reassurance on that.

The definition of "compassionate" could have been clarified earlier. Circumstances such as acute family illness or bereavement could arise in which any reasonable person would agree that the prisoner should be released on licence. I would have no objection to someone who has concluded the custody part of his or her sentence being allowed to go on holiday abroad, because that could happen under the existing system in any event. There is no problem there. Has "compassionate" ever been defined?

Johann Lamont: I suspect that my definition of "compassionate" is pretty rigorous in comparison with some others. I understand that it is a matter for Scottish ministers to determine any particular case. It is not the intention that the provision seems irrational and illogical. I said that if the offender was behaving himself or herself, was not getting into any bother and had been out in the community for a significant period, it would in certain circumstances be reasonable for that person to leave the country. However, it will not be a catch-all provision. The fact that it has been defined in those terms implies that it would be narrowed a bit.

I turn to the point that Colin Fox made. Everyone on the committee accepts that there is an anomaly and that there will continue to be an anomaly wherever the threshold is, if this is the process that we are using. The point that I was trying to make last week was not to understate the significance of the community part of the sentence, even if it were limited and even if it were about signposting. Colin Fox will have to say how he would deal with the anomaly even if he shifted the threshold—if he was going to set a limit at all. There is still something to do in sentences of fewer than 15 days that involves community sentencing.

On Bill Aitken's points, no one wants to see people disappearing

"into the great blue yonder",

as he described it. My understanding is that an offender will not, until his appeal is settled, be liable to be removed or deported. Such people will still be subject to the condition not to leave the UK, but might be detained under the Immigration Act 1971. It would not be a question of people simply disappearing—they would be caught one way or the other.

Amendment 57 agreed to.

Section 24—Release on community licence on Parole Board's direction

Amendment 58 moved—[Johann Lamont]—and agreed to.

Section 24, as amended, agreed to.

Section 25—Community licences in which Scottish Ministers may specify conditions

Amendment 59 moved—[Johann Lamont]—and agreed to.

Section 25, as amended, agreed to.

Section 26—Release on life licence: conditions

Amendment 60 moved—[Johann Lamont]—and agreed to.

Section 26, as amended, agreed to.

After section 26

Amendment 61 moved—[Johann Lamont]—and agreed to.

Section 27—Release on licence of certain prisoners: supervision

Amendments 62 to 71 moved—[Johann Lamont]—and agreed to.

Section 27, as amended, agreed to.

Amendment 72 moved—[Johann Lamont]—and agreed to.

Section 28 agreed to.

Section 29—Prisoner to comply with licence conditions

Amendment 73 moved—[Johann Lamont]—and agreed to.

Section 29, as amended, agreed to.

Section 30 agreed to.

Section 31—Revocation of licence

The Convener: Amendment 74, in the name of the minister, is grouped with amendments 75 to 79.

Johann Lamont: Amendments 74 to 79 deal with the effects of a revocation of licence and a recall to custody on offenders who are released on compassionate grounds. The Scottish ministers already have the power to release any prisoner on licence at any time if they are satisfied that there are compassionate grounds for doing so. In effect, that happens in cases of offenders who have been diagnosed with terminal illnesses. It happens rarely—the annual numbers are in single figures.

Under the bill's provisions, a compassionate release licence will include the standard licence conditions and the supervisory licence conditions. Amendments 74 to 79 will clarify the procedures for revoking the licences of those who have been granted compassionate release and the circumstances under which they, like any offenders whose licences are revoked, would be considered to be unlawfully at large.

Amendment 74 will delete subsection (6) from section 31. The provisions on prisoners who are unlawfully at large will be replaced, for the purposes of clarity and ease of reference, with a new section to be inserted after section 31, through amendment 76. It will provide that, once

"a prisoner's licence is revoked",

but when they have not yet been detained in custody, they will be considered to be "unlawfully at large." Any period that is spent unlawfully at large will not count towards discharge of the sentence.

Amendment 75 will also add a new section after section 31. It will be entitled "Compassionate release: additional ground for revocation of licence". The new section will apply where Scottish ministers are satisfied that the grounds that led to compassionate release being granted are no longer justified. That is likely to result from a reversal of, or significant improvement in, the medical conditions that led to the compassionate release. The instances of that happening are rare, but we consider it advisable to allow for the possibility. The Scottish ministers will be required to revoke the licence and, if the offender is not already detained, to recall him or her to prison.

As I have said, compassionate release is granted in relation to very specific circumstances. If those circumstances change, it is right that prisoners should revert to serving the sentence that the court imposed and to being subject to the terms of the bill. Amendment 77 addresses that: it will insert a new section after section 31, entitled "Compassionate release: effect of revocation in certain circumstances". If the offender has been recalled to custody and that happens before expiry of the offender's sentence in the case of a custody-only prisoner, the custody part of a custody and community sentence or the punishment part of a life sentence, the prisoner's sentence will continue as if he or she had not received compassionate release.

Section 32 provides that, in cases where Scottish ministers have revoked a prisoner's licence, they

"must … inform the prisoner of the reasons for the revocation, and subject to"

the multiple sentences provisions,

"refer the prisoner's case to the Parole Board."

Amendment 78 will amend section 32 to include a prisoner whose compassionate release licence has been revoked. Amendment 79 will make a further amendment to section 32. It will require Scottish ministers to refer such a prisoner's case to the Parole Board when and if required to do so by the provisions in the bill. A prisoner whose compassionate release licence is revoked will be treated as though he or she had not been released. In the case of a custody-only prisoner, there is no role for the Parole Board. In the case of a custody and community sentence prisoner, the case would be referred to the board at the end of the custody part if the offender posed a risk of serious harm. In the case of a life sentence prisoner, the case would be referred to the board at the end of the punishment part.

I move amendment 74.

14:45

Bill Aitken: I assume that agreement to the amendments will not mean that a more administrative way of dealing with temporary compassionate release in the event of, for example, family bereavement or serious family illness cannot be introduced at some point. If it does mean that, the amendments will overcomplicate everything.

Secondly, if a licence for release on compassionate grounds is, for whatever reason, revoked, will the sentence be reduced by the period of that release or will that time be excluded?

Johann Lamont: On your first point, if we had found a simpler administrative way of doing this—

Bill Aitken: It would have been your preferred option.

Johann Lamont: Indeed. I think that, after studying the matter, we have accepted that that would be the case.

As for your second question, I have been advised that the time that the person in question is on compassionate release will count as part of the sentence until the point of recall, as opposed to the point at which they come back to prison. In other words, the period will stop when the person is recalled because it will have been decided that the grounds on which compassionate release were granted are no longer justified.

Amendment 74 agreed to.

Section 31, as amended, agreed to.

After section 31

Amendments 75 to 77 moved—[Johann Lamont]—and agreed to.

Section 32—Referral to Parole Board following revocation of licence

Amendments 78 and 79 moved—[Johann Lamont]—and agreed to.

Section 32, as amended, agreed to.

Section 33—Consideration by Parole Board

Amendment 37 moved—[Johann Lamont]—and agreed to.

The Convener: Amendment 80, in the name of the minister, is in a group on its own.

Johann Lamont: Colin Fox will be glad to know that amendment 80 is another example of our willingness to listen and respond to helpful comments from the committee and other interests that will be most directly affected by the measures. We might not respond to every single comment, but we try to please where possible.

The Sentencing Commission's report on early release, which was published in January 2006, recommended that separate bodies should be responsible for recall and re-release decisions. At the moment, Scottish ministers and the Parole Board can order an offender's recall. The purpose of the commission's recommendation was to remove any potential for accusations of bias; the bill seeks to implement that by separating those functions. As a result, the decision to recall, which is made by Scottish ministers alone, will be reviewed by the Parole Board.

At stage 1, the committee and the Parole Board for Scotland expressed concern that applying the public interest test to recall to custody and the serious harm test to re-release would create

difficulties in practice. For example, if an offender had been recalled to custody because it was in the public interest to do so, the Parole Board might have no option but to release the prisoner straight away because he or she did not pose a risk of serious harm. It was argued that such a situation would lead to a revolving door for recall cases, that it would place an unnecessary burden on resources and that it would defeat the key purposes of the arrangements.

Under the custody and community sentence structure, offenders will have the opportunity to use their time on licence in the community to address their offending behaviour and to turn their lives around. However, during the community part of the sentence, the offender can, if necessary, be appropriately restricted and supervised to ease their reintegration into the community and to protect the public. Offenders must be very clear that their liberty is conditional and that they cannot flout the conditions of their licences. That is why the broad public interest test will be applied to consideration of recall to custody.

Having listened to the committee and the Parole Board, we agree that the test for re-release should be the same when such cases are considered. Amendment 80 seeks to replace the serious harm test for re-release with the public interest test to allow the Parole Board to apply the same criteria in reviewing the circumstances of the recall and the case for re-release. The Parole Board has welcomed this change, and I trust that the committee will do the same.

I move amendment 80.

Bill Aitken: The minister is to be congratulated on recognising that the issue was a recipe for considerable difficulty. If the bill had been passed without amendment 80, there would have been all sorts of difficulties in the year ahead because of the dual and, in some respects, inconsistent definitions. If we are going to go down the route that was decided by the committee last week—Parliament has already made a determination on that—the bill will be able to work effectively only with the inclusion of amendment 80. Otherwise, it will be a recipe for chaos.

Johann Lamont: To say that

"it will be a recipe for chaos"

is to overstate the case slightly. Nevertheless, we recognised that for clarity of understanding for all involved, if someone had been recalled on one ground, the same test should apply. The underlying message is that certain responsibilities go with the community part of a sentence and that there are consequences of breaches. Although there has to be flexibility, there is quite an important contract between the individual and the community in relation to their commitment to participate and to pay heed to the conditions on which they were released.

Amendment 80 agreed to.

Amendment 38 moved—[Johann Lamont]—and agreed to.

Section 33, as amended, agreed to.

After section 33

Amendments 39 to 41 moved—[Johann Lamont]—and agreed to.

Section 34—Effect of revocation

Amendment 42 moved—[Johann Lamont]—and agreed to.

Section 35 agreed to.

The Convener: That ends today's consideration of the bill.

Colin Fox: For the second week running, Bill Aitken's amendment has not been considered.

The Convener: I am not sure what the query is.

Bill Aitken: Bearing in mind that only a few amendments remain, I would have no objection to the remaining amendments being considered today, if that is in order.

The Convener: The procedures for today's meeting have been published. In addition, there may be further amendments lodged. I thank members for attending, and the minister for her co-operation.

14:53

Meeting suspended.

14:55

On resuming—

Serious Crime Bill

The Convener: Item 4 is the Serious Crime Bill, which is United Kingdom legislation. Members received a written submission from the Association of Chief Police Officers in Scotland, and we have had a late submission from the Law Society of Scotland. We also have a Scottish Parliament information centre briefing paper.

I gather that the minister would like to make a short opening statement.

Johann Lamont: The Serious Crime Bill sets out new measures to provide law enforcement with added powers to help to disrupt organised crime. The majority of the bill contains provisions that are for England and Wales or Northern Ireland, or which will affect Scotland within a reserved area. However, three provisions in the bill apply to Scotland and fall within devolved areas. They are the application to Scotland of the offence of breaching a serious crime prevention order that was issued in England, Wales or Northern Ireland; the extension of the use of production orders and search warrants under the Proceeds of Crime Act 2002 for detained cash investigations; and the permission to use force in executing search warrants in Scotland under the 2002 act.

I will briefly outline each provision. First, serious crime prevention orders are civil orders that may be used against individuals and organisations to place restrictions or obligations on them in order to prevent serious crime and to protect the public. They may be used to prohibit, restrict, or place requirements on financial, property or business dealings. Their aim is to prevent the harm caused by crime and to reduce criminal behaviour. The provisions allowing the courts to impose SCPOs will not extend to Scotland's courts, but it would be sensible to ensure that it is also an offence to breach an SCPO in Scotland. We do not want Scotland to become attractive to those who are associated with serious organised crime who would use the proximity of Scotland to carry on with whatever the courts in England and Wales have prevented them from doing.

The second provision relates to the extension of production orders and search warrants to investigate cash detained under the Proceeds of Crime Act 2002. Production orders are currently used in connection with civil recovery and criminal confiscation investigations. They allow information such as bank statements to be obtained from financial institutions. They cannot be used currently in investigations following seizures under section 294 of the 2002 act, which allows the police or revenue officers to seize cash over the minimum threshold of £1,000 if they have reasonable grounds for suspecting that it is the profit of a crime or that it is intended for use in unlawful conduct. As law enforcement agencies are currently limited in the further investigations they can conduct following cash seizures, making available the additional tool of production orders for use in detained cash investigations will prove to be extremely helpful.

The third provision is the power to use force when executing a search warrant under the 2002 act. Currently, the power to use force when executing a search warrant under that act is not beyond doubt. Although the Scottish Parliament can legislate for devolved matters such as SCPOs and production orders for detained cash investigations, there is no suitable opportunity to do so before the end of this parliamentary session. It is therefore sensible to use the Westminster route on this occasion so that Scottish authorities do not miss out on the additional powers when other UK colleagues are getting them.

In relation to the power to use force when executing a search warrant, although we could legislate, we would not be able to make comprehensive provision in areas such as money laundering and confiscation in relation to drug offences, which are reserved areas. As those are the most frequent types of investigation, it would be unsatisfactory to legislate in Scotland without being able to cover those areas. I am sure that the committee will agree that it is entirely sensible to ensure that those types of investigation could also be covered. I therefore ask the Parliament to support the Executive's motion.

The Convener: Thank you, minister. I also welcome your third set of officials for the afternoon. They are George Burgess, Jill Clark, Paul Johnston and Stephen Crilly.

I will start with a general question. In the development of the bill, what involvement, if any, did the Executive have with Her Majesty's Government?

Johann Lamont: There is generally good communication, particularly at official level. George Burgess might want to outline what contact there has been.

15:00

George Burgess (Scottish Executive Justice Department): There has been extensive contact over the past six months with the bill team, and especially with the Home Office and HM Revenue and Customs, on the development of the proposals.

The Convener: Are there areas that caused difficulty or discussion because of the differences between the two legal systems?

George Burgess: No provisions in the bill as it now appears caused particular difficulties. Of course, we have had to consider the differences between the Scottish system and the system in England and Wales. The power of forced entry for which the bill makes provision is Scotland specific and deals with a Scotland-specific issue.

The Convener: During the second-reading debate on the bill, a number of serious concerns were raised about the introduction of SCPOs. In its report, the House of Lords Constitution Committee concluded:

"SCPOs represent an incursion into the liberty of the subject and constitute a form of punishment that cannot be justified in the absence of a criminal conviction."

What is the Executive's response to that comment?

Johann Lamont: Today we are saying clearly that, if serious crime prevention orders exist, it is advisable for us to ensure that they cannot be breached in Scotland. At this stage we are not making a judgment on whether we want the orders to operate in Scotland. Some people have strong views on them. Instinctively, I recognise them as another means of dealing with serious crime, provided that sufficient safeguards are in place. Westminster will make a judgment on the issue once it has finished considering the legislation. The Executive has said that it does not want an anomalous situation to arise that might encourage criminality in Scotland, because people could then breach orders without suffering any consequence. It is for the Parliament to consider whether it wishes to legislate in the area for Scotland.

Bill Butler: As the convener stated, it appears that an SCPO could impose significant restrictions on a person's activity. Is the Executive sure that that is reasonable and proportionate, and that—as you put it in your previous answer—sufficient safeguards are in place? I refer you to the submission of the criminal law committee of the Law Society of Scotland, which has doubts about whether sufficient safeguards are in place and is

"concerned that such prohibitions, restrictions or requirements will encroach upon the liberty of either an individual or an organisation in the absence of a criminal conviction and accordingly carry with it the connotation that either an individual or an organisation has been found guiltyof being involved in organised crime without the fact of any criminality ever having been proved to the accepted criminal standard."

That is a serious concern. How does the Executive respond to it?

Johann Lamont: I repeat the point that I made earlier: if the Westminster Government is satisfied that SCPOs are ECHR compliant and that the member's concern has been addressed, and if it creates such orders under the bill, what do we in Scotland do about the fact that they may be breached here? We have taken the view that it would be appropriate for us to deal with those circumstances through the Scottish courts. That is separate from the issue that the member raises. SCPOs have not been interrogated for suitability and appropriateness through the Scottish parliamentary process.

It is right that any concerns about the ECHR compatibility of the Westminster bill should be explored and resolved. Home Office officials have analysed the matter carefully, and UK ministers have indicated that they are content with the analysis that has been carried out. The issue is being considered in detail as part of the process that is currently under way. There are a number of precedents for applying criminal sanctions to breach of a civil order of this type.

We made a judgment about whether it would be appropriate to allow everything to be done at Westminster through a legislative consent motion. Even in the short time that the committee has been asking me about the bill, a number of issues about which we would wish the Parliament to be satisfied have been flagged up.

As I indicated, there is no doubt that United Kingdom ministers are content that SCPOs are ECHR compatible. I would probably be close to that judgment myself, but that is not the position that the Executive is in, precisely because points have been raised. A future Administration might introduce such orders, but the judgment has been made that if Westminster has accepted that SCPOs are ECHR compatible and is going to bring them into force, it is important to determine what should happen through the Scottish courts as a consequence of such an order being breached.

Bill Butler: I hear what you say on that question. I will ask about a related issue. It appears that, under the bill, people who live in Scotland could have serious crime prevention orders, which would limit what they were able to do in Scotland, imposed on them by courts in other parts of the United Kingdom, provided that the limitations were aimed at preventing serious crime in those other parts of the UK. Am I correct about that intention? If so, do you find anything about that provision awkward?

Johann Lamont: If I do not answer the question fully, I will get the officials to respond further. My understanding is that the provision relates to an order imposed on a Scottish person through a court in England. It would have to be imposed through a court, so there are safeguards built into the provision.

Bill Butler: Is this intended to close a loophole, as I think you put it, and remove a method of evading an order?

Johann Lamont: Yes. We do not want to be in a position in which serious crime prevention orders could be breached from across the border. That is the judgment that has been made.

Colin Fox: I will approach the matter in two questions. I take the point that we will not have serious crime prevention orders in Scotland but, if they are used elsewhere and somebody who is subject to an order comes to Scotland, the bill affords us a power that allows us to act if the order is breached. However, the corollary jumps out at me: what happens if Westminster decides that the orders breach the ECHR? Will you come back with an order to disapply the provisions here?

It seems to me that there is a comparison with antisocial behaviour orders. An ASBO is a civil order, but the breaching thereof means a criminal conviction. It strikes me that that means that someone could be punished for something for which they had no conviction in the first place. In other words, an order would be applied to somebody as a preventive measure but, should they breach it, they could find themselves punished without having been convicted of anything in the first place.

Johann Lamont: The comparison with antisocial behaviour orders is not direct, because the High Court would apply a serious crime prevention order, so it would be a more significant measure. The comparison lies in the fact that, because it is deemed appropriate to apply the order, ignoring it becomes a problem, and the person is aware of that before they commit the breach.

You mention that serious crime prevention orders will not apply in Scotland, but I would add that that is as yet. It is not that ministers have set their face against SCPOs and said that, although they will be introduced in England and Wales, that ought not to happen in Scotland. There are hard issues in the bill that it would be relevant for the Scottish Parliament to consider. Whether the Parliament has an opportunity to interrogate those sooner rather than later depends on the colour of the Administration after the elections in May.

In an LCM, we give Westminster consent to legislate on our behalf. As far as I understand, if serious crime prevention orders were deemed to be incompatible with the ECHR, unsustainable and open to challenge, we would not have to do anything further because we would have given Westminster responsibility for dealing with the matter on our behalf. If Westminster introduced a separate bill, we would have to think again about whether we wanted to lodge an LCM or address the matter ourselves.

Jackie Baillie: Clearly, given the complex issues that underpin the introduction of serious crime prevention orders, the stance that has been taken on introducing the legislation in Scotland ultimately makes sense. Has the Executive carried out any initial work on whether the Scottish courts should also have the power to impose serious crime prevention orders?

Jill Clark (Scottish Executive Justice Department): No.

Jackie Baillie: Is such work likely to be undertaken, given the Executive's current commitment and desire to introduce legislation soon? Of course, that will depend on what happens in the future.

Johann Lamont: From my position, it seems entirely logical that we will need to close any loophole that might exist. It would be entirely reasonable, logical and rational to conclude that if SCPOs are deemed to provide protection for communities in England and Wales, a future Administration will need to consider whether such orders would also be appropriate for the communities that we represent. However, it will be for a future Administration to determine whether the Parliament should have an opportunity to introduce such legislation.

I think that there will be layers of views on SCPOs, as there were on ASBOs. Some people say that ASBOs never work and have no value, whereas some of us are strongly committed to them because we have seen how effective they can be in local communities in preventing and deterring people from moving up the scale of criminal activity. I suspect that we would get into similar arguments if we considered SCPOs in more detail. However, that will be a matter for a future Administration. To a large extent, what happens on 3 May will determine how quickly such legislation is introduced to Parliament.

The Convener: I have a supplementary question on that point. I understand that family court case decisions apply either side of the border by virtue of some arrangement of the two judicial procedures. Is there a route—this question is perhaps directed at the minister's officials—for something similar to happen if SCPOs are not introduced in Scotland?

Johann Lamont: If you are asking whether a future Administration, when confronted with the fact that the bill has been passed and the loophole has been dealt with, ought to take further action, my response is that if I am part of that Administration, I will want us to consider all the options that are available so that we can interrogate those further.

The Convener: Thank you. I think that Jackie Baillie has another question.

Jackie Baillie: My next question has been asked and answered already.

The Convener: We move on to question 7, which will be asked by Maureen Macmillan.

Maureen Macmillan: I have a what-if question. What would happen if a future Scottish Parliament wanted Scottish courts to have the power to impose SCPOs containing restrictions that applied in other parts of the UK? In other words, what would happen in the reverse situation? How would we achieve that? Would legislation be required at Westminster to allow us to introduce SCPOs that would apply to people in Scotland even if they decamped to England?

George Burgess: The Scottish Parliament can legislate only on matters of Scots law and in or as regards Scotland. However, the Scotland Act 1998 provides mechanisms—which are in fact frequently used—for supplementary provision to be made through orders at Westminster under section 104 of that act when such provisions are needed to complete the package. For instance, it would be possible to use those powers to make it an offence in England, Wales and Northern Ireland to breach a Scottish SCPO—if there were to be such a thing.

Maureen Macmillan: If that could be done, there is no case for leaving all cross-border applications until the Scottish Parliament has decided whether it wants to introduce SCPOs in Scotland.

Johann Lamont: The Executive's view is that we are satisfied that it would be worth while to introduce these provisions just now. The provisions will not pre-empt any decisions that might be taken about the broader issues around SCPOs in Scotland. The provisions are practical and sensible, given the opportunity that is presented by the bill as it goes through Westminster.

Maureen Macmillan: So it will be fairly simple to introduce such orders later.

Johann Lamont: Is anything that involves lawyers ever simple?

Maureen Macmillan: The minister makes a cry from the heart.

Johann Lamont: Yes, the process would be straightforward.

Maureen Macmillan: I move on to the changes that the bill will make to the Proceeds of Crime Act 2002. What is the purpose of a "detained cash investigation"? How will such investigations fit in with the range of other investigations that may be carried out under the terms of the 2002 act?

15:15

George Burgess: The Proceeds of Crime Act 2002 already provides powers for people and premises to be searched and for cash to be seized and detained. However, unlike with other provisions of the 2002 act—such as those on confiscation and civil recovery—when cash has been detained in that way, the act does not provide enough investigative powers. It contains a large suite of investigative powers, including the power to make production orders, but experience over the years since the act came into force has shown that there is a gap in its operation. It is possible for the police and revenue officers to seize cash that they suspect is related to criminal activity, but they lack the investigative powers to establish whether that is indeed the case.

By creating detained cash investigations, the Serious Crime Bill brings together the existing cash seizure powers and the existing investigative powers. That will ensure that cash that is related to criminal activity can be seized, detained and ultimately forfeited.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): I was going to ask about the lack of such powers at present, but my questions were answered by the minister's opening comments.

If I understand correctly, the powers that will be made available to police forces in Scotland will be introduced under a separate order in the Scottish Parliament. Is that correct?

George Burgess: I think that you are thinking of the bringing into force of the provisions, which will be a separate matter. The bill provides that the bringing into force of the provisions in Scotland will be a matter for the Scottish ministers.

Jeremy Purvis: I presume that the matter will be brought back to the Parliament—with details on how the provisions will be brought into force—after the Scottish elections.

George Burgess: The detail is already in the bill. It is simply a question of the Scottish ministers making a commencement order to bring the provisions into force. In common with other commencement orders, no parliamentary procedure will be associated with that. However, the code of practice under the 2002 act is subject to the Parliament's oversight and we think that the code will need to be revised, so there will be some parliamentary involvement before the provisions come into force.

Jeremy Purvis: As I understand it, Scottish police forces will be able to apply for orders in relation to Scottish investigations. In the case of a cross-border investigation, would an order be applied for through the main agency in England

and Wales—the Serious Organised Crime Agency—even if the investigation concerned detained cash in Scotland, or would that be done through the Scottish Crime and Drug Enforcement Agency or the Scottish police?

George Burgess: The critical thing is where the cash is seized. If it is seized in Scotland, the bill provides that a constable or an officer of revenue and customs may make the seizure, but applications for detention and ultimately for forfeiture of the cash, whoever seized it, will be made by the Scottish ministers through the civil recovery unit or by the procurator fiscal. They will always be involved.

Colin Fox: Minister, the third provision that you mentioned in your introduction was the power to use force in executing a search warrant. I listened to what you said, particularly about money laundering and confiscation in relation to drug offences, which are reserved matters. It seems that the power to use reasonable force is already implicit in the provisions that apply south of the border. Why is that not the case in Scotland?

Johann Lamont: My understanding—again, I will check with officials on the matter—is that, as I said, it is not beyond doubt and we wanted to put it beyond doubt. We wanted to make it clear, rather than leave it implicit, that reasonable force could be used.

Colin Fox: What is not beyond doubt?

George Burgess: In relation to applications in Scotland for production orders and search warrants, the 2002 act provides a power of entry but does not make it clear that reasonable force may be used in executing that power. We understand that that problem does not exist south of the border. The issue was identified by practitioners in the police and the Crown Office after the act came into force, so we want to ensure that there is no doubt about the matter.

Colin Fox: Will the provision apply specifically to police action in relation to confiscation in money-laundering cases?

George Burgess: No. The provision will apply across the board to all uses of production orders and search warrants, as the minister said. It would be perfectly possible for us to legislate on devolved matters, such as civil recovery or criminal confiscation that is not related to drug offences. However, we would have a problem if we tried to make an across-the-board provision that would apply to money-laundering investigations or criminal confiscation in relation to drug trafficking. That is why we are taking this opportunity to make comprehensive provision through the Westminster bill.

Michael Matheson (Central Scotland) (SNP): When are serious crime prevention orders likely to be applied for? Will an SCPO be sought when it is thought that a crime is being committed and the order might prevent further criminal activity?

Johann Lamont: As I understand it, the intention is that the SCPO will be a preventive measure, so orders will be sought earlier rather than later.

George Burgess: SCPOs will mainly be made post conviction, to prevent further activity by a person who has been convicted of an offence. Members might see a parallel in sexual offences prevention orders: if someone has been convicted of a sexual offence, the court can, as well as imposing sentence, make an order to prevent the person from engaging in activities that are likely to lead to further offending.

Michael Matheson: That is helpful. Are you saying that an SCPO can be made only post conviction?

George Burgess: Under complex provisions in section 1, which relate to the High Court in England and Wales, it is possible for an order to be made in relation to a person who has not been convicted of an offence if there is clear involvement in serious crime. Section 2 defines a person who is "involved in serious crime" as someone who has committed an offence, facilitated the commission of a serious offence, or done other things that are likely to lead to the commission of a serious offence—

Michael Matheson: But who has not been convicted.

George Burgess: The person would not necessarily have been convicted.

Michael Matheson: I understand from the Law Society of Scotland's submission that if an individual who had not been convicted of a crime but who was subject to an SCPO breached the order, they could be sentenced

"on conviction or indictment to imprisonment for a term not exceeding 5 years".

If the original reason for making the order did not subsequently lead to a conviction, would the person remain in prison for the duration of their sentence? Would the conviction for the breach of the order still stand?

George Burgess: The offence on both sides of the border would be one of breaching an order that the High Court in England and Wales had made—

Michael Matheson: I understand that. The point I am making is that the order would be taken out on the basis that they were being pursued for a crime of which they had not been convicted.

George Burgess: They would have to fall within the definition of being involved in serious crime: they would have committed a serious offence in England and Wales, they would have facilitated the commission of such an offence by another person, or they would have

"conducted himself in a way that was likely to facilitate"—

Michael Matheson: Would they have to have been found guilty of that crime?

George Burgess: My reading of the provision and the bill is that, if it says that the court must be satisfied that the person has committed a serious offence, a finding of guilt would be necessary. If a person had been found not guilty, it would be difficult for the court to consider that the person had committed the offence. We have moved one stage on from that. The court in England and Wales has already satisfied itself about that and has decided to make a serious crime prevention order. There is a similar situation at the moment in relation to risk of sexual harm orders. A criminal conviction is not necessarily a prerequisite for the making of one of those orders, yet the breaching of such an order constitutes a criminal offence.

Michael Matheson: I hope you understand where I am coming from. I am trying to clarify whether, when an order is taken out against someone who has not been convicted of a crime because the case is not pursued or dropped, or because they are found not guilty, that person can end up in prison for breaching an order that was taken out in relation to a crime for which they were never convicted.

Johann Lamont: In those circumstances, rather than breach the order, the person should go back to court and ask for the order to be set aside. That would be the protection. If somebody knows that there is an order against them and they breach it, there are consequences.

Michael Matheson: I appreciate that.

Johann Lamont: If they believe that the order ought not to have been taken out against them, there is another avenue through which they can deal with that.

George Burgess: There are also provisions in the bill for the variation and discharge of orders. The grounds for the discharge of an order include the fact that there has been a change of circumstances affecting the order. In the circumstances that you envisage, in which it is subsequently demonstrated that a person had no involvement whatever in serious crime or in facilitating it, those provisions for the discharge of the order could be brought into play.

Michael Matheson: That is helpful. Thank you.

Bill Butler: Let us be absolutely clear about this. Are you saying that SCPOs are directly comparable to risk of sexual harm orders? My understanding of risk of sexual harm orders is that, although someone has no convictions, they can have a risk of sexual harm order laid against them because of a pattern of worrying behaviour. Are SCPOs directly comparable?

George Burgess: I would not suggest that they are directly comparable; I was drawing an analogy on the basis that a risk of sexual harm order is a civil order with a criminal sanction for breach, of which a conviction is not necessarily the precursor.

Bill Butler: Are you saying that SCPOs could be taken out simply because of a worrying pattern of behaviour, or will they apply only to someone who has a conviction against their name?

George Burgess: No, SCPOs will not be restricted to those who have convictions against their names.

Bill Butler: So the SCPO is a hybrid order that could be taken out against someone who had a conviction against their name, someone who had exhibited a worrying pattern of behaviour or someone who had associations with those who had convictions of that type. Is that correct?

15:30

George Burgess: I do not think that the analogy is quite as close as that. The test in the High Court for the imposition of a serious crime prevention order is that the person

"has been involved in serious crime".

That is either commission of an offence or facilitating the commission of an offence by another person—someone who conducted themselves in such a way that they were likely to facilitate the commission of the offence by himself or another person. That is what the bill provides for.

Bill Butler: So, known associates could be part of it.

George Burgess: If the person facilitated someone else in doing the crime.

Bill Butler: Okay. I think that that is clear, but I am not quite sure that it is.

Jeremy Purvis: Unlikely as it may seem, an English court will be asked to make an order against a Scot. I understand that schedule 1 to the UK bill defines the criteria in that regard. Given that the bill allows for representations to be made in the English court, could the person apply for legal aid to defend themselves?

George Burgess: Under the English legal aid provisions, I see no reason why a person who was faced with a significant order such as this being made against them would not be entitled to legal aid.

Johann Lamont: It would be subject to the test.

George Burgess: Yes.

Jeremy Purvis: The Scot would apply for English legal aid?

George Burgess: Yes. We are talking about a case in England and Wales.

Jeremy Purvis: But what if the activity was carried out in Scotland? I understand that an order can be made against companies and individuals. Given that one of the serious crimes is fraud and alleged fraud, surely we will see considerable cross-border activities.

George Burgess: The limitation in section 2 is that the criterion for making the order is that the person

"has been involved in serious crime in England and Wales".

Someone who commits fraud or other serious offences up here in Scotland would not be liable to have an SCPO made against them by the English courts unless he was in some way involved in serious crime in England and Wales. He would have either to have committed offences in England and Wales or to have facilitated other people to commit such offences in England and Wales.

Jackie Baillie: I am clear about the first criterion, of someone who is post conviction. I am less clear about your second criterion, of someone who has facilitated a crime. Surely they would have been convicted of aiding and abetting—or whatever the terminology is—someone to commit an offence. I assume therefore that their case would also be clear, given that they, too, are post conviction. I do not want to confuse matters further, but I feel the need to seek further clarification on the point.

Johann Lamont: Like other areas of legislation, this is complex and difficult. The criterion of whether someone has a conviction or no conviction is not sufficient. The UK Government has indicated that the purpose of these civil orders is to "plug perceived gaps" in relation to persons and organisations who are

"known by law enforcement to be acting unlawfully but who cannot be prosecuted because it is not possible to gather sufficient evidence".

We are trying to deal with the fact that there are people who are involved in serious crime in a range of ways, but who are short of conviction. We are trying to address patterns of behaviour and so on, to prevent offending. The order is not a substitute for the range of measures that are available to the legal system in prosecuting offences; it is another means by which the courts can address this kind of behaviour that is happening in our communities.

Jackie Baillie: From what the minister has just said, I am clear that there is a preventive element to the proposal. In the terminology that Bill Butler used, we are talking about "known associates". The burden of proof for someone who fits into that category would be what?

Johann Lamont: The civil standard.

Colin Fox: I will broaden Bill Butler's line of questioning slightly. I have no wish to put the officials on the spot; if they require to write to us, I am perfectly happy with that. We have antisocial behaviour orders, serious crime prevention orders and risk of sexual harm orders and we seem to have a pattern of introducing civil orders whose breach could lead to a criminal conviction. Will the minister or her staff provide a more comprehensive list of orders that contains more than just the three that we have highlighted? The issuing of all such orders seems to be based on a pattern of behaviour that allows an order to be achieved without a conviction. Are there other such orders that we have not touched on?

Johann Lamont: I am happy to ensure that you have a comprehensive note of the orders that are available. What I will say will not be couched in legal terminology. Orders such as antisocial behaviour orders or risk of sexual harm orders acknowledged that we needed something more than what the legal system provided before. We needed something to address a pattern of behaviour and perhaps catch somebody before they ended up in the court system or to recognise that some behaviour was difficult to pin down in a straightforward case.

People have seen such orders as beneficial, because they address and deter behaviour and seek to prevent behaviour. They are in addition to seeking conviction of somebody who has obviously committed a crime. In a sense, such orders reflect the diverse ways in which communities can have problems with people who are on the margins, or at the centre of activity that is criminal but which is not in itself sufficient to seek a conviction in court.

My instinct is that, throughout the Parliament, the need for such orders is understood. Perhaps Colin Fox's concern is more about the proliferation and effectiveness of such orders. I would be happy to provide a note on all the orders.

Colin Fox: I would be grateful for a note, at least for myself. If the minister wanted to send it to the whole committee, I would not object. We could easily introduce a prevention of violent crime order or any number of orders to prevent behaviour, and

such orders could have conditions and sanctions for their breach. I would be grateful if the minister dropped us a legal note with a longer list of orders.

George Burgess: The committee may have a full, or at least partial, list because, in the House of Lords Constitution Committee report to which the convener referred, that committee noted the proliferation of civil orders to prevent or interfere with criminal activity. That brief report contains a short list of examples of which that committee is aware.

The Convener: The matter is a concern to us. What about new arrangements across international boundaries and among police forces to share not only information, but intelligence reports? I presume that such reports—about a crime in England, for example—fly round the world and are exchanged. That would give the High Court an area of operation to work with. What tests are applied internationally? I do not expect to have a full answer today, but it would help if you provided information about that. Does the bill represent the beginning of an international exercise against crime? Whether it is organised or petty does not matter. According to the Constitution Committee, a sweeping change is being made. If you can go away and consider that, please do.

Johann Lamont: I would like to reflect on that. I do not want to overstate the situation. We have had an interesting discussion. It is clear that the Parliament would wish to scrutinise matters further before introducing serious crime prevention orders in Scotland. Most people perceive such orders as another useful means of addressing the problems of serious crime, which scars communities and ties up huge amounts of time in the legal system. Such orders deal with the sense that people still cannot grapple with how perpetrators of serious crime can be creative in using all sorts of means to avoid conviction. A balance will always need to be achieved between the rights of the individual on whom an order is imposed and the recognition of how serious crime expresses itself in communities and of how perpetrators evade justice.

The Convener: I thank the minister and her colleagues for coming to the meeting to help. Do committee members wish to seek further evidence? The clerks intend to produce a draft report for the committee's next meeting, so it would help if the Executive fed whatever information it wishes to provide to the clerks at the earliest time. Do members agree to consider the draft report in private at our next meeting?

Members *indicated agreement*.

The Convener: At our next meeting, which will be on 27 February, we will have the final day of stage 2 of the Custodial Sentences and Weapons (Scotland) Bill. I remind members that the deadline for amendments to sections 36 to 42 and 47 to 50 and schedules 2 and 3 is noon on Thursday 22 February. The clerks make their usual appeal for early notification of amendments, which is welcome. I thank members for attending.

Meeting closed at 15:40.

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