JUSTICE COMMITTEE

Tuesday 20 January 2009

Session 3

£5.00

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

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JUSTICE COMMITTEE
3rd Meeting 2009, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Angela Constance (Livingston) (SNP)
Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*Paul Martin (Glasgow Springburn) (Lab)
*Stuart McMillan (West of Scotland) (SNP)

COMMITTEE SUBSTITUTES

Aileen Campbell (South of Scotland) (SNP)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)
Dr Richard Simpson (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Darren Burgess (Scottish Government Constitution, Law and Courts Directorate
David Cabrelli (Law Society of Scotland)
Danny Jamieson (Scottish Government Constitution, Law and Courts Directorate)
Paul Johnston (Scottish Government Legal Directorate)
Kenny MacAskill (Cabinet Secretary for Justice)
Alan McCreadie (Law Society of Scotland)
Raymond McMenamin (Law Society of Scotland)
Euan Page (Equality and Human Rights Commission Scotland)
Brian Peddie (Scottish Government Constitution, Law and Courts Directorate)
Inspector Dean Pennington (Association of Chief Police Officers in Scotland)
Superintendent David Stewart (Association of Chief Police Officers in Scotland)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 20 January 2009

[THE CONVENER *opened the meeting at 10:17*]

Offences (Aggravation by Prejudice) (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I remind everyone to switch off mobile phones. We have received apologies from Cathie Craigie MSP.

Today's meeting is the second formal evidence-taking meeting on the Offences (Aggravation by Prejudice) (Scotland) Bill. On the first panel, sitting in splendid isolation, is Euan Page, who is the parliamentary and government affairs manager for the Equality and Human Rights Commission. We move straight to questions. Bill Butler will open.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, Mr Page. In your written evidence, you state:

"LGBT and disabled people are significantly more likely to be targets of various types of crime, including harassment, abuse and assaults".

How will the provisions in the bill help to address that situation?

Euan Page (Equality and Human Rights Commission Scotland): The bill will do that in a number of ways. The thinking behind statutory aggravation is that it requires—over and above the flexibility and the provisions in the common law—a necessary response from the various actors in the criminal justice process: the police, the Crown Office and Procurator Fiscal Service and the courts. It gives weight to a particular type of criminal offence and concentrates minds in the police, the prosecutors and the judiciary.

The seriousness that aggravation lends to the type of offences that we are talking about in relation to the bill feeds through to give the victims of such crimes the confidence that they will get an adequate response from the criminal justice system. It is, importantly, a useful tool in mapping patterns of offending behaviour, whether that involves dealing with particular hotspots—as was mentioned during last week's evidence—or with individuals.

If someone repeatedly comes up before the court for minor public order offences with aggravating factors, we can begin to identify patterns of behaviour that might require an intervention such as an altered sentence or an increased tariff. However, the other important point is that the approach gives people in the criminal justice social work sector the evidence that they need to tailor interventions better to get to the root of an individual's behaviour.

Bill Butler: Are you saying that the bill will, in addition to concentrating minds and tracking trends in offending behaviour, help with the rehabilitation of offenders?

Euan Page: Absolutely. It will help not only with rehabilitation but with early identification of patterns of offending behaviour. Such behaviour being addressed earlier can lead to better outcomes for offenders and victims.

Bill Butler: Do you know of any other legislation that supports rehabilitation and aids offenders in that way?

Euan Page: The approach might not be appropriate in all circumstances, but there is evidence that, for certain offenders who have been prosecuted for less serious offences with an element of homophobic aggravation, courts have used the homophobic aggravation offence that is set out in the Criminal Justice Act 2003 to pass sentences involving work with or for lesbian, gay, bisexual and transgender organisations. In that way, they have sought to turn an individual around or to reorient the attitudes to sexuality that lie at the root of their offending behaviour.

Bill Butler: How much of that evidence is there and what is the success rate of such an approach? Is it simply too early to say? Is all the evidence just indicative at the moment?

Euan Page: To the best of my knowledge, the evidence is indicative. I am sure that research on the subject has been carried out by people who are better qualified than I am to do so. However, this debate is very timely in Scotland and I am sure that the committee will be fully engaged in debates on addressing offending behaviour through more appropriate and imaginative sentencing. There is scope for tying our debate about statutory aggravations to that debate to ensure that we take into account not only punishment, which is obviously part of the mix, but rehabilitation. If we can address some of the root causes of an individual's offending behaviour, we can turn their life around and make society safer.

Bill Butler: That is very clear. Thank you.

The Convener: It could be argued that what you suggest could happen under the existing process. A social inquiry report, for example, might highlight an offender's difficulties so that he might, as a result, be put on probation on condition that he will undergo the type of counselling and attitude-changing processes to which you have referred.

Euan Page: That argument is perfectly valid and brings us back to the debate on the relative merits of common law versus statutory aggravations. A statutory aggravation ensures concentration of the minds of all the actors involved and inspires in victims the confidence to come forward. As we know, there is underreporting of certain classes of crime.

It would, of course, be theoretically possible to meet the bill's aims through common law. However, all the evidence suggests that that is not happening.

Angela Constance (Livingston) (SNP): In your submission, you state:

"This type of targeted crime would also appear to have a more profound and lasting impact on the victim than other types of crime."

Will you elaborate on that comment?

Euan Page: The point is important, because we must not get caught up in a false debate over whether we are seeking to give greater weight to certain classes of offence based on a victim's identity. That is not what the bill will do.

Organisations such as Victim Support Scotland have responded to the bill at stage 1. All victims of crime must have their needs, concerns and reaction to the crime taken seriously—they need full support—but there is compelling evidence that when an individual is targeted by an offender because of who they are or what they represent, there can be an additional psychological impact that we must take into account in addition to the complex psychological responses that any victim of crime has.

Victims of violent crime often go through various stages in coming to terms with what happened. Part of that involves self-recrimination: they ask why they were so stupid, why they took a certain route home or why they did not get a taxi. That can lead to their altering their behaviour or being trepidatious about going out at night. Academic studies have suggested that the problems are compounded for victims of targeted crime, who can feel that there is nothing they can do to change who they are. They can change their behaviour or where they go out, but being attacked because of a core aspect of one's identity can present additional problems in coming to terms with being a victim.

Angela Constance: So, you are saying that a specific trauma is associated with a victim being singled out rather than being just a random victim of crime.

Euan Page: Yes. Every victim's experience of crime is unique, but there can be a specific trauma.

Nigel Don (North East Scotland) (SNP): I want to return to your comment that most of what the bill seeks to achieve could be dealt with under the common law, which does not seem to be working. Those are my words, not yours. Is the bill the right legislative way forward?

Euan Page: Yes, it is. However, it is important that we do not think about the bill in isolation. We are not talking about an all-or-nothing debate—a statutory aggravation is not the only way in which to deal with disability, homophobic and transphobic hate crime. It is one useful criminal justice response, but it must be placed in a mix of responses, some of which will be through the criminal law, some through the civil law and others through policy and attitudes in public authorities.

Nigel Don: I am sure that you agree that the bill will send a message, but will it send the right message? Is there any way in which we could amend the bill to improve the message?

Euan Page: The bill has the virtues of brevity and great clarity. I am sure that that is not always the case with proposed legislation that comes before the committee—I am thinking ahead to the criminal justice and licensing bill, which will be a slightly more weighty document. It is important to send out a message, as witnesses at last week's meeting said. One consequence of the bill is that it will send out a message, but the Equality and Human Rights Commission does not support it primarily because it has that role. If we simply wanted to send out a message, there are other ways in which to do that, for example, by education or public awareness campaigns. We support the bill because it will provide an important extra dimension in criminal justice agencies' responses to particular types of targeted crime. As a consequence, it will undoubtedly reinforce messages about what constitutes civilised behaviour. However, sending out a message is not the paramount concern in making any change to the criminal law.

Robert Brown (Glasgow) (LD): I will examine the purpose of the aggravation a little further. It is often helpful in such cases to consider what the mischief is and what the possible remedy would be. The convener touched on existing sentences of the court. Do you know of any research that shows that sheriffs do not take aggravations under the common law as seriously as they should? I appreciate that there is underreporting, but that is a slightly different issue.

10:30

Euan Page: I am anxious not to appear to be berating sheriffs for their responses. One can point to some slightly surprising instances or, rather, one can point to responses that have been given

by sheriffs in cases where there has clearly been a homophobic element to a serious crime. For example, there was the homophobic murder of a man in Perth a couple of years ago. The sheriff mentioned that there may have been "a homophobic element" to the murder: the circumstances were that two young men murdered a man in a public park in Perth and were witnessed bragging about the murder at a party later that night, using explicitly homophobic language.

We can compare and contrast the response of the sheriff in that case, who made a slightly ambiguous statement about the possibility of "a homophobic element" to the murder—most of us would say that homophobia lay at the heart of that offence, its motivation and execution—with the response to the murder in England of Jody Dobrowski on Clapham common a few years ago, following the introduction of the Criminal Justice Act 2003, in which the judge explicitly referred to the convicted murderer having committed an act of "homophobic thuggery". I do not want to criticise sheriffs; it was right that the sheriff in Perth suggested that there was an "element" of homophobia, but an aggravation would have made the matter much more explicit from the start and would have allowed an opportunity to explore much more fully the motivation behind that offence.

Robert Brown: I wish to explore that element of aggravation, on which you have started to give your views. Let us consider the high level, and a murder with either a disability or homophobia aspect to it. Would you expect there to be a higher minimum sentence in that situation? What would the purpose of the aggravation be for such a serious level of crime?

Euan Page: One of the virtues of the bill is that the purpose of the aggravation is determined by the seriousness of the offence. In the case of the most serious of all crimes—murder—we would consider the response of an increased tariff, to take account of the motivation for the murder, as was the case with the Clapham common murder, in which case two individuals went out with the express purpose of finding somebody who was gay, or whom they believed to be gay, in order to cause them serious harm.

The nature of the aggravation will differ with less serious offences. That goes back to the points that were discussed earlier about how we can use the bill as an effective intervention for dealing with offending behaviour.

Robert Brown: I want to explore that further. That touches on the example of somebody committing breaches of the peace, with an element of the sort that we have been discussing attached. Prison might not be the obvious remedy in such cases, but something could perhaps be done to change the offender's attitudes. Do you have any information about the availability of rehabilitative arrangements—for example, anger management courses or courses that attempt to change people's attitudes and which might be relevant to such offences. Are facilities in place to allow the courts to do something effective with offenders at that level?

Euan Page: I return to the point about this being a timely discussion. If we in Scotland are to address in the round what we expect sentencing to achieve, this is exactly the time to have such a debate in order to ensure that provisions are in place to address offending behaviour appropriately. In the case of somebody who has committed a series of aggravated breaches of the peace, it will have become obvious that that person has an issue or problems with a particular social group. How can that be turned around effectively to stop that behaviour, thereby giving more confidence to other potential victims?

I would have to get back to you on whether particular facilities are available. However, the issue is perhaps more how we start to ask such questions as part of the policy debate in Scotland. The bill might offer a useful opportunity to explore such matters.

The Convener: You referred to the Perth case, which you quite rightly described as an horrific crime. It is important to stress that the case was dealt with not in the sheriff court but in the High Court. Indeed, Lord Macphail, who was the sentencing judge, passed a fairly exemplary sentence.

Euan Page: That is absolutely right. I bow to your greater knowledge of the matter, convener. I did not mean any criticism; I was simply giving an example of a case in which the homophobic element was perhaps underplayed, given the remarks from the bench about such an element being a possibility.

The Convener: The sentence was eloquent testimony to the seriousness with which the judge took the case.

Euan Page: Yes, indeed.

Stuart McMillan (West of Scotland) (SNP): The committee has heard that underreporting of crimes is a particular issue for lesbian, gay, bisexual and transgender people and for disabled people. Will you elaborate on the reasons for that and explain how the situation would be improved if the bill were passed?

Euan Page: There is evidence of significant underreporting among all the groups who are affected by such crimes. In addition, much work has been done on how disabled people,

particularly people with learning disabilities, internalise and come to accept as being part of their lived experience crimes that target them, which they cannot do anything about. Such an attitude has sometimes permeated organisations' responses to crimes.

That brings me back to what I said about the virtue of creating a statutory aggravation. If people have confidence that they and their concerns will be taken seriously, they will be much more likely to come forward to the police, which should create a virtuous circle. For example, after the Clapham common incident there was an upturn in complaints to the police down south about homophobic incidents because people had more confidence that the police, prosecutors and courts would take their concerns seriously.

Stuart McMillan: The committee will take evidence from the Association of Chief Police Officers in Scotland later in the meeting. In its submission, ACPOS said that under the proposed new arrangements

"an individual person's perception of motivation for an offence will be sufficient for the aggravation to be competent."

Might the bill be used in a negative way? Could a person's perception be used to justify convicting someone of an aggravated offence although there was no aggravation?

Euan Page: Are you suggesting that victims might feel that there was aggravation or even that they might maliciously insist that there was aggravation?

Stuart McMillan: Yes.

Euan Page: The trigger for the police to identify a crime as aggravated would be victim led, as is the case for statutory aggravations in general. Currently, if a person says that they have been the victim of a racist or sectarian incident, the police will regard the incident as such.

The wider point, which was picked up when the committee took evidence on the bill last week, is that given the nature of such offences it is possible to draw broad conclusions about where they occur and under what circumstances. They tend to take place in public places, and the victim and the perpetrator tend not to be known to each other. Often, they involve public order offences.

There is little evidence, to my knowledge, of serious problems of corroboration emerging from existing statutory aggravations, or evidence that there have been widespread inappropriate or malicious appeals to statutory aggravations on the part of witnesses. I will always be alive to such concerns, but evidence suggests that they might not be particularly well founded at this stage.

Bill Butler: In your written evidence, you comment on suggestions that police and prosecutors in England and Wales are only now beginning to recognise the scale of disability-related aggravations, despite legislation having been in force for some time. Are there any particular reasons for that, and what should be done to prevent a similar situation arising in Scotland?

Euan Page: That is an important and complex question, which I will endeavour to cover coherently.

There are particular issues attached to effective implementation of the disability-aggravation provisions down south, because implementation is intimately tied to wider public and organisational perceptions of disabled people. The two impairment groups that are most likely to be victims of this type of crime are people with learning disabilities and mental health service users. In the past, some organisations have exhibited a cultural reluctance to see such crime as being motivated by prejudice or malice towards a social group—people have less resistance to identifying racist or homophobic crimes, but people tend to see crimes that target disabled people as being motivated by their real or perceived vulnerability rather than by hostility towards a particular social group.

As I said, this is a complicated area, but we have invaluable learning to build on from implementation of the aggravation provisions down south. It is less a question of legislation than it is of organisational and wider public attitudes to disability.

My submission refers to the words of the former director of public prosecutions in England, Sir Ken Macdonald. It was refreshing to hear someone in such a senior position in the criminal justice system in Great Britain exploring the issues as passionately and compellingly as he did.

I say—at the risk of sounding jargony—that we need to draw a distinction between situational and inherent vulnerability. When people raise objections to the use of a statutory aggravation provision for crimes that are motivated by prejudice towards disabled people, the stock scenario that they come up with involves a frail old woman with a visual impairment who has her bag stolen. The objection runs that the person who committed the crime did so because that individual was vulnerable, not because the criminal had any particular animus towards disabled people. That is perfectly true, and I think it likely that, if such a case reached the courts, an appropriate common law response would be used to reflect the particularly callous nature of that crime.

10:45

However, we are dealing with another phenomenon, as we have to draw a distinction between people who are inherently vulnerable and people who are in vulnerable situations. To illustrate that, it is worth considering a series of appalling murders of young people with learning disabilities that have taken place both north and south of the border. In those cases, a clear failure on the part of the social care regime allowed those young people to get into vulnerable situations. However, it would have been unacceptable to treat the victims as being inherently vulnerable so that, no matter how serious the offence that they endured, the issue was treated as primarily a matter of social care rather than of rights and justice, as would be the case for any other citizen.

If failures in the social care regime allow a person with learning disabilities to fall in with an inappropriate crowd who exploit the person financially, sexually or in others ways—in a number of those cases, there was a clear pattern of the vulnerable individual being exploited on many different levels and in ways that systematically stripped away their humanity to the point where it became easy for the perpetrators to take the final step of murder—the fact that the person was murdered and was targeted because of a disability is a matter not simply of social care but of rights and justice. The issue should be treated as a criminal justice matter. We can learn from what has happened in a number of such cases down south, of which I am sure the committee is aware.

Bill Butler: In your opinion, have the various agencies down south improved their appreciation of the fact that such cases involve inherent vulnerability rather than situational vulnerability?

Euan Page: An encouraging development since we submitted our written evidence has been my discussions with people in the Crown Prosecution Service down south who have done valuable work on hate crime policy. I recommend a paper that Joanna Perry of the CPS published some years ago that explores some of the issues. I would be happy to forward that paper to the committee as background information.

Bill Butler: It would be helpful to have that paper, convener.

The Convener: Absolutely.

Euan Page: An enormous amount of work is taking place, so there are encouraging signs. As I said, when a former DPP takes a lead on an issue, that changes the environment in which the debate takes place.

I should also flag up work that the commission is doing at GB level that makes a number of recommendations on disabled people's physical safety and security. That work sees the issue in terms of the spectrum that I have talked about, by considering not only the failures in social care regimes that help to create vulnerable situations but the attitudinal barriers that make people reluctant to see these crimes as matters of justice and rights rather than simply failures in a care regime.

Bill Butler: Thank you, Mr Page. That is very clear, although the issue is complex.

Paul Martin (Glasgow Springburn) (Lab): Good morning, Mr Page. As you will be aware, the Equal Opportunities Committee's report on the bill concluded that aggravation based on age and gender should not be included in the bill. What are your views on that?

Euan Page: The commission gave evidence on that point to the Equal Opportunities Committee during its deliberations. Our recommendation was that introducing statutory aggravations for gender and age would not be an appropriate response for a number of reasons. However, the question opens up an interesting but complicated issue.

As I pointed out earlier, statutory aggravations are one—but not the only—response to particular manifestations of crime. The commission feels that particular issues would arise with an aggravation based on age. Although older people are statistically least likely to be victims of crime, they face particular issues of fear of crime, isolation and disconnectedness from wider communities and other generations. Older people can be victims of particular types of crime, such as confidence crimes and so forth. However, taking the lead from our partners in the age sector, we feel that an aggravation would not be the most useful way to target such crimes.

Gender is a complicated area. There are passionately held views on both sides of the debate, but we have taken our steer from the women's sector in Scotland. We think that a gender aggravation is not the most urgent response that is needed to crime that is based on prejudice or malice towards women. The debate is complicated, and we are dealing with a wide range of offences.

That takes us back to the crude typology in relation to how the current statutory aggravations work and the types of crime that will be covered by the bill. Gender-based crime can fit within the model of a public order offence or a crime that takes place in public, but that does not get to the heart of domestic abuse or many crimes involving sexual violence, for example. Our approach is less a case of saying yes or no to including aggravations based on age and gender in the bill

and more a case of asking whether that would be the most appropriate response.

We have used the debate as a starting point in commissioning research from the University of Glasgow on current policy and legislative responses to gender-based crime in Scotland in the round. Recommendations on future action will be made and, because of the Equality and Human Rights Commission Scotland's role, there will be particular emphasis on the impact that the gender equality duty can have on public authorities' responses to gender-based crime.

Paul Martin: You talk about the matter being complex. If you look back at *Official Reports*, you will find that we have all said that on a number of occasions. You recognise that the proposed legislation is complex and that it deals with a number of complex areas, and you also say that dealing with age and gender issues is complex. Does the bill represent an opportunity to consider all the issues? You recognise that age and gender crimes take place, so perhaps there is a missed opportunity. Is there a missed opportunity that we can act on?

Euan Page: I absolutely recognise that the crimes take place, and the work of the Equal Opportunities Committee and the Justice Committee is testimony to the fact that an opportunity is being grasped to explore issues further. The commission's work was born out of the debate on the viability or otherwise of a gender aggravation and will be carried forward. The debate on more appropriate and effective responses to how crime manifests itself and is experienced by different sections of society will not by any means begin and end with a discussion of the provisions of the Offences (Aggravation by Prejudice) (Scotland) Bill.

The Convener: Thank you, Mr Page. That was very clear and helpful. It would also be helpful if you gave the clerk details of the Joanna Perry document. Thank you very much for coming to the meeting.

I suspend the meeting briefly while the panel changes.

10:53

Meeting suspended.

10:54

On resuming—

The Convener: I welcome the second panel, who represent the Association of Chief Police Officers in Scotland. We have with us Superintendent David Stewart, project manager, and Inspector Dean Pennington, secretary, of the ACPOS diversity strategy project. We will move straight to questions.

Bill Butler: Good morning, gentlemen. In your written evidence, you state that the bill, if passed, will have an impact on the Scottish police service in terms of recording, reporting and monitoring mechanisms. Will you elaborate on that and explain how the police in Scotland currently record crimes that are motivated by prejudice relating to disability and sexual orientation?

Superintendent David Stewart (Association of Chief Police Officers in Scotland): On the first part of your question, there will be two impacts on the police service. First, there will be additional information technology requirements, which come with any new legislation that is passed—IT systems need to be upgraded—but, on a positive note, the bill will allow for accurate and consistent recording across all the Scottish police forces.

That also relates to the answer to the second part of your question, which is that, at this time, given that no specific statutory aggravation exists and that no criminal legislation is in place, the recording systems for crimes that relate to LGBT and disability issues vary from force to force.

Bill Butler: Will you give me some examples of that variability?

Superintendent Stewart: Yes. In Strathclyde Police, homophobic crime is recorded via the vulnerable persons database, which aims to record the impact of particular crimes on victims. Similar crimes or incidents that are recorded on that system include domestic violence and racial incidents. However, no disability-related incidents are recorded on the database at the moment.

Other forces in Scotland record hate crime across all strands of diversity through the STORM command and control system by applying specific codes to incidents. In certain forces, a crime management system has been implemented, with upgrades such as specific markers against certain types of crime, which allow the system to be searched. There is inconsistency throughout Scotland, which ACPOS thinks the introduction of a statutory aggravation will help to address.

Bill Butler: That is very clear.

You said that there will be two impacts. What is the second one? You have told us about the information and communication technology impact.

Superintendent Stewart: The ICT impact on the police service relates to amending systems to record certain types of crime.

Bill Butler: Were you referring to the culture that will come with our creating a statutory aggravation?

Superintendent Stewart: I did not really mean the culture but the means of examining the scale of such crime and getting a baseline throughout Scotland. One of the issues that the service faces is determining the levels of hate crime. We can tell you the levels of race crime, and some forces can tell you the levels of homophobic crime, but there is no consistency across all the Scottish forces on the whole hate crime agenda.

Bill Butler: Thank you for that. Inspector Pennington, do you have anything to add?

Inspector Dean Pennington (Association of Chief Police Officers in Scotland): No. Superintendent Stewart has covered everything.

Bill Butler: Okay. Thank you.

Robert Brown: We have heard evidence on underreporting, which is linked to what you have said, and on which you gave evidence in your written submission. Do you have a perspective on why there should be problems with underreporting? What action are the police taking to try to improve the situation?

Superintendent Stewart: Inspector Pennington will certainly be able to add to this answer. ACPOS feels that the vast majority of hate crime is underreported. As we say in our written submission, that could be down to the unwillingness of people to come forward to the police, which is an issue for us to address, but there could be another issue with confidence in the criminal justice system from end to end.

You asked what we are doing to improve the situation. The Scottish police forces work very closely with all diverse communities and organised groups locally and nationally to try to encourage people to come forward. Individual forces and ACPOS are looking at an online third-party reporting system, which would allow people to report hate crime to the police via the internet if they were concerned about coming to police stations.

Someone commented last week from the transgender community that there were concerns that people might be made fun of if they came forward to report an incident, so we are trying to introduce systems and to implement new IT systems that may positively impact upon people's ability and willingness to report crime to us.

11:00

Robert Brown: I would like you to elaborate on third-party reporting, as I am not sure what is involved. We are talking about reporting by the victim, but at arm's length.

Superintendent Stewart: Yes. If there is a reluctance to approach the police directly, victims can go to a third-party organisation, which can take the report on their behalf and act as a mediator between them and the police in reporting the crime. Third-party reporting goes beyond hate crime—it is in place for domestic violence and a number of other crimes—but ACPOS currently has a focus on hate crime.

Robert Brown: Does it happen to any extent now? Will the bill make a difference to the extent to which it happens?

Superintendent Stewart: In respect of overall reporting or third-party reporting?

Robert Brown: Third-party reporting.

Superintendent Stewart: The point is that if members of, currently, the LGBT and disabled communities are aware that a statutory aggravation is available, and they see something coming out of that, they will have more confidence in reporting crimes. The better we are at taking reports individually and ensuring that systems are in place when people do not want to come directly to the police, the more that people will be encouraged to come forward.

Robert Brown: So the problem is slightly different from those that you have with rape and sexual offences, when there are evidential issues. The issue is not a poor conviction rate once you get cases to court—slightly different issues are involved.

Superintendent Stewart: Absolutely. The conviction rate when we go to court with hate crime incidents—racial crimes in particular—is fairly solid, but there is an issue about getting people to come forward and report the crime in the first place.

It was interesting listening to Mr Page talk about the issues around disability. We seem to take disability for granted, far more than transgender issues, but the impact on people coming forward to the police, the concerns about how they will be treated by the criminal justice system, and the concerns about publicity surrounding cases are important factors that must be taken into account.

Robert Brown: People probably do not know the nuances of the law when it comes to things happening to them personally. Will the introduction of the bill's statutory aggravations make a difference to the levels of reporting?

Superintendent Stewart: I would like to think so. The fact that at the conclusion of a trial the judge will comment specifically on the impact that the aggravation has had will send a strong message out to offenders, at whom the bill is aimed, and to victims, who will be encouraged to take their issues to the criminal justice partners.

One of last week's submissions suggested that the bill might lead to a reduction in the number of hate crimes. However, as with any new legislation, in the early years we should see an increase in the number of such crimes—we will be disappointed if we do not—until we get an accurate baseline. Once we know what the baseline is, the role of the police and our partners is to address the issues and try to reduce the crime level. So one thing that the legislation will do is allow us to have a baseline. It might not be accurate, due to underreporting, but at least it will be a baseline.

Robert Brown: You see third-party reporting as being important in improving confidence. To what extent are front-line police officers aware of the potential for bringing in third-party organisations or referring people on for support? Are you conscious of that in practice?

Superintendent Stewart: Yes. In all the Scottish forces, third-party reporting is usually co-ordinated by a specialist team, supported by front-line officers. In effect, front-line officers—community officers—are the day-to-day contacts with third-party reporting centres, but that is monitored centrally. In Strathclyde, for example, my unit monitors third-party reporting and supports front-line officers with training and familiarisation with third-party reporting centres.

The Convener: The committee has no difficulty in accepting that there is underreporting of this type of crime. Indeed, as you will be aware, the results of a recent survey indicated that, for various reasons, there is a great deal of underreporting of all types of crimes and offences. Has Strathclyde Police or any other force undertaken any research into whether there are particular problems with reporting this type of crime?

Inspector Pennington: The only research that I am aware of is on third-party reporting. Back in 2004, we introduced third-party reporting for reports of homophobic crime. A year later, research was undertaken into people's perceptions of the change, including whether it had resulted in increased confidence in reporting such crime. The response from the community was overwhelming: people told the researchers that, although they had not used the new provision to any great extent, the mere fact that it had been put in place gave them confidence that the police took such crime seriously and would deal with it.

Superintendent Stewart: On that point, interestingly, the Scottish police service found itself the subject of a tabloid headline only a matter of months ago. At the time, we were slapping ourselves on the back for succeeding in getting more people to come forward, but the paper spoke only of a shocking increase in homophobic crime.

If the bill becomes an act, the committee should expect the usual toing and froing from different perspectives on the reporting of recorded crime levels. From the police perspective, our emphasis will be on the fact that we view positively more people coming forward to report such crimes. That said, the public perception that I described, which is driven by the media, will remain.

The Convener: As Superintendent Stewart is well aware, you get credit for nothing.

Nigel Don: The statutory aggravations of racial and religious prejudice have been on the books for a while. In terms of the bill, what should we avoid and what lessons can we learn?

Superintendent Stewart: As we highlighted in our submission, there are minor differences between the bill's proposals and the racial prejudice aggravation. I refer specifically to what members of the judiciary say in court when summing up at the end of the judicial process. Consideration needs to be given to aligning the terminology for all statutory aggravations.

In considering the racial aggravation under the Crime and Disorder Act 1998, the main issue for the police is that there is another piece of primary criminal legislation on racially aggravated harassment and conduct—the Criminal Law (Consolidation) (Scotland) Act 1995—and we can report a racial crime as a stand-alone crime under sections 50A(1)(a) or 50A(1)(b) of it. If we do so, corroboration—two pieces of direct evidence—is required.

Again, as we said in our submission, ACPOS is extremely supportive of the bill and the putting into law of the statutory aggravations that it proposes. We do not wish in any way to delay the progress of the bill through the Parliament, but—longer term—we believe that consideration needs to be given to whether stand-alone criminal legislation similar to that which I have outlined is required for aggravations other than race. If not, given that in the 1998 act we have the stand-alone section 96 aggravator for racially aggravated offences, do we need to retain the other provision?

Nigel Don: While I acknowledge those technical arguments—my intention is not to disparage them by describing them as technical—are there any substantive problems with how we propose to proceed?

Superintendent Stewart: No.

Paul Martin: Good morning, gentlemen. Can you give us further details of the training and guidance that is provided on diversity and race hate crime?

Superintendent Stewart: Every new police officer in Scotland receives a week-long input in relation to equality and diversity during the first

week of their training at the Scottish Police College. Throughout the remainder of their time there, they receive input in relation to legislation across the board, which includes current legislation on race hate crime and the religious aggravation.

Over and above that, within each force there is on-going refresher training, specifically on diversity, in which any criminal aspects are brought to the fore. There is on-going training at a national level for first-line managers—sergeants, inspectors, chief inspectors and so on—as they progress through the ranks. It gives them a balanced view and, to a certain extent, helps them to understand why legislation such as the bill is important, because of the potential impact of diversity on the population.

Paul Martin: How would the legislation impact on the delivery of those training programmes? Would you have to reconfigure them? Would you require additional resources to deliver them?

Superintendent Stewart: When any legislation comes into force, ACPOS seeks guidance from the Crown Office on its implementation internally. Once that guidance is received, it is circulated among the Scottish forces. I agree with Mr Page about the size and scale of the bill—it might be a far-reaching piece of new legislation, but it is written in a fairly clear and straightforward way. ACPOS believes that the bill will not have a huge impact on training, although there will be more to do on the awareness side. Some input will be needed to adjust our IT systems to take account of the legislation, but that will not be particularly onerous.

The Convener: In your reply to Nigel Don, you referred to your written evidence and said that it was possible that some aspects of the legislation could cause confusion. You dealt with the question of race hate crime, but would any other aspects cause similar difficulties?

Superintendent Stewart: I do not think that difficulties would be caused with the stand-alone aggravations as they are. I am here today representing ACPOS, which represents the interests of the front-line police officers who will have to implement the legislation. Although we understand that the legislation is offender focused, we are keen to ensure that the impact on the victim is taken into consideration by the first officers on the scene. When those operational police officers arrive on the scene, they have immediately to think about whether the incident is to be dealt with under section 50A of the Criminal Law Consolidation (Scotland) Act 1995, section 96 of the Crime and Disorder Act 1998, section 74 of the Criminal Justice (Scotland) Act 2003 or a section of the new legislation on offences aggravated by prejudice. I reiterate that ACPOS does not wish to delay the process in any way, but we wish there to be, at some future date, a single piece of stand-alone legislation that covers all hate crime, whether it involves aggravators and/or criminal offences.

The Convener: That is very clear.

Stuart McMillan: The bill states that evidence from a single source is sufficient to prove that an offence is aggravated by prejudice. In your written evidence, you state that that will have a positive effect on the police, because it will remove the need for a victim to have independent witnesses to the aggravation. In the words of your submission:

> "an individual person's perception of motivation for an offence will be sufficient for the aggravation to be competent."

In your experience of dealing with racial and religious aggravations, have they given rise to false accusations that offences were aggravated by prejudice?

Superintendent Stewart: To my knowledge, there have been none in relation to racial aggravation. In general terms, many of the issues around race are obvious. In relation to religious aggravation, to my knowledge there have been no such cases. As I said earlier, clear guidance from the Crown Office will assist ACPOS and the police service in implementing the legislation.

As Mr Martin said, we must also consider how we inform our officers about the aggravations. Our officers have experience of dealing with aggravated offences, such as those to which you have alluded, so it will be their responsibility to highlight within police reports to the Crown Office any concerns in relation to aggravated offences. I would like to think that police officers will be sharp enough to identify the aggravations at any point. As I say, there is nothing to suggest that the existing statutory aggravations have had a negative effect.

The Convener: There are no other questions. I thank Superintendent Stewart and Inspector Pennington for coming to see us this morning. Your evidence has been useful.

11:15

Meeting suspended.

11:17

On resuming—

The Convener: I welcome the third panel of witnesses, who represent the Law Society of Scotland. We have with us Alan McCreadie, the deputy director of law reform; Raymond McMenamin, of the criminal law committee; and David Cabrelli, of the equalities law sub-

committee. Good morning, gentlemen, and thank you very much for coming. We will move straight to questions.

Angela Constance: Good morning, gentlemen. In your written submission, you express concerns about the effectiveness of the bill. Do you believe that the common law is sufficiently equipped to deal with crimes against people on the basis of their sexual orientation, transgender identity or disability?

Raymond McMenamin (Law Society of Scotland): The short answer is yes. The question is whether such an aggravation could be applied effectively when those issues arise in court. There is nothing in the bill that cannot be achieved through the use of the common law as it stands. What the bill does is highlight particular problems. It may be that those problems are not highlighted at present, which may have given rise to the need for such legislation. However, essentially, it is possible to deal adequately with such crimes at present under the common law.

Alan McCreadie (Law Society of Scotland): There is nothing that I can usefully add to that. In our written submission, we also refer to issues of evidence that must be discharged by the Crown if legislation is in force that adds a statutory aggravation. Under normal circumstances at common law, in disposing of a case the sheriff, judge or justice of the peace can take aggravating or, indeed, mitigating circumstances into account in arriving at a sentence. However, under the legislation on racial and religious aggravation, the matter must be proved.

David Cabrelli (Law Society of Scotland): I agree. As Mr McMenamin and Mr McCreadie have made clear, the common law could deal with these issues, but the committee should remember that the benefit of the bill is that it will send a positive message to society and the public; on the other hand, however, it will mean a loss of some of the flexibility that is inherent in the common law. Those two competing requirements have to be balanced.

Angela Constance: Mr McMenamin said that the current law needs to be applied more effectively. How could that be done? What are the advantages of the flexibility of common law?

Raymond McMenamin: Procurators fiscal and prosecutors more generally could be trained to highlight such issues when they come into court. Of course, that might be a matter for the Crown Office and Procurator Fiscal Service.

If these issues are to be highlighted in court, the prosecutor has to bring them to the attention of the presiding judge or sheriff. That approach could be coupled with training for the judiciary to recognise and deal with such issues when they arise. My understanding is that the intention behind the bill is partly to highlight these issues in court and ensure that, as with offences involving racism and sectarianism, they stand out from the norm. It is for the personnel in court to apply the current law and highlight these issues and for the judiciary to deal with the matter once it has been highlighted.

Alan McCreadie: I have nothing that I can usefully add to that.

David Cabrelli: A benefit of common law is that crimes such as breach of the peace and assault are drawn in fairly general terms and can be used at the instance of both the prosecution and the judiciary. With a statutory aggravation offence, however, defence solicitors might well challenge the prosecution's case with technical arguments over the meaning of particular words. As a result, those words will become frozen in time and the flexibility that is inherent in the more general common-law approach will be lost.

Angela Constance: Does the bill have any advantages? I believe that Mr Cabrelli was about to touch on those earlier.

David Cabrelli: Indeed. The bill sends a message to society about the statutory aggravation of offences based on sexual orientation, transgender identity or a victim's disability and puts the issue into the public consciousness. The issue might be inherent in the common-law system, but it is not so much at the forefront of it. Moreover, the relevant subsections of sections 1 and 2 will provide the impetus for better recording of these crimes by the judiciary.

Raymond McMenamin: We should bear in mind that the more you bring legislative aspects into the courts, the more opportunities you give the defence to challenge cases. You might find, for example, that, as with racially aggravated charges, cases go to trial on the aggravating factor alone, which means that witnesses have to go through the ordeal of giving evidence. We should not lose sight of the fact that it is not simply a case of highlighting the issue and the court rubber-stamping it—it will be open to challenge. I am not saying that that is an argument against the proposal, but it is worth considering.

Robert Brown: I want to get a clear view of the position with regard to solicitors in practice in the criminal courts. You have indicated that the common law can deal with these matters, but is that happening? Are judges and prosecutors highlighting such issues in the way in which the bill seeks? In your experience, is there a difficulty? Do the issues not always come through as strongly as they ought to?

Raymond McMenamin: Of the three of us, I am the most regular practitioner in the courts. The issues are highlighted, but not with a great degree

of consistency. It comes down to the specifics of the case and the approach that the prosecutor takes in presenting it. For example, if an assault was clearly motivated by homophobic attitudes, I would be surprised if there is a procurator fiscal in the land who would not bring that to the attention of the court.

Robert Brown: I want to pursue the point. You have touched on the issue of inconvenience to witnesses and the desire to get rid of cases without putting witnesses through the ordeal of giving evidence. The other side of the coin is that, through plea bargaining, something that ought not to be compromised on can be negotiated away. Does that happen at the moment and, if so, to what extent?

Raymond McMenamin: In racially aggravated cases, procurators fiscal were instructed—and may still be instructed—not to desert cases or to accept not guilty pleas, so their hands were tied; they had to run with those cases, regardless of their personal view. Their independence as prosecutors was compromised in that regard; not many practitioners in the courts see that as healthy. There will always be situations in which charges may be diminished, for want of a better term, as the defence will always challenge the charges.

Robert Brown: I am not sure that we are quite hitting the nail on the head. There is a fear that, if a substantial aggravation has been libelled in a case, presumably for good reason, that may be lost by a compromise, in effect, between the prosecution and the defence out of a well-motivated desire to save witnesses trouble. Is that happening to any significant extent in this area, or, based on your experience of professional practice, is it not an issue at the moment? The other witnesses may want to comment.

Raymond McMenamin: I cannot say that it happens on matters relating to disability, sexual orientation or gender, but it does happen—day in, day out. If we introduce an issue as an aggravating factor, under common law or statute, the defence will potentially use that as a bargaining tool to diminish the charge. That happens in other areas. A defence lawyer is under a duty to act in his client's best interests; if his client's instructions are to challenge the charge of aggravation, it is fair game.

Robert Brown: For the avoidance of doubt, are you expressing opposition to the view that the procurator fiscal's discretion should be compromised by statutory direction or direction from the Lord Advocate in such cases?

Raymond McMenamin: Yes. Generally, I do not think that it is healthy for prosecutors to have their hands tied in such situations. If there is be a professional, independent prosecutor in court, he or she should be able to act as such and use their discretion.

Robert Brown: Do the other witnesses have a view on the matter?

Alan McCreadie: As my colleague Mr McMenamin said, statutory aggravation can be used as a bargaining tool when dealing with the substantive offence. The accused may plead out to the charge under deletion of the statutory aggravation; I am sure that that happens day in, day out in all our courts.

David Cabrelli: I agree with what has been said and have nothing to add.

Paul Martin: Good morning, gentlemen. You state that the creation of a new statutory aggravation may impose additional burdens on the Crown. You have already touched on the issue, but could you describe those burdens in more detail?

Raymond McMenamin: Take the example of a situation in which one man hits another in the street, people intervene and pull them apart and, as they are being pulled apart, the person who is alleged to have committed the assault makes a remark to the other person concerning gender identity or disability. The onus is on the Crown not only to prove the assault but to tie in the alleged remark to the assault, in order to show that the assault was motivated by that person's views on gender, disability or whatever. All that adds to the burden on the Crown, and might, in some instances, make it harder for the prosecutor to secure a conviction on the aggravated charge. Of course, the substantive common-law charge is still there to fall back on, but the issue of aggravation can make everyone take the long way round to get to the final resolution. Touching again on what we said about challenges from the defence, I think that such a trial could end up being quite long and involved.

Paul Martin: However, as you said, the common-law charge of assault would still be there to fall back on.

11:30

Raymond McMenamin: Yes. That is the situation that currently exists with racial and sectarian aggravation.

Alan McCreadie: I have nothing to add to that. As Raymond McMenamin said, the issue here is simply the aggravation, which will have to be proved along with the substantive charge.

David Cabrelli: As was said earlier, with a statute, there are definitional issues that can be challenged at the instance of the defence. The

case has to fit with the wording of each of the subsections and various challenges can be made on the import, width and scope of particular words.

Paul Martin: Should we, as legislators, be concerned about the additional burdens that will be placed on the prosecutors? It is their job to prosecute on the basis of legislation that has been passed by Parliament. If the common-law charge is still there to fall back on, should we be concerned about how complex and challenging the situation will be for the prosecution? The prosecution will always face challenges, will it not?

Raymond McMenamin: That is right. Ultimately, the decision about how something is prosecuted is down to the Crown. I do not think that the concerns are a bar to legislating in this area, but they are a consideration. Practising lawyers will tell you that the more laws that are created and brought into courts, the more complex the job of presenting, prosecuting and defending cases becomes.

Bill Butler: Mr McMenamin, as a matter of interest, what is your view of racially aggravated offences and offences that are aggravated by sectarian behaviour?

Raymond McMenamin: Insofar as they are prosecuted in courts?

Bill Butler: Yes. What do you think is the efficacy of those charges?

Raymond McMenamin: They have been effective. In Scotland, we have particular issues in those areas, and the aggravations that have been brought before the courts following legislation have been useful in highlighting those cases in which those issues have arisen. However, there is a caveat to that, as I have seen cases in which those charges have been badly applied, and in which aggravations have been attached—and, indeed, pleas of guilty have been entered—even though the situation might not have amounted to terribly much.

For example, a case that I worked on in Glasgow involved a teenage male who had been arrested for a number of matters—there were a number of charges on the complaint. At the trial, after some evidence had been heard, the procurator fiscal decided not to proceed with the charges, save one. However, the accused pled guilty to a racially aggravated breach of the peace in a police station in Glasgow. One of the police officers who had been processing him at the police station had an English accent and, at one stage, well advanced into the processing, the youth, who was drunk, said something along the lines of, "You're an English bastard." The case was prosecuted as a charge of racially aggravated breach of the peace. Ultimately, as part of what was I suppose a plea bargain, the accused pled guilty. The case was dealt with as no more than a token breach of the legislation and a very small fine was applied. My view, which is shared by many practising lawyers in the courts, is that that is not a true use of the legislation and not the sort of situation that it is designed to attack. As I say, the caveat is that, although such legislation can in general be effective, it is only as effective as those who bring it into court and apply it can make it. To be frank, if the legislation is used poorly, it is at risk of being trivialised and not having as effective an impact as it can in more serious situations.

Bill Butler: Legislation can always be trivialised and we should try to ensure that that does not happen, but some might argue that, although the particular case that you mention was minor in nature, it was still an infraction and therefore rehabilitation or the salutary effect of a fine was appropriate. Earlier, Mr McMenamin said that the racial and sectarian aggravations of offences have in the main been effective. Why should the aggravation that we are considering not be effective and why should it not raise particular issues?

Raymond McMenamin: I do not think that I have ever said that it will not be effective.

Bill Butler: I beg your pardon. Why will it not be particularly effective, then?

Raymond McMenamin: I would not even subscribe to that. There are benefits in introducing the proposed legislation. The distinction that was made earlier was that the issue can be dealt with under the common law. We need to consider what the ultimate aim is. If it is just to punish people a bit harder, that is slamming the stable door after the horse has bolted. However, if the aim is to highlight a problem in our society for people with disabilities and gender issues, the bill can be effective along with other measures such as training and education. We must make available to the courts ways in which to tackle the issue after conviction. I am not convinced that simply hitting people with bigger fines or putting them in jail for longer will be effective, but if the bill is coupled with other steps, it can be effective.

Bill Butler: I agree with you on that.

Stuart McMillan: The committee is aware that some victims of hate crime might be reluctant to report such crimes for fear of being outed. Does the bill have the potential to focus unwanted attention on personal and confidential aspects of a victim's life if a case goes to court, which might, unfortunately, increase the level of non-reporting?

David Cabrelli: In the absence of clear statistics on the level of underreporting, it is difficult to conjecture about the effect that the bill will have on that. To return to the bill's symbolic effect and the point about putting the issue into the public

consciousness, one would hope that the bill will encourage persons who have been the subject of hate crime to come forward and report. As the ACPOS representatives mentioned, there has been an effect in the context of racially aggravated crime. However, I am not in a position to comment on the effect of the fact that individuals who have been the subject of hate crime will have to reveal various details about their personal life in court.

Alan McCreadie: We will have to see what happens. In our response, we talked about the need for effective monitoring. I endorse that point. The issue must be considered if the bill is implemented.

Raymond McMenamin: I agree that it is difficult to answer the question. Monitoring of the legislation would be important in that context.

Nigel Don: In the final paragraph of your written evidence, you mention the need for updated and refreshed diversity training, for police officers in particular. That is a statement of fact, to which I take no exception. Is it an unexceptional statement of what will be needed, or is there something more behind it, which perhaps relates to your experience of previous legislation?

David Cabrelli: There is no hidden agenda. We simply wanted to highlight best practice.

Alan McCreadie: It is an unexceptional statement.

Nigel Don: We will treat it as such.

The Convener: Given that court practitioners are here today, I will ask Mr McMenamin the same question that we asked ACPOS. In your experience, have you come across false accusations of racial or religious aggravation being made in an attempt to ensure that prosecution went ahead?

Raymond McMenamin: Yes. I have encountered such accusations in relation to racially aggravated charges. It has been contended—and I have good reason to believe—that accusations about the use of racist language have been made when that might not have happened, or that such aspects have been exaggerated, to ensure that a prosecution followed.

The Convener: Do you want to comment, Mr Cabrelli?

David Cabrelli: I have nothing further to say on that point.

The Convener: I take it that you are adopting the same position, Mr McCreadie.

Alan McCreadie: Yes.

Bill Butler: Mr McMenamin said that such instances have occurred in his experience as a practitioner. Do they occur often or once in a blue moon?

Raymond McMenamin: They are not infrequent. They do not happen daily or weekly, but they do arise. Very often when one is taking instructions from a client who has been charged, one gets the flavour of something that was said having been blown out of proportion. Very infrequently, one gets the impression that something has been made up altogether.

Bill Butler: "Not infrequent" is not very specific. What percentage of cases are you talking about, approximately?

Raymond McMenamin: In about one in five—

Bill Butler: That is a high proportion.

Raymond McMenamin: In about one in five cases there is an issue about the veracity of the accusation.

Bill Butler: That is helpful.

The Convener: If there are no more questions, I thank the witnesses. Your evidence was clear and will be extremely helpful to the committee.

11:43

Meeting suspended.

11:51

On resuming—

Justice and Home Affairs in Europe

The Convener: We now bring an international dimension to our activities by dealing with justice and home affairs in Europe. This is the first time that the committee has taken oral evidence from the Cabinet Secretary for Justice on the matter, although we considered an update paper in November 2008.

I welcome the Cabinet Secretary for Justice, Kenny MacAskill MSP, who is accompanied by officials from the European Union and international law branch of the Scottish Government's civil law division. With us are Brian Peddie, Darren Burgess and Danny Jamieson. Thank you very much for coming—and for getting here somewhat earlier than you might have anticipated.

What are the main differences in approach between the current Administration and the previous Administration in relation to EU justice and home affairs matters?

The Cabinet Secretary for Justice (Kenny MacAskill): I do not think that there any matters of great significance to mention. We view ourselves as a distinctive Government, and we wish to ensure that the representation of our distinctive legal system is preserved. Every Administration has sought to ensure that Scotland is safe and that we play our part and work with other nations; I have no criticism of what has gone on before in that respect. The difference, perhaps, is that we wish to fly the flag more, in seeking representation at the JHA councils. If I or a minister cannot attend, we ensure that a law officer goes. The general idea is to continue to build upon what we have inherited.

The Convener: Is there anything else that you would like to say about the generalities, or by way of introduction?

Kenny MacAskill: I am happy simply to proceed with questioning. We take the general view that broad, cross-party interests should be served in this area. Questions of underlying political ideology might occasionally differentiate political parties but, in the main, we aim in our discussions to represent the interests of the nation and to work together to make Scotland safer and stronger.

The Convener: What factors influence the selection of the Scottish Government's current EU justice priorities? What, in practice, are the consequences of that selection?

Kenny MacAskill: Many EU priorities are driven more by my colleague Linda Fabiani, who will address matters in detail. In justice, we sometimes respond to what is on the table—to the agenda at European level. We wish to ensure that Scotland's economic interests, our distinctive legislation and our national interest are protected. The JHA matters that require to be addressed are on an agenda that is set for us, to an extent, and to which we respond, as opposed to matters on which we seek to interact. However, we obviously wish to co-operate with regard to police, prosecution and civil matters, so that we can be the best that we can be, so that we can protect our communities and so that we can allow our businesses and citizens to flourish.

The Convener: We turn to some specific issues, on which Angela Constance will open.

Angela Constance: Can the cabinet secretary give us any indication of the EU's likely priorities for the Stockholm programme?

Kenny MacAskill: I invite one of the officials to answer.

Brian Peddie (Scottish Government Constitution, Law and Courts Directorate): The Stockholm programme is still being developed, so we have yet to see firm proposals for it. We expect those proposals to be published around May for adoption before the end of this year under the Swedish presidency, hence the reference to Stockholm.

As far as the Scottish Government and the United Kingdom Government are concerned, we want to see continued emphasis on practical measures, such as: co-operation across borders between criminal justice authorities and police; greater emphasis on evaluating measures that have been introduced and implemented before proceeding to radical new measures in different fields or extending existing measures; and continued emphasis on mutual recognition and on a strengthening of the activities that have been undertaken in that regard under the Hague programme.

A lot will arise from experience under the Hague programme. A review was conducted in the middle of that programme and lessons were identified by the Council of Europe and the European Commission about the need to ensure effective implementation of existing measures. There were additional comments about decision making. Some of this hinges on whether we have the Lisbon treaty by the end of this year, which remains somewhat uncertain.

As far as the Scottish Government and the UK Government are concerned, we are looking to build on the progress that has already been made and to develop practical measures for co-

operation that benefit citizens directly. We are not looking for radical departures or initiatives—at least not before the existing ones have been properly assessed.

Angela Constance: Thank you. What action is the Scottish Government taking to ensure that an effective contribution is made to the formulation of the Stockholm programme?

Darren Burgess (Scottish Government Constitution, Law and Courts Directorate): We have been liaising with stakeholders across the board on the civil and family law aspects of input into the Stockholm programme. We are holding a specific EU civil justice stakeholders event on Friday in St Andrew's house, which will involve a broad range of interested actors in the civil justice arena, including the Law Society of Scotland, the Faculty of Advocates and the Scottish Law Commission, as well as the leading Scottish legal academics from the Scottish universities. They are all coming together to discuss the Scottish input to the Stockholm programme and whether we make a separate response or whether we look to marry up our input with that of the UK Government.

Angela Constance: Will you say a bit more about the input that is expected from stakeholders? What are the subsequent timescales, other than from Friday onwards?

Darren Burgess: As Brian Peddie indicated, we expect the Commission to come forward with a draft proposal around May. That will work up towards the end of the current year, when the Hague programme effectively comes to an end. We will capture the input from various stakeholders and academics across the range of EU civil and family law subjects that will be considered. Our intention is to ensure that those Scottish aspects are fed into the Commission in time for the May timescale to which it is working.

Kenny MacAskill: That is why we have put Scottish Government lawyers into Brussels and why we support the Law Society being represented there. To some extent, we are ensuring that you can influence the agenda and that you are forewarned about it, so that you can react to it. We are talking about a fluid situation that relates not simply to the Government, but to the Law Society, the Faculty of Advocates and, of course, the academics, in whom we put great faith and on whom we rely.

The Convener: We will concentrate on family law for a few moments.

Nigel Don: Good morning, gentlemen—it is still morning by a few seconds. It is clear that the citizen recognises what the impact will be of potential changes in family law. It seems to me that family law divides—the law always divides—into matrimonial and succession law. One of my colleagues will deal with succession law shortly. Matrimonial law also seems to subdivide—for example, the courts need to recognise divorce and maintenance decisions that have been made by courts in other countries. I would have expected that Europe's institutions ought to be able to make progress in that area and I would be disappointed if we were not in a position to ensure that Scots courts could enforce proceedings that took place and decisions that were made in France or anywhere in England, for example. Will I be disappointed? On what timescale will such issues be resolved?

12:00

Kenny MacAskill: Darren Burgess or Brian Peddie will deal with the specifics. On the generalities, our view has been that Scotland has always sought to participate in processes to ensure that people do not lose out because of cross-border fleeing and that people's obligations are met. That is why, for example, people have always sought to impose and uphold The Hague Convention on the Civil Aspects of International Child Abduction in the courts here. Equally, people have obligations when it comes to perhaps simpler matters such as providing maintenance. People should not be able to avoid their obligations by seeking to remove themselves from one jurisdiction and to put themselves under another.

Divorce and succession matters, for example, are more complicated. On harmonisation, we certainly accept that, in principle, a good argument can be made for greater coherence in, and greater understanding and simplification of, the international private law perspective in the European Union, but we should consider how matters are currently dealt with in Scotland and the idea of putting things into the straitjacket of a system from the continent. Our system is a hybrid—Robert Brown has commented on that before at the committee—but there would be considerable difficulties in some areas, certainly with matrimonial and succession matters, if we accepted some suggestions that have come from Europe, which have been based entirely on its civil law system. We seek to work towards a situation in which there can be greater European Union unity and unanimity at some stage in the future, but to ensure that we meet the obligations that it is necessary to meet for those who come to Scotland and for those who depart from it and go elsewhere, we must ensure that we do not put a square peg into a round hole in dealing with child abduction, maintenance, matrimonial and succession matters. Considerable difficulties could arise in the area of succession in particular and in the area of divorce if we accepted some of the European positioning.

We must work with the UK Government south of the border. Currently, we agree with it on most of the matters in question. Our legal system is distinct from that south of the border, but we have the same concerns that the UK Government has about matrimonial and succession matters in particular.

Darren Burgess or Brian Peddie may want to comment further.

Darren Burgess: There is only one thing that I would like to add. Under the Hague programme, the Commission has been particularly active in bringing forward draft regulations and proposals on cross-border divorce and maintenance obligations in the field of family law. A green paper on matrimonial property regimes was published in 2006. As the minister said, the Scottish Government and the UK Government support much more the concept of mutual recognition of judicial decisions on family law matters as the best option for joint co-operative working, rather than advocating that foreign laws on family law matters be applied in the Scottish courts, which tends to be inherent in a number of the Commission's proposals. That is not traditionally accepted in our legal system.

Nigel Don: From what has been said, I take it that you do not see the proposed regulation on maintenance obligations causing a problem; rather, it is going in the right direction.

Kenny MacAskill: There may be some technical problems with the regulation—such things never come alone—but it appears to us that the principle behind it is relatively straightforward, because the obligations and nature of the law in that field are much easier to understand. However, there are problems in dealing with the grounds for divorce in different European countries. Countries such as Malta and Sweden have different positions on divorce. Financial obligations are easier to regulate and deal with, without cutting across the distinctive nature of the Scottish legal system, than are divorce and related matters such as succession.

Darren Burgess: The maintenance regulation will finally be approved in December and will come into effect in June 2011. The important distinction in relation to that instrument is that the problematic applicable law rules were taken out of the EU instrument and left to one side in an optional protocol in the Hague instrument, which is international or worldwide and applies to those contracting parties that will sign up. The UK will not sign up to that optional applicable law protocol; therefore, we will benefit from the co-operative measures in the EU instrument but we will not be bound by the problematic applicable law rules.

Nigel Don: If I understand correctly, that means that we would be happy to implement what appeared in the document but within Scottish law—we would not attempt to interpret it in the context of somebody else's law. Is that fair?

Darren Burgess: Scottish courts will be required to uphold maintenance decisions that have been established in other EU member states. However, as with other instruments of this nature, were there to be any maintenance decisions that were not in keeping with our overriding public policy objectives, there would be an opportunity to knock those back. There is an underlying public policy exemption within the regulation.

Brian Peddie: There have been some encouraging signs from the outcome on the maintenance regulation, precisely because the UK Government, with support from us, did not opt in to that at the beginning because of concerns around the applicable law rules but, nonetheless, continued to work hard on the process and the negotiations to achieve an outcome that would be acceptable. To be fair, the Commission and other member states were keen to get the United Kingdom on board. Therefore, after a lot of hard work—in which we took part, as well as our UK counterparts—we were able to come up with the solution that Darren Burgess outlined, which was generally acceptable and gave an outcome on the maintenance regulation that the UK could live with. The result was an instrument that was fundamentally about exactly the kind of things that you are emphasising the importance of—about improving enforcement across boundaries without, at the same time, having to accept applicable law rules that we would have found it difficult to live with. I hope that that is a good sign for the future.

Nigel Don: Thank you. I would like to pursue that a little further. I fully understand that our divorce law is different from other people's and that other people have different divorce laws from one another. Are the discussions that are going on in Europe leading to any hope that, maybe within a generation, those things could be harmonised? Or are people sitting in their corners and saying that they will not move, therefore that will not happen? What is the feeling?

Darren Burgess: The fact that the Rome III proposal lapsed and could not be taken forward is indicative of there being different and contrasting attitudes to divorce throughout the EU. Some member states do not recognise divorce; some do not recognise same-sex partnerships. When such fundamental differences exist, it will be difficult in the short to medium term for an instrument to obtain unanimous agreement across the 27 member states. That is not to say that there are no other options, including one that is currently being considered following a request from 10 member

states to consider an enhanced co-operation measure. However, ultimately, the Commission may decide that it does not want to proceed with what is, in effect, a two-speed regime in which some member states are covered by an instrument in that area when others are not.

Kenny MacAskill: Some may well depend on the outcome of a referendum in the Republic of Ireland. It is not a question simply of the attitude towards matrimonial law; it is a question of the attitude towards the European Union.

It is safe to say that the Government wants to do what is best for Scotland and that we want to play our part. Such questions involve a balance. We were happy to sign up to provisions on financial maintenance obligations, which had a clear benefit. However, our law of succession is that responsibility vests in executors on testacy or intestacy, whereas in other jurisdictions, the estate goes straight to the heirs. Harmonising such rules would involve significant problems. We must proceed cautiously on such issues and achieve what is best for our citizens.

The Convener: We will advance to questions on matrimonial property and succession from Robert Brown.

Robert Brown: While listening to your evidence, cabinet secretary, I was struck by the fact that the subsidiarity principle is struggling to survive. Perhaps that provides some answers.

I will ask about matrimonial property and succession and wills. The approaches of the UK's legal systems and of the civil jurisdictions on the continent are to an extent divorced, if I can put it that way. Speedy and efficacious remedies for individual citizens are desirable in such matters, given that people move around Europe—they might settle, die or divorce in Spain, for example. How hopeful are you that the Scottish and UK Governments' shared concerns will be addressed in the forthcoming draft regulations in an effective way that will be advantageous for citizens of Scotland?

Kenny MacAskill: It is fair to say that the position is not simply the UK, including Scotland, versus continental Europe. Divides and schisms exist between the north and the south and in various ways. As you say, society is fluid. Some people possess properties in Spain. Members will see from my entry in the register of members' interests that my brother and I have a flat in Estonia. Jurisdictional considerations apply, whether divorce or succession is involved. We want to achieve the right balance, but that is an extremely complex and difficult job.

As Darren Burgess said, countries view divorce in a variety of ways. The law of succession is significantly different in countries where the estate goes straight to the heirs. In Scotland, executors have a duty to ingather the estate and to pay out from it. Any attempt to put such systems in a straitjacket could create great complications and be difficult.

We rule nothing out. We will proceed cautiously and ensure that a system for dealing with these matters exists. We will not throw the baby out with the bath water and undermine the law of succession, which has served us well and has had to adapt to deal with illegitimacy and various matters. We will ensure that the law continues to serve us well and is not jeopardised.

I do not know whether my officials can add any detailed points.

Robert Brown: Last September, you said that you would prepare a further response to inform the European Commission's thinking on matrimonial property. At what stage is that work? Will you give us a feel for the issues that it will highlight that are emerging from that work and from stakeholders?

Darren Burgess: The follow-up to the UK's initial response on matrimonial property regimes will be dealt with under the same process as the Scottish and UK Governments followed on succession and wills. Much time has elapsed since the Commission's green paper was produced and member states' responses were submitted. The Commission has also, in effect, put matrimonial property regimes on the back burner, pending resolution of several other family law initiatives.

We await the draft proposal that the Commission will publish towards the end of 2009. As with succession and wills, we intend to look at that draft with a view to inputting follow-up comments, to try to shape the Commission's thinking as much as possible before it produces its final legislative proposal for negotiation. That is not to say that we have not worked with stakeholders—we have indeed done that. In anticipation of the Commission's draft proposal, we have worked with academics at the University of Glasgow. We have material, but we can do nothing more until we see the shape of the Commission's proposals.

12:15

Kenny MacAskill: As you will know, Mr Brown, in our lifetime as lawyers we have moved from registration of titles to land registration. It is an important part of proving title to have that link, along with the will and making reference to executors. If we were to move precipitately to a system from elsewhere, we would undermine our position on land registration and, indeed, on how we record titles in Scotland. We must therefore proceed cautiously because an attempt to solve one problem with wills or succession could open

up a significant problem in the registration of titles and the possession and transfer of heritable property. There is a general willingness to ascertain what we can do—but from the perspective of ensuring that what we do does not undermine the system that we already possess.

Robert Brown: I am glad to say that I have managed to go through life with minimal knowledge of the land registration system; I hope that I continue to do so. I want to highlight a small point. In matrimonial property and succession, Scots law retains relics of its old Roman law history. Did that give you, intellectually, any potential for acting as a sort of bridge? As you know, some of our textbooks argued for that away back.

Kenny MacAskill: I would like to think so, and I hope so. As you said, we have a hybrid system. However, we can justly be proud of our legal profession. The Government is keen that the legal profession, in its academic input and its input into the Scottish economy, should be able not only to continue to serve our communities but to compete pan-UK and, indeed, globally. I would like to think that we can seek to provide a bridge for that.

Frankly, with an EU of 27 nations, it is simply not true that there is one legal system on the continent and another in the British isles. We have several legal systems in the British isles, including the system in the Irish Republic, never mind that in Northern Ireland. Equally, there are huge differences between the legal systems of the Mediterranean countries and those of the north of Europe. However, we have an opportunity to encourage the legal profession to be all that it can be and to look outwith the confines and borders of Scotland. We will assist the profession in that. As I said, we should be proud of our legal profession.

Robert Brown: I have a final point on matrimonial property. You indicated that a UK opt-in in relation to maintenance obligations is now likely. Does that draw with it the likelihood of an opt-in in relation to the matrimonial property regime, given the close connection between maintenance obligations and matrimonial property? It is difficult to envisage the two areas being entirely separate, is it not?

Darren Burgess: We cannot take that further opt-in as a given, although you are right that the two subjects are inextricably linked. However, as I said in response to an earlier question, the applicable law rules, which would pose the most difficulty for the Scottish system, were taken out of the EU maintenance regulation and set to one side. There is an optional protocol in the Hague instrument, to which the UK Government will not seek to sign up. Therefore, the fact that the UK Government is likely to opt into the final maintenance obligations instrument does not necessarily mean that it will do the same for the matrimonial property regulation, because we expect the applicable law rules to be in that regulation.

The Convener: We turn now to policing matters and criminal law generally.

Stuart McMillan: Can you provide an update for the committee on progress on the two current EU initiatives on the exchange of information from criminal records? Given that Scotland has its own criminal records system, are you satisfied that the negotiations sufficiently take account of Scottish interests?

Kenny MacAskill: Absolutely. We believe that the negotiations have hit the correct balance, in which we can protect what we believe is integral to our systems. As well as ensuring that people meet their obligations to their children, we are ensuring that those who commit offences can be detected and do not avoid apprehension, whether through fleeing here to avoid justice elsewhere or through fleeing to Europe to avoid justice here. Details about a certain case are sub judice, but I can say that European co-operation on DNA evidence has been of considerable benefit to the police and prosecution systems in Scotland. We welcome that.

Clearly, the latest change following the Prüm Council decision is to ensure that we get the best balance, which is to allow nation states to operate on what has been described as a hit or no-hit basis so that they can access information throughout relevant states to see whether a piece of data comes to light. If it does, the authorities then have to go through various checks and balances. The caveat is that they do not have unrestricted access, so we can protect our citizens from unnecessary intrusion as appropriate. That provides a balance so that people in this country and elsewhere can be sure that those who are fleeing justice are detected and then go through the appropriate processes. We think that that is a balance between protecting individuals' rights and ensuring that we protect our communities' rights.

Bill Butler: I want to develop the discussion on the Prüm convention. Can you update the committee on the progress that has been made on the implementation of the Council decision that began life as the Prüm convention? For example, have the shadow databases been set up? Are they operating appropriately, and are they configured to ensure that Scots law is taken fully into account?

Kenny MacAskill: I ask Brian Peddie to comment.

Brian Peddie: Mr Jamieson is my expert on shadow databases.

Danny Jamieson (Scottish Government Constitution, Law and Courts Directorate): Thank you. I hope that the committee will not be disappointed by having me as the third option.

Scottish interests have been taken into account fully in the development of the implementation programme. We understand that a scoping study is being done.

Members should bear in mind the fact that although the Council decision was agreed in June last year, there is quite a long lead-in period for implementation because of some of the technical issues that have been raised with regard to the hit or no-hit system and what happens subsequently.

Bill Butler: What is the timescale for full implementation?

Danny Jamieson: Full implementation is due by August 2011, so there is quite a long lead-in period.

Bill Butler: What will happen after the scoping study?

Danny Jamieson: After the scoping study has been carried out, our lead people will continue to engage with the people in the UK who are taking the system forward; we are fully involved in that, so our interests will be taken into account fully. Obviously, we have separate databases, so anything that is devised needs to take account of that.

Bill Butler: Are you confident that that can be taken into account?

Danny Jamieson: Yes, I think so. As I said, many of these matters are technical and to do with—

Bill Butler: But they are not insuperable. That is what I am getting at.

Danny Jamieson: No, they are not. The Scottish Police Services Authority is fully engaged. We are content that our interests will be taken account of.

Representatives of the Scottish Government, the SPSA's forensic services department and ACPOS are all engaged in the implementation measures at UK level, under the UK umbrella.

Bill Butler: So they are working co-operatively.

Kenny MacAskill: Absolutely. Clearly, technical matters require to be signed off, such as the protection of data that other police services and institutions might have. The Government believes that we will benefit. We are working with the UK, with which we already have great co-operation, despite our having our own database. It will benefit law enforcement if we work towards that co-operation. Although there may be the odd glitch here or there, the spirit and intention is to ensure that we deliver as speedily as possible.

Bill Butler: I am sure that the committee is pleased to hear that.

I have one final question on Eurojust, which, as you know, was established to deal with the investigation and prosecution of serious cross-border and organised crime. The EC proposes changes to the operation of Eurojust. What is the timescale for the changes? Will Eurojust acquire significant extra powers? If so, what are they and what benefits will they bring?

Kenny MacAskill: I will ask Danny Jamieson to come in on the detail.

Whether we are talking about the European Police Office, Eurojust or DNA database sharing, we do these things because we live in a global world. Criminal gangs operate across borders—not only the border that lies between the Tweed and the Solway, but those that are formed by the English Channel and the North Sea.

Clearly, bureaucracy is involved, which we must seek to simplify. Some of the changes are not gargantuan in nature, and are being put in place to speed up the process of justice. The intention is to create a smaller bureaucracy in which the rights and individual primacy of nation states are retained. We need to achieve a balance between protecting citizens from unnecessary interference and ensuring that those who seek to flee from justice are dealt with.

We continue to pursue a variety of proposals—big and small—to further our intention of addressing serious crime, including measures to deal with money laundering, people trafficking and drug crime. That is the broad thrust of our policy. Danny Jamieson can give the committee the detail.

Bill Butler: I am glad to hear your assurance on the policy. Mr Jamieson will give us the particulars.

Danny Jamieson: Eurojust was set up back in 2002, which is not all that long ago, by way of a legislative instrument known as a Council decision. As the member knows, such instruments are the least intrusive of European Union measures in the criminal justice and policing field. The European Union has moved on a bit since 2002. We should also bear in mind the fact that the negotiations took place some time before the decision was taken in 2002. For those reasons, it was felt that it is now appropriate to look again at Eurojust and to update and refresh some of the provisions. The revised Council decision has either been adopted or is about to be adopted. In the main, it makes no radical changes; the system is working effectively and correctly, as it was set up to do.

I will cite an example that gives a flavour of what Eurojust does. It has established a co-ordination facility that has representatives on call 24/7, which is a sensible provision that had not previously been put in place. Eurojust also has a more formal role in cases that involve concurrence of jurisdiction—international cases in which more than one member state has jurisdiction to prosecute or investigate. Eurojust always had that role informally. The new Council decision built in a provision that encourages mutual agreement, where possible, between the national competent authorities. Where there is no agreement, it can issue an opinion. Albeit that the opinion is non-binding, it is—

Bill Butler: It will be persuasive.

Danny Jamieson: It might well be. Ultimately, however, there is no compulsion to do what the opinion says.

Eurojust also provides a more consistent role for national members. For instance, some were not located at the Eurojust headquarters in The Hague; now, they all have to be there. The revised Council decision also provides for the improved transmission of information to Eurojust and it has set up a new case management system. Those are practical measures that seek to build on the success that Eurojust has been to date.

Bill Butler: Thank you very much for that. That was very clear.

12:30

The Convener: If there is nothing that you would like to say in conclusion, Mr MacAskill, we will suspend briefly to allow a changeover of officials before we deal with an item of subordinate legislation; Mr MacAskill, you are not going anywhere.

Before we move on, Stuart McMillan has a final question regarding the e-justice system.

Stuart McMillan: It could be argued that Scotland's justice system is quite paper driven. In his answer to the previous question, the cabinet secretary highlighted the bureaucratic aspects of Eurojust. Could the paper-driven nature of the Scottish system hamper the effectiveness of initiatives such as a European justice portal, which will use member states' existing electronic information?

Kenny MacAskill: I do not believe that it could hamper it. The two are entirely distinct and separate matters. Robert Brown will know that some antediluvian practices still exist in the Scottish legal system, but the legal profession accepts that we must move into an electronic age. We must ensure that we do things better and reduce the paper stream, although some things will always have to be printed out and formalised. There is a general desire in the legal profession to move in that direction. I pay tribute to the sheriff principal of Glasgow, in particular, for being a big driver for that.

The European justice portal is at a very early stage and is, to some extent, being driven by the Czechs, who intend to focus on it. They have just assumed the EU presidency and will co-operate closely with the Commission in defining projects for realisation within the portal by the end of 2009. They want to focus on activities that will promote and facilitate the more frequent use of videoconferencing in cross-border cases. They also intend to develop further the pilot project of integrated insolvency registers to enable further member states to take part in the project and to develop technical solutions for facilitating other functionalities in the portal.

To some extent, there is a parallel track. There are matters that we must proceed with in Scotland to ensure that we do not have to convene a hearing on expenses in Alloa with an agent from Aberdeen and an agent from Dumfries. Perhaps we could conduct such business in some other way. Equally, we must see whether matters at a European level can be dealt with likewise. We are at an early stage, and it is up to the profession and experts to work out just what can be dealt with by electronic means, by telephone or by videoconferencing. Sometimes, the theory does not match the reality—we know that from our experience with prisoners on occasion.

I do not see any conflict—the two systems can run in parallel. It is a matter of both international law and the law in our sheriff and district courts beginning to recognise that we must move into the 21st century, and that will serve us well.

Stuart McMillan: You have just suggested that it is up to the legal profession in Scotland to introduce better practice. What plans does the Scottish Government have to improve the electronic availability of information in Scotland?

Kenny MacAskill: We want to work with the legal profession, and the first port of call will be the Scottish Court Service. Given where we positioned it by passing the Judiciary and Courts (Scotland) Act 2008, it would be entirely inappropriate for either the Government or the Parliament to make recommendations. We must allow the service to try to head in that direction.

It is about trying to encourage. The legal profession recognises that change is necessary, so matters would not necessarily be best driven by our seeking to dragoon the service. We must encourage it to recognise that there are better practices, and I think that it has cottoned on to that. One of the drivers will also be economic. We

face difficult economic times and significant savings can be made. We must look into that. It is not about asking the profession to work harder; it is about asking the profession to work better.

These matters must be looked at by the Scottish Court Service, which is responsible for the day-to-day administration of the system, whether in the high courts or in the sheriff or lower courts. Equally, the legal profession has to work out how the system operates. The Government has a role in giving encouragement and, ultimately, it has powers if people drag their heels, but these issues are probably best dealt with by encouraging the profession to recognise the advantages that can come. That has happened before—lawyers have moved on from the quill to other methods of recording. We did not use computers when I first went into the legal profession, but now no firm would open without using computers. We have to move on, but it is about encouragement rather than Government diktat.

The Convener: If not economic necessity.

Kenny MacAskill: Absolutely.

The Convener: Having somewhat prematurely attempted to end the evidence session earlier, I now ask the officials who are not concerned with the next item to leave. I thank them for their attendance.

Subordinate Legislation

International Organisations (Immunities and Privileges) (Scotland) Order 2009 (Draft)

12:36

The Convener: The draft International Organisations (Immunities and Privileges) (Scotland) Order 2009 is an affirmative instrument. I draw members' attention to the order and to the cover note.

Prior to the formal procedure in respect of the motion on the order at item 4, members have an opportunity now to ask questions of the cabinet secretary and officials. The cabinet secretary remains in situ, as does Mr Peddie, and they are joined by Paul Johnston, of the constitutional and civil law division of the Scottish Government legal directorate.

Robert Brown: I appreciate that a lot of this emanates from Westminster and that the international obligations have to be followed through, but I was struck by a number of differences between the immunities given to different officials. In particular, I was struck by the fact that some officials have immunity from criminal arrest, some have specific immunity from prosecution for road traffic offences and some do not. I know that that has been an issue in London and it may well have been an issue in Scotland. In almost all cases, if I have understood the papers properly, persons who are British citizens are not given those immunities. That creates the odd situation that if, for the sake of argument, a European Court of Human Rights judge happens to be British, he would not have immunity from criminal arrest for such offences when he carries out his duties in the UK, whereas other European Court of Human Rights judges would. That seems odd. What is the rationale for those distinctions?

The other issue relates to spouses, who are sometimes excluded and sometimes not. There does not seem to be an obvious principle that runs through these immunities and privileges.

Kenny MacAskill: The driver—if not an obvious principle, because in some cases one could certainly query whether there is one—is clearly that the UK has to meet its obligations to these international organisations. The organisations of which the UK is a member vary, so the nature and scope of the immunities and privileges, which are set out in the schedules to the draft order, also vary; it depends on the convention or agreement covering them, but in essence the order is referring to what is described as diplomatic immunity. To some extent, meeting those

obligations is a condition of membership of the organisations. The overarching reason for the order is to help the UK to fulfil its international obligations. If it did not meet its obligations, it would be in breach of the agreements. I understand that in London issues have been raised about parking tickets but, unfortunately, that is the nature of the agreements that have been signed up to. They are bilateral and whatever else.

We are happy to allow the order to go forward on the basis that it is about the UK, and Scotland as a part of the UK, seeking to meet these obligations. I appreciate that some of the immunities and privileges may raise eyebrows but, to some extent, they are not up for negotiation. If you want to join the club, these are the rules and regulations. There may be some perversities in them, but if the UK wants to be a member of such organisations—and, given the nature of the organisations, we do—we unfortunately have to put up with the rules, although we may sometimes wonder whether some of them are being abused.

Robert Brown: I entirely accept that, but will you comment on the reason for the exclusion of British citizens from the immunities? In the example that I gave, the purpose of the immunities is to prevent European Court of Human Rights judges from being harassed as they go about their business, but one would have thought that that should apply to a judge who is a British citizen as well.

Kenny MacAskill: I think that the logic is that UK citizens are resident here and are therefore subject to the laws of the UK and the legal jurisdictions within it. We are looking to establish reciprocity so that, when UK citizens are in other countries, they have obligations and indeed rights. There is a dichotomy, but the reason is that a UK citizen is covered by the law of the land. The purpose of the draft order is to ensure that, as a state, we meet the obligations that we are required to meet to citizens of other countries who come here. UK citizens are offered the rights if they go to Paris or Berlin and, equally, citizens of France or Germany are offered them when they come here. That is the reason. It is about the UK citizen's rights elsewhere as opposed to their rights here.

Brian Peddie: I will add to that point with a comment about the differences between the various organisations. In relation to some, there are only brief references to what the privileges ought to be, but in relation to others there are more detailed provisions. As an example, CERN, which is the European Organization for Nuclear Research, has a 27-article protocol on privileges and immunities, and one of the articles states:

"No State party to this Protocol shall be obliged to accord the privileges and immunities set out in this Article to its own nationals".

That sort of provision is built in. It seems to be an underlying principle in these matters.

Robert Brown: I have a final, technical point. The final page of the Executive note on the draft order states:

"the existing orders will not be expressly revoked and replaced but will remain in force."

However, it rather suggested somewhere earlier on that some of the things were being revoked. What is the position on that? Why are certain things not being revoked if they are being replaced by the new provisions that we are asked to approve?

Paul Johnston (Scottish Government Legal Directorate): The order revokes any provisions that are now unnecessary given the new provisions in the draft order, but quite a lot of orders have been made by the UK Parliament over the years since devolution that deal only with reserved matters, and they will all remain in force to the extent that they continue to deal with reserved matters.

Bill Butler: Is that why the word "expressly" is used?

Paul Johnston: Yes.

The Convener: As there are no further questions, we move on to item 4, which is formal consideration of the motion to approve the draft order.

Motion moved,

That the Justice Committee recommends that the draft International Organisations (Immunities and Privileges) (Scotland) Order 2009 be approved.—[*Kenny MacAskill.*]

The Convener: Are there any further comments from members?

Members: No.

The Convener: Cabinet secretary, do you feel the need to wind up?

Kenny MacAskill: I will dispense with that privilege.

Motion agreed to.

Assistance by Way of Representation (District Court Financial Limit) (Scotland) Order 2008 (SSI 2008/416)

Legal Profession and Legal Aid (Scotland) Act 2007 (Handling Complaints and Specification of Interest Rates) Order 2008 (SSI 2008/428)

12:43

The Convener: There are two statutory instruments to be considered under the negative procedure. The Subordinate Legislation Committee raised no points on the orders. Do members have any questions?

Members: No.

The Convener: Are members content to note the orders?

Members *indicated agreement*.

The Convener: I thank members for their attendance.

Meeting closed at 12:44.

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