JUSTICE COMMITTEE

Tuesday 12 May 2009

Session 3

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JUSTICE COMMITTEE
14th 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)
*Stewart Maxwell (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:

Rt Hon Lord Cullen (Royal Society of Edinburgh)
Sheriff Michael Fletcher (Sheriffs Association)
Johan Findlay (Scottish Justices Association)
Rt Hon Lord Gill (Lord Justice Clerk)
Rt Hon Lord Hamilton (Lord President and Lord Justice General)
Professor Jan McDonald (Royal Society of Edinburgh)
Sheriff Nigel Morrison QC (Sheriffs Association)
Robin White (Scottish Justices Association)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 12 May 2009

[THE CONVENER *opened the meeting at 10:03*]

Criminal Justice and Licensing (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I begin the meeting with my usual admonition for mobile phones to be switched off. We have received no apologies; we have a full turnout.

Item 1 is consideration of the Criminal Justice and Licensing (Scotland) Bill. Members should have with them written submissions from the judges of the High Court of Justiciary and briefing papers from the Scottish Parliament information centre. I welcome to the meeting Lord Hamilton, Lord President of the Court of Session and—perhaps more appropriate, given the focus of our questions this morning—the Lord Justice General; Lord Gill, the Lord Justice Clerk; and Carolyn Breeds, the deputy legal secretary to the Lord President.

Lord President, I am aware of your commitments at the appeal court this morning. We will attempt to get through our business as expeditiously as possible, so we will move straight to questions.

In your written submission, you state that the current

"range of mechanisms ... for exploring and developing sentencing issues ... could ... be improved".

Will you give us a brief overview of those mechanisms and suggest how they could be made better?

Right Hon Lord Hamilton (Lord President and Lord Justice General): I am not sure whether I am wired up or not.

The Convener: You are completely wired for sound.

Lord Hamilton: That is splendid.

As we indicate in our paper, there are a number of existing mechanisms for seeking to secure consistency of sentencing. They include the general framework of decisions by judges—particularly judges of the High Court sitting on matters of appeal—and the facility that the High Court has to issue guideline judgments, which it did to only a limited extent initially but in relation to which a measure of momentum is now building up.

There are other mechanisms. The Lord Advocate is currently making use of Crown appeals in two murder cases to seek general guidance from the court in relation to the range of punishments for those who are sentenced to life imprisonment for murder. A system has also been in place for some time in which Lord McFadyen and now Lord Carloway have sought to identify cases that are coming to appeal that might be suitable for guideline judgments. We are therefore being alerted to that.

There is a prospect of improving on and extending that system. I have suggested to Lord Carloway—he is now considering it—that a reference body should be set up. It could include members of the profession, other judicial office-holders such as sheriffs or justices and, conceivably, persons from the outside community. Those people would make their particular contributions to that exercise and identify particular areas in which it might be useful if we issued guideline judgments on matters on which we have not done so already. That is the sort of line that I envisage.

The Convener: I note with interest that Lord Carloway is now carrying out that exercise. What criteria is he applying in identifying appropriate cases?

Lord Hamilton: I am not sure that I have identified any specific criteria. The exercise covers cases in which there would appear to be a generality of concern: cases in which general matters arise rather than matters that are simply special to the particular circumstances of a case.

The Convener: It appears—and your paper mentions—that there is a view that there is scant evidence of inconsistency in sentencing, although the public perception is perhaps that such inconsistency exists. Have you any views on what action could be taken to overcome that perception?

Lord Hamilton: As we say in our paper and as has been recognised, there is no empirical evidence to suggest that there is inconsistency in sentencing. Of course, one needs to understand what consistency of sentencing is in the first place. I have no difficulty with people understanding that broadly similar circumstances of offence and offender should in general attract a broadly similar sentence. That appears to me to be an appropriate part of a well-ordered criminal justice system.

I am not aware of, and no one has brought to my attention, any empirical evidence to suggest that there is inconsistency of sentencing in Scotland. I am concerned that the bill may involve the expenditure of a substantial amount of funds on a particular exercise without the truth of the premise

that there is an inconsistency in sentencing being examined.

On more than one occasion I have made an offer to the Cabinet Secretary for Justice to open the doors of the justiciary office so that the records can be examined of cases in which either the prosecutor or the convicted person has appealed against the sentence—whether or not leave to appeal has been granted; what has happened if leave has been granted and the matter has been dealt with in the appeal court; and, lastly, what the appeal court has done in those particular circumstances. An empirical exercise could be carried out to identify whether there is any true inconsistency of sentences across the board.

If that was done—and I make the offer to the Parliament now—one could discover whether there is in fact an inconsistency of sentences. If there were no inconsistency, the appropriate exercise would be to dispel the false impression that there is an inconsistency; if there were an inconsistency, the appropriate exercise would be to address that matter and determine the best way to cure it. That offer is open.

The Convener: We will take that into consideration.

Another concern that you express in your paper is that the sentencing council would undermine the independence of the judiciary. Clearly, it would be inappropriate for politicians to interfere in individual cases, but why might it be considered unconstitutional for a Parliament to establish an independent body to produce general sentencing guidelines? That has been done in other jurisdictions.

Lord Hamilton: One has to recognise the radical difference between the proposals now made and the proposals that were made by the Sentencing Commission for Scotland, chaired by Lord Macfadyen. The commission recognised the importance of the High Court of Justiciary, as the senior criminal court in Scotland, being the ultimate body responsible for laying down sentencing guidelines. It saw the advantage in there being an advisory body with a research facility for undertaking exercises and putting matters before the appeal court for endorsement or otherwise. However, I think a situation in which an outside body that is not itself elected and which comprises, as the present proposals indicate, a majority of non-judicial office-holders impinges on the independence of the judiciary, if that body is to lay down what are, in effect, prescriptive guidelines.

I understand that, in England and Wales, a majority of judicial office-holders sit on the Sentencing Guidelines Council. In our jurisdiction, it has been recognised—most recently in the Judiciary and Courts (Scotland) Act 2008—that the judiciary is itself an arm of Government and has important functions to fulfil. That would properly be recognised by a scheme in which, ultimately, the laying down of the guidelines were reserved to the highest criminal court in this country, which is what has happened traditionally.

The Convener: Lord Gill, would you like to introduce anything into our discussions at this stage?

Right Hon Lord Gill (Lord Justice Clerk): I am slightly troubled by the term "inconsistency". Forgive me for going back to a slightly earlier point, but it relates to the point that has just been raised with the Lord Justice General.

If the legislation sets out to achieve what is described as consistency, it seems essential that it should define what it means by consistency and inconsistency. The consultation paper started off by talking about inconsistency and then spoke about a perception of inconsistency, which is rather a different thing. It is not quite clear yet what the legislation seeks to achieve. There is no definition of consistency in the draft, and it seems to me that those who would form a sentencing council would find some difficulty in knowing exactly what they were trying to do unless the legislation gave them a clear definition by which to judge their own views and decisions.

That raises in a clear way the constitutional issue that underlies this legislation. It is part of the constitution that it is for the appeal court to determine sentencing, except to the extent that legislation lays down what the sentence should be. To read the bill, one might think that it involved merely the creation of some quango but, in fact, there is a huge constitutional question underlying the bill. That is what troubles me.

10:15

Nigel Don (North East Scotland) (SNP): I am grateful to Lord Gill for reaching that point, which is where I wished to come in. Your submission states at paragraph 8:

> "the High Court has always been and remains the body ultimately responsible for decision-making in the development and implementation of sentencing policy."

Although penalties such as prison, fines, admonition and discharge—and indeed execution and transportation—predate any Parliament, is it not fair to say that anything to do with probation, community orders, drug treatment and testing orders and so on is a creature of Parliament? Therefore, is it fair to say that the development of sentencing policy has been parliamentary, rather than judicial, over recent history at least?

Lord Hamilton: There is no doubt that statute—acts of Parliament—has brought into range for the sentencer a number of sentencing options as to what, in the modern community, are thought to be appropriate disposals. However, the question whether the sentencer has the option of prison or a community service order or the like is different from the matter of what his actual decision making is, or what the range of his decision making is. The range of decision making is one question that has been truly germane to the exercise of authority by the courts hitherto.

Nigel Don: My point is about the constitutional issue, which is at the nub of the question. I understand entirely the sentiments that you have recorded. Parliament has decided that capital punishment is no longer appropriate, and it has moved the boundaries. I am not suggesting that anybody should do this, but surely it is open for Parliament to say that nobody will ever be put in prison again. That is absolute nonsense, but we could theoretically do that. That is surely a matter of policy and, if we were to do that, that would be sentencing development—undevelopment, we might say for that example. Surely it is for us to do that, rather than yourselves, and if we were to do that, you would be stuck with it. I apologise for using an extreme example, which you will obviously see straight past, but I am trying to distinguish between policy development, which I think is for us, for better or for worse, and individual sentencing, which is clearly and unambiguously for yourselves.

Lord Hamilton: There may be a question of propriety as to in which arm of government particular functions properly lie. We are not being asked, under the bill, to contemplate Parliament itself dealing with guidelines. It is not that Parliament will make the guidelines; Parliament is going to strip the High Court of Justiciary of powers that it otherwise had and pass on to a non-elected non-judicial body the function that the High Court has exercised hitherto. That is where I see a particular difficulty.

Nigel Don: So if we—in this committee, let us say for practical purposes—were to retain the development of policy and the processes of the proposed Scottish sentencing council, you would be happy as it would then be a matter of Parliament developing policy.

Lord Hamilton: The question is whether you could do that practically in any meaningful way—and I would still have an issue with the propriety of that course. There is a debate here: although it is technically within the powers of the Parliament to say that there shall no longer be imprisonment, there is a question as to whether it would be proper for it to do so. Likewise, there is a question as to whether it would be proper for it to remove from the High Court the powers that it has exercised hitherto.

Angela Constance (Livingston) (SNP): I wish to pick up on the panel's point that there has been no empirical evidence for inconsistency in sentencing. The panel is aware of the 2006 report by the Sentencing Commission for Scotland, which I believe was chaired by a High Court judge and whose membership included other judges and sheriffs. The report stated:

> "such research evidence as does exist, limited though it is, supports the view that there is some inconsistency in sentencing in Scotland".

Lord Hamilton: I think that the commission made it clear that, in so far as there was any evidence, it was anecdotal rather than from a study into the particular matter. It took the view that, given the time constraints that it had to deal with, it would take too long for such an exercise to be carried out. I am not sure that I accept that that would take long: it appears that if the right materials were made available the exercise could be quite short. The commission recognised that there was no study that supported the proposition that there was an inconsistency in sentencing.

Angela Constance: The report stated that there was some evidence. Is it not the case that one proposal is for the sentencing council to undertake some more in-depth research?

Lord Hamilton: I suppose that, to some extent, the in-depth research would be about whether there is inconsistency in sentencing. However, in a sense, that puts the cart before the horse, because we should want to know that there is truly an inconsistency in sentencing before undertaking the very expensive exercise of setting up a body of the kind envisaged in the bill, with operating funds that have been identified of more than £1 million a year.

Angela Constance: I would accept that if that were the only case for establishing a sentencing council, but, as I am sure that other members will explore, it is also about society having an input into the core values of our criminal justice system.

Lord Hamilton: I have no problem with society having an input. If it is thought to be financially justifiable to have a sentencing council, I can see an advantage in persons from society in general being involved. However, they should be involved on an advisory and informing basis, rather than on a determining basis, which should be left to the High Court itself.

The Convener: Having dealt with that section, we must turn to the purposes and principles of sentencing.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Lord Hamilton, you say in your submission:

"We are content that the purposes and principles of sentencing should be set out in statute."

Do you think that that would be helpful or necessary? As a lay person, I would expect the purposes and principles to be widely known by the people sitting in judgment.

Lord Hamilton: I do not think that it is essential. I am not sure to what extent people who are otherwise ill-informed would read an act of Parliament to discover the purposes and principles of sentencing. Such purposes and principles have been set out in statute in a variety of jurisdictions. The proposals draw on the English experience, although one or two aspects are perhaps new. They also reflect to a large extent what the courts do. I have no particular difficulty with having the purposes and principles of sentencing set out in an act of Parliament if it is thought that that will assist members of the public to understand what courts do and what principles they look to in deciding on particular disposals, but I do not regard it as critical.

Cathie Craigie: You said that that had been done in other jurisdictions. Has it been done only in England? Has research been carried out to see whether it has made any difference?

Lord Hamilton: I am not aware of any research on that.

Cathie Craigie: In your submission you say that there are two matters of concern to you. One is section 1(5)(a), which provides that the purposes and principles do not apply to people who are aged under 18 at the time of committing an offence. Will you expand on your concerns about that?

Lord Hamilton: I think that the provision is drawn from English experience and the Criminal Justice Act 2003, but as I understand it the English have a quite separate system of youth criminal justice. In Scotland, the children's panel takes a non-criminal approach to problems that arise in relation to young people, but in more serious cases we bring people who are under 18 before the ordinary criminal courts. In such circumstances—for example, if a 17-year-old is brought before the criminal courts because they have committed murder or a robbery—we do not see in principle why the purposes and principles that are set out in section 1 should not apply. Of course the courts must take into account the person's youth, but it seems equally apt to consider, for example, whether a sentence would help in

"the reform and rehabilitation of offenders"

in relation to a 17-year-old as it does in relation to a 19-year-old or 21-year-old.

Cathie Craigie: You said that it is not essential to set out in statute the purposes and principles of sentencing, but would you want to add anything to section 1?

Lord Hamilton: I do not think that there is anything that I would press for. I noticed that the Sheriffs Association talked about denunciation in its submission—the importance of a judge's expressing society's condemnation of what has been done when they sentence in a particularly atrocious case. I suspect that that is not as much a purpose and principle of sentencing as it is an appropriate mechanism to be used when a judge is expressing why they are doing what they are doing.

The Convener: Paul Martin will explore unresolved issues to do with the proposed Scottish sentencing council.

Paul Martin (Glasgow Springburn) (Lab): A function of the proposed sentencing council will be to prepare sentencing guidelines to which a court must have regard. How do you interpret the phrase, "have regard to"?

Lord Hamilton: It does not bind absolutely, but it is constraining to a significant extent, as I think it is intended to be. Currently, the lower courts require to have regard to a guideline judgment that has been issued by the appeal court. Likewise, if the bill were passed, not only the initial sentencing courts but the appeal court, which would deal with sentencing guidelines and the like and with cases on appeal, would be constrained by the provisions and would require to apply them unless there was good reason not to do so.

Paul Martin: Do you welcome the inclusion of such a phrase in statute?

Lord Hamilton: I do not welcome the concept if the situation is that guidelines are to be laid down by the sentencing council, as distinct from being laid down by the appeal court on a recommendation by the sentencing council.

Paul Martin: Although the bill uses the phrase, "have regard to", the judiciary could ignore the guidelines. There could be circumstances in which a court said, "We had regard to the guidelines but we took a different decision."

Lord Hamilton: We must proceed on the premise that the courts will implement acts of Parliament that exist to be applied. There will no doubt be circumstances such as you describe, but they will require to be carefully examined. If a lower court stated that it had had regard to the guidelines but thought that the circumstances were special and therefore that it should not apply a particular guideline, that would be open to

examination, in the same way as it would if the guideline had been laid down by the court.

Paul Martin: Does more need to be done to provide sentencers with sentencing guidelines and to provide the general public with accurate information on the sentencing process?

Lord Hamilton: As I say, sentencing guidelines are used increasingly by the court. On alerting the public to what is happening, there have been important developments in our dealings with the press and the public in relation to what we do in the process of sentencing. Sheriffs and judges much more frequently issue sentencing statements in cases that are likely to give rise to public concern, anxiety or interest. That could involve an explanation of why a particular principle of sentencing was adopted.

10:30

Paul Martin: Could the sentencing council play a role in developing information for public consumption about the sentencing process?

Lord Hamilton: It could be a source of information as to what it was doing in that regard. If it were an advisory body—as I suggest it should be, if there is to be a council—it could publicise what it was doing so that the public could understand it.

Nigel Don: If we accept the premise that the sentencing council is to be established in some form or other, what changes would you make in respect of its proposed composition or membership?

Lord Hamilton: I urge strongly that the council should have a judicial majority—the proposals are short of representation from among senior members of the judiciary. It would be inappropriate merely to have the Lord Justice Clerk as the chairman and one other judge—in effect, a first-instance criminal judge—as the only two senators on the council. I would be minded to double that to four senators. I would leave the number of sheriffs and justices the same, but I would remove the constable, because I do not recognise the function of the constable in that regard. I would reduce the provision in paragraph 1(5)(b) in schedule 1 from "two other persons" to "one other person", which would mean council membership of 12, with judicial office-holders being seven of the 12.

Nigel Don: We could spend the next half hour picking over that. I want to pick up on the general principle of the council including lay people, which brings me back to the basic principle behind the proposals. Surely—although we are clear that this should not happen in individual cases—society should have a say in sentencing policy. Sentencing policy concerns the man and woman in the street. Although it would be wholly inappropriate simply to pick two people off the street, surely there are people outside the legal system who can bring their life experience to the council, as MSPs do to our role. I am not suggesting that lay members of the council should be MSPs or ex-MSPs, but we represent, and sometimes meet, people out in the world. It is surely not inappropriate for representatives of society to be part of the process of policy development.

Lord Hamilton: I am content with that, but the issue is the degree of involvement. There could be very important input from somebody who has particular knowledge of the issues that victims of crime face or from a penologist who has particular knowledge of the effects on convicted persons who are given particular disposals. Such knowledge could usefully be brought into an exercise that would give rise to informed advice on what the courts should do.

Nigel Don: You have spoken a bit about the process of establishing guidelines. How would you—assuming that we will have the sentencing council and that it will produce guidelines—like the proposed legal effect of the guidelines to be changed?

Lord Hamilton: I might be repeating myself: the critical difference is that the sentencing council should be an advisory body that does research and prepares draft guidelines that it presents to the appeal court, which endorses the guidelines if it thinks fit and sanctions them, such that sentencing courts are bound to have regard to them. That is how I would organise it.

Nigel Don: If the appeal court chose not to sanction guidelines, where would we be?

Lord Hamilton: I have no doubt but that the appeal court would have to explain why it was not sanctioning the guidelines. It might have a power to remit guidelines to the council for reconsideration in the light of the court's views, after which an amendment might be made. Another possibility is that the court could sanction guidelines subject to amendment.

Cathie Craigie: You have told us what happens when guidelines are prepared and issued now. Is any account taken of informed representatives' views by whatever panel of judges considers guidelines?

Lord Hamilton: We do not have input from members of the public generally. We take into account representations that might be made by the Lord Advocate as prosecutor, for example. I can think of an appeal against an allegedly unduly lenient sentence in a rape case in which the Lord Advocate put before us several factors in relation to public concerns and so on. We had, under the

new regime on the constitution of rape, to make a distinction between rapes that are of a particularly brutal character and those that are not. Information from the prosecutor, as well as anything that might be said on the accused's behalf, is input into such matters. However, we do not receive information from the public in general.

The Convener: Does the Lord Justice Clerk have anything to add? I have no doubt that you wish to make the point that judges, too, are members of the public and speak to people in their everyday lives.

Lord Gill: Contrary to any other popular belief, there is no doubt that we have our finger on the pulse, simply because of our long experience as practitioners and judges and because of the number of cases that we deal with in the appeal court day in, day out.

I will mention one point in supplement to what the Lord Justice General has said. There is a role for a sentencing council in Scotland, but it is not what is proposed in the bill. We need hard research to establish the effects of sentencing. The courts have before them a wider range of disposals than they have had at any stage in history. We need to know how to measure the success of those disposals and, if a criterion exists for their success or failure, to know what is happening out there in the field. Useful research could be done on that.

A sentencing council could do much on that matter. It could also consider developments in sentencing in other jurisdictions in the world and see what other imaginative ways have been devised in other countries. That would provide a basis to enable sentencing by the High Court and by sheriff courts to be better informed. Of course, such a council would, in essence, be a research and advisory body, which would be different from the conception in the bill.

Robert Brown (Glasgow) (LD): I have one or two points to make on short custodial sentences. Again, a constitutional issue underlies the matter. Section 17 talks about replacing short sentences with community sentences, to an extent. Does that raise the prospect of undue interference with the judiciary's freedom on sentencing? That is a relatively substantial policy direction.

Lord Hamilton: I approach the matter with some hesitation, because the High Court's experience relates mainly to dealing with High Court sentences rather than with short sentences, which are closely associated with the exercise of shrieval and justices' jurisdictions.

I do not think that I have a particular problem with that aspect of the bill, if it is simply regarded as a presumption. The present position—which the sheriffs will no doubt be able to expand on—is that although the sheriffs do not readily sentence people to short sentences, they recognise that such sentences are, in a range of circumstances, the only option that is truly available to them. That is particularly the case with people who have been given all manner of non-custodial disposal options in the past and who have simply set their faces against being prepared to answer to the community for their failures. There are other cases—involving, for example, repeat offenders or people who have committed road traffic offences such as continuing to drive without a licence—in which a short and, one hopes, sharp sentence might bring home to the individual concerned the importance of complying with the law. I do not think that I have a difficulty in principle with what is proposed.

Robert Brown: I would like to develop some of the points that you make in paragraph 10 of your submission. You express the fear that the provision of mandatory directions to the court by a non-judicial body might undermine judicial independence under the European convention on human rights. Will you give us a flavour of your concerns in that area?

Lord Hamilton: The ECHR is concerned with the requirement that every person whose criminal as well as his civil position is to be adjudicated on is entitled to an impartial and independent tribunal. That includes circumstances in which a person who has been condemned in a criminal case is disposed of by a judicial office-holder, so the judicial office-holder must be an independent tribunal. I am concerned that if the judicial office-holder is constrained to a significant degree by the dictates of a body that is neither a judicial nor—in the sense that it is not elected—a democratic body, an issue might well arise about whether the person who is sentenced has had the benefit of having their disposal dealt with by an independent tribunal.

Robert Brown: The issues of principle aside, is it fair to say that that casts an element of uncertainty on proceedings?

Lord Hamilton: It certainly raises a question about them.

Robert Brown: I wish to develop a slightly different point that follows on from that. The Sheriffs Association expressed some concerns about the composition of the proposed sentencing council and have referred to the fact that the Lord Advocate must be consulted on the draft guidelines, whereas the judiciary does not have to be. In addition, they feel that the fact that there is to be a prosecutor on the council means that there is a suggestion that arrangements will have a prosecutorial bias. Do you have any concerns about those aspects?

Lord Hamilton: I suppose that one starts from the premise that in general—at least, traditionally—the prosecutor or the Lord Advocate has not been concerned with sentencing. In our jurisdiction, the prosecutor does not, as happens in other jurisdictions, propose that a particular sentence be imposed by the court. Nonetheless, the Lord Advocate has an interest in what the courts do, as is illustrated by the fact that statute allows her to appeal, without leave, to the High Court against a sentence that she contends is unduly lenient. I therefore have no particular difficulty with recognising that she, or someone on her behalf, should have an interest in the matter.

10:45

Robert Brown: It says in section 2(2) that where the guidelines from the Scottish sentencing council are inconsistent with section 1,

"the court need not comply with section 1".

Does that not raise a question about what principles should be applied by the sentencing council in that regard? Will you elaborate on that?

Lord Hamilton: I have a concern about that. If the principles are to be recognised as being applicable in the criminal justice system, they should also be applicable to the sentencing council. It should not be free to deal with the matter without regard to those principles.

Robert Brown: I am conscious of the time, but I have a final question, which relates to the issue about alcohol in section 24. You suggested in your submission that bereavement would be a possible mitigating factor. Voluntary intoxication is not a mitigating factor under the bill, but should that exclude consideration of bereavement in the background as a factor of which account should be taken? In other words, would the provisions in that section be as practically restrictive as you suggest in your submission?

Lord Hamilton: If there is an absolute prohibition on taking into account the existence of voluntarily ingested alcohol, I do not think that the sentencer would be allowed to take into account background circumstances such as a personal tragedy of that sort.

One can think of other examples. A recent case gave rise to a lot of controversy: a young woman who had been sexually assaulted outside a club of some sort had driven off while she was affected by alcohol and was ultimately prosecuted. There was a question about whether she should have been prosecuted and about what the ultimate disposal should have been. If the terms in section 24 were to apply, it would not be possible to take into account that that young woman had driven off under the influence of alcohol, but in circumstances in which most people would recognise that there was a mitigating factor.

Robert Brown: That is perhaps a salutary example of the kind of difficulties that one can get into when trying to be too prescriptive about such matters in statute.

Lord Hamilton: Yes—that is true.

The Convener: Robert Brown might think that; the Lord Justice General cannot possibly say it.

Stewart Maxwell (West of Scotland) (SNP): On Robert Brown's question, I am not sure that I follow the line of argument. Section 24 talks about "voluntarily consumed alcohol", which must not be taken into account as a mitigating factor. Section 24 does not suggest in any way, shape or form that you could not take into account as a mitigating factor other circumstances—for example, if the person had been recently bereaved, sexually assaulted or any other circumstance. Because you cannot take into account the fact that the person was under the influence of alcohol, I do not follow why you cannot take into account that they were emotionally disturbed or had acted in an abnormal way because of other circumstances.

Lord Hamilton: I see your argument, but it seems to me that section 24, as it is framed, gives rise to an ambiguity that ought to be addressed.

The Convener: Surely the argument would be that the proximate cause of the intoxication was the traumatic experience that the individual had had and it would be competent to introduce that experience in mitigation.

Lord Hamilton: I will leave that matter for the committee to consider.

The Convener: We are aware of the time constraints this morning. Lord Justice Clerk, do you wish to add anything in conclusion?

Lord Gill: No—there is nothing that I wish to add.

The Convener: Lord Justice General, do you wish to add anything?

Lord Hamilton: No thank you.

The Convener: I take it that if any issues arise, you will be happy to respond to them in correspondence.

Lord Hamilton: Certainly.

The Convener: I thank you very much for your attendance this morning; we appreciate the pressures on your time. It has been an exceptionally useful evidence session.

10:49

Meeting suspended.

10:51

On resuming—

The Convener: The committee will continue consideration of the Criminal Justice and Licensing (Scotland) Bill. Members should have the written submissions from the Sheriffs Association and the Scottish Justices Association.

I welcome from the Sheriffs Association Sheriff Michael Fletcher, who has attended the committee previously, and Sheriff Nigel Morrison QC. Sheriff Morrison, who sits in Edinburgh as a sheriff, is the general editor of "Sentencing Practice" and the author of "Greens Annotated Rules of the Court of Session".

The representatives of the Justice Association are Johan Findlay, who is a justice of the peace and the association's chairman, and Robin White, who is a committee member. I thank you for your attendance. We will proceed to questioning.

Cathie Craigie: Part 1 of the bill sets out the purposes and principles of sentencing. Is it necessary to set that out in legislation?

Sheriff Michael Fletcher (Sheriffs Association): The view of the association is that it is not necessary to set out those principles as has been done in the bill, because all sentencers are well aware of those principles. I doubt that it assists the public to know that those are the principles by which sentencers impose sentences, and I doubt whether the public would look at section 1 to find out why a sentence had been imposed as it had been.

Cathie Craigie: Would having the principle in statute in any way help those of you who have to sit in judgment?

Sheriff Fletcher: It could help only if it was necessary for people who were sentencing to justify the sentence using such principles. When an individual sentence has been imposed, and is perhaps not approved of, I cannot imagine that it would be possible to justify it simply by saying, "We followed the principles that are set out in the act." I doubt very much whether it would be helpful to have those principles in statute.

Cathie Craigie: The submission from the Sheriffs Association says that the list in part 1, section 1 of the bill is not exhaustive and that many more purposes could be included. If section 1 is to stay in the bill, should we add to the list? Should we delete section 1?

Sheriff Fletcher: We suggested one possible addition, but that is all it was—one possible addition. We also tried to show that many other principles should perhaps be followed too, but that it would be very difficult to define them all. However, I doubt that we would change the principles that have been set out, if they are to remain in the bill and be enacted.

Johan Findlay (Scottish Justices Association): I do not have much to add to that. It is clear that justices, in particular, are trained very highly in sentencing—we use those principles all the time.

Cathie Craigie: Aside from what is in the legislation, should there be publicity so that the general public understand the purposes and principles behind sentencing?

Sheriff Fletcher: The general public might not take kindly to being lectured on the principles behind sentencing. Some people will be interested anyway, and will want to inform themselves about the principles in different ways, but I doubt very much whether the general public would be interested in seeing the principles.

Robin White (Scottish Justices Association): I take a slightly different tack from my colleagues: I see no harm in a statement of principles such as that in section 1. We could argue for a long time about what should go in the list—I would add "denunciation" as another aim of sentencing—but I do not think that there is any great controversy about the aims of sentencing. Various authors have produced various lists, but they all boil down pretty much to the list that is in the bill—which appears, incidentally, to have been lifted from the English legislation.

The list in section 1 perhaps suffers because it contains the sort of things that sentencers obviously take into account when sentencing. However, I do not see any particular harm in stating the principles.

I feel—pace Sheriff Fletcher—that the list may have more value from the public's point of view. We will, no doubt, discuss the proposed sentencing council, but one of its functions will be to provide public information and education. I think that it is generally agreed that there is a good deal of public ignorance about the purpose of sentencing, so it would be useful to have an authoritative and orthodox statement of the principles, if only to allow a sentencing council to use its terms when talking to the public.

The Convener: That possibility already exists, because an official is employed by sheriffs and judges to ensure that appropriate statements are publicised. Is not that the case, Sheriff Morrison?

Sheriff Nigel Morrison QC (Sheriffs Association): Yes—that is true.

I would like to add that the purpose of setting out the principles in the bill was not simply to set them out. As the policy memorandum indicates, the purpose was to achieve consistency, transparency

and confidence. However, we do not think that that purpose has been achieved.

Cathie Craigie: I think that other committee members will ask about that in more detail later.

The Convener: We turn now to the somewhat more vexed issues of consistency in sentencing and the proposed Scottish sentencing council.

Bill Butler (Glasgow Anniesland) (Lab): Good morning Ms Findlay and gentlemen. What is wrong with asking the courts to exercise their discretion, in individual cases, within a general sentencing framework that has been established by some other body?

Sheriff Fletcher: It is not correct to say that we think that it is wrong to have a sentencing council, or that we think that it is it wrong that members of the public should have an input to allow consistency of sentencing to be achieved—or to be seen to be achieved, as it is perhaps more correct to say.

As we said in our written response, the difficulty that we are concerned about is the constitution of the proposed body. It is fair to say that it would be difficult for the main sentencers in Scotland—the sheriffs—to have confidence in a body that did not have a judicial majority.

11:00

Bill Butler: Do other members of the panel wish to add anything to that?

Sheriff Morrison: The Lord Justice General and the Lord Justice Clerk made the point that, under the European convention on human rights and the decisions of the European Court of Human Rights, sentencing is for judges, and, as Mr Don said earlier, the principle of policy—with a capital P—is a matter for Parliament. However, the proposed sentencing council would take away from Parliament from the judges the policy making, to an extent, and the decision making.

Bill Butler: Parliaments create criminal offences that the judiciary then applies in individual cases. If that is all right, why should it be undesirable for a non-judicial body to be involved in establishing sentencing guidelines that the judiciary then applies in individual cases? Is the problem the type of body that the bill proposes? Lord Gill said that there is a place for a sentencing council, but not the one in the bill. He went on to sketch briefly his thoughts on a research and advisory body. Would you be more comfortable with such a body? Is the problem the sentencing council that is outlined in the bill?

Sheriff Morrison: Lord Gill's suggestion would be more palatable.

Bill Butler: The proposed sentencing council is indigestible, then. Is that because there would not be a judicial majority on the council and that, rather than being an advisory body, it would take over what the court of criminal appeal does as a determining body? Is that correct?

Sheriff Morrison: Yes.

Sheriff Fletcher: Yes, that is the difficulty. Sentencing has been described as an art rather than a science. I do not think that everyone realises the amount of time that it takes to come to a decision about an individual sentence. That is why it is so attractive to other people to have guidelines, which they think would be relatively straightforward to apply to cases. In fact, the circumstances in every case are so different that guidelines are difficult to apply. I am not suggesting that we should not have guidelines because I or other sheriffs find them difficult. I am simply trying to illustrate the fact that guidelines are not the be-all and end-all.

However, if guidelines are to be prepared, that should be done by a body in which the majority of people deal with sentencing all the time. Sheriffs, judges and justices of the peace are regularly subjected to training, involving all sorts of sentencing exercises in which skilled people discuss sentences. It is important that such training also involves lectures from a variety of people—psychologists, psychiatrists, social workers, victim support people, police officers and academic lawyers—who describe the purposes of sentencing. The skill that those people have is gathered over a long time, and it seems to me that that is the skill that should be employed to create sentencing guidelines. That work has to be informed by the wider public, and I have no difficulty whatsoever with the wider public being involved in helping to create those guidelines. However, it is not so easy to have confidence in a body in which the majority of the people who make the guidelines do not have that skill.

Johan Findlay: I often describe sentencing as neither an art nor a science but as an impossible equation in which one balances the means of the offender against the seriousness of the offence. As Sheriff Fletcher said, it is very difficult to lay down guidelines on that.

I am never very sure what we mean by public opinion. It is very often that which is reported in the press; we do not know who exactly has said something in the beginning or where it is leading.

Bill Butler: It may be editorial opinion.

Johan Findlay: It could be that or anything else. It is very difficult to get public opinion. A lay person on the Scottish sentencing council, depending on what background they come from, may be very biased, nevertheless theirs would still be a lay

opinion. Justices are lay people, but we have had years of training. I have been a justice for 22 years and—as Sheriff Fletcher said—we are pretty expert on sentencing.

Bill Butler: Does the panel agree with Lord Hamilton's comment that the need for guidelines, as set out in the bill, will constrain sentencers and the appeal court to a significant extent?

Sheriff Morrison: I agree with him. There are elements in the bill that would make guidelines prescriptive—I think that that was the word that he used—and I agree.

Bill Butler: Are we all in agreement?

Robin White *indicated agreement*.

Sheriff Fletcher *indicated agreement*.

Johan Findlay *indicated agreement*.

Bill Butler: I am obliged.

Robin White: I was hoping to say something about some of the other matters that have been raised in the past few minutes, particularly the constitutional issue. Certainly, two constitutional issues are involved—we might call them the internal and the external.

The internal is the actual constitution of a Scottish sentencing council. Our evidence has spoken in favour of a 50:50 split between judicial and non-judicial members. One can argue until the cows come home about the appropriate level. We ended up with 50:50 having tried to square a circle by giving confidence to the judiciary, which might argue for a judicial majority, but also confidence to the public at large—

Bill Butler: Could that not lead to stasis?

Robin White: That is precisely my next point, if I may say so. Public confidence might require a judicial minority—

Bill Butler: Why should that be so?

Robin White: With the greatest respect to all members of the judiciary, it is because there is a danger of a certain amount of conservatism—with a small c—in sentencing, by which I mean that, on the whole, most sentencers are pretty satisfied with sentencing at present. However, if one wants a few new ideas or some public reaction one might not want a judicial majority.

Bill Butler: What is your evidence for that assertion?

Robin White: Which assertion?

Bill Butler: About small-c conservatism.

Robin White: I have no evidence at all.

Bill Butler: Therefore, it is your opinion.

Robin White: As are most of the things that are said from this side of the table.

I mentioned the internal. Might I say something about the external, which the Lord Justice General said something about? The proposed sentencing council would be a constitutionally interesting body externally because clearly the Parliament can tell the courts what to do—full stop. You made the point about the creation of new criminal offences, for example. The Parliament could decide that there should be a fixed penalty for every single offence in the calendar and the courts would loyally have to obey that. It would not be good policy, but it would be perfectly sound constitutionally. That is not true for the Executive. The courts do not do what the Executive says. If the Executive wishes a particular policy to be followed, the appropriate course is for it to introduce legislation. The proposal falls somewhere between those two; guidelines are not exactly a nudge and a wink, but they have an interesting status. We are used to the idea of guidelines in legislation—they have been around for a very long time.

Bill Butler: What is your reply to what Lord Hamilton said about the phrase "have regard to" being too prescriptive, with which Sheriff Morrison agreed?

Robin White: I would always defer to the Lord Justice General, but I should have thought that the phrase "have regard to" was not inappropriate. You can interpret it as you wish, but it means something like "must have in your mind".

Bill Butler: If you can interpret it as you wish, why have it at all?

Robin White: Because you have to have something.

Bill Butler: Okay.

Robin White: You could use alternatives such as "must take account of", which racks things up slightly, or "is obliged to". If one is to have principles, there must be a verbal form for the notice that the courts should take of them. With great respect to the Lord Justice General, I should have thought that "have regard to" was at the lower end of the requirements.

Bill Butler: I am obliged.

Nigel Don: Some of the questions that I wanted to ask have been pre-empted. Sheriff Fletcher's comments about the people who train sheriffs seemed to reflect precisely the description of those who would be appointed to the sentencing council. Is there a synergy that may have eluded you?

Sheriff Fletcher: That is partly why I chose to mention those people, although there are others

who give us lectures. I was trying to illustrate the fact that judges have training that extends beyond what you might think of as our little world—if some people think that we have one—into the wider world, not just of the general public but of experts who know how things work and tell us about the difficulties and advantages of dealing with people in the way in which we are required to deal with them.

Nigel Don: Is there not an advantage in constituting a body that can provide guidelines regularly to everybody, rather than putting up with what is necessarily intermittent training? I nearly used the word sporadic, but there is nothing random about it. If there were such a body, guidelines could be issued generally, rather than being issued occasionally to those who happen to be being trained at a particular time.

Sheriff Fletcher: The advantage of training is not just that it gives people knowledge but that it allows them to absorb that knowledge in a way that enables them to form the skill that they need to do the job. That is different from having a body of people who have a skill because they are experienced and trained and live in the real world, which we do. It is better for guidelines to be produced by people with that body of knowledge than by people such as psychologists, psychiatrists and policemen, who add just one aspect of their knowledge.

The Convener: Ms Findlay, do you have anything to add?

Johan Findlay: No—Sheriff Fletcher's answer is quite clear.

Robert Brown: Do both the justices and the sheriffs accept what I understand to be the view of the senators: first, that there is a place for research into the effects of sentencing, on which we could be better informed; and, secondly, that the nub of the matter is who has the final decision on sentencing guidelines? Should it be the body that will be set up under the bill or should it be the High Court in its appeal capacity, with the sentencing council acting just as an advisory body? Is that not the nub of the constitutional point? What is your view on that?

Sheriff Fletcher: Sheriffs think that the High Court of Justiciary, advised by guidelines, should have the final say.

Robert Brown: Is there a place for better research into the effects of sentencing?

Sheriff Fletcher: Definitely. A wide variety of sentences are available to us, and we use them pretty regularly. We see the results of those sentences: in some cases community service is successful, but in others it is completely unsuccessful. However, we have no research that tells us whether, overall, that is the correct course for us to take. It would be helpful to have such research.

11:15

Robin White: For precisely the reasons that Sheriff Fletcher has highlighted, I absolutely agree that it would be enormously valuable for the bill to give the sentencing guidelines council the function to carry out or commission research.

I have to say that I defer to the Lord Justice General on the point about constitutional status. I suppose that, from a judicial point of view, it would be a good deal more satisfactory for the guidelines to have the imprimatur of the High Court acting as a court of appeal.

Paul Martin: Why has no research been carried out? After all, some of you have significant experience in the judiciary and I am sure that over the years sheriffs and various authorities have made representations on that matter. Why are you asking for research now?

Robin White: A good deal of research has been carried out, but there is plenty of room for more. New sentences keep being introduced; for example, community payback orders might well come in as a result of the bill, and research will have to be carried out on their effect, on variations within unpaid work and so on. No one will argue that there is no research; it is just that there needs to be a lot more.

Paul Martin: So some research has been carried out.

Robin White: Yes, but it is constrained by funders funding people to do it.

Paul Martin: I appreciate that, but you said that new legal remedies such as CPOs are going to be delivered—

Robin White: I am sorry. My point is that when new sentences such as drug treatment and testing orders and restriction of liberty orders are invented and introduced someone early on has to find out whether they are having their intended effect.

Paul Martin: So is there a failure in—

Robin White: I am not saying that there has been a failure. I am just saying that there could be more and better research.

Paul Martin: Please let me finish my question. Has there been a collective failure in this respect, perhaps by Parliament, the justice directorates and so on? In almost every evidence session, someone says that we need more research. Surely we need first to clarify the research that already exists and secondly to think about the action that needs to be taken as a result of any

research that is carried out. After all, if, in light of research showing that a particular sentence has been effective, we say that you will be required to deliver it, you will simply say that we are taking away the judiciary's independence. In that case, what purpose will research have?

Robin White: With respect, that sounds like a counsel of despair.

Paul Martin: It does not.

Robin White: I do not wish to monopolise the discussion, but let me address the two points that you have raised. On the question whether enough research exists already, that is a matter that needs to be discussed and on which we will end up with our own opinions. It certainly is an issue, but I doubt that it can be resolved today. As for the question of what happens as a result of research, that is a matter of political will.

Johan Findlay: An amount of research has been done, but it is not always easy to get hold of it. It depends on who has commissioned it or carried it out. A sentencing council or advisory board would be able to gather that research together and give it to the people who need to see it.

Paul Martin: So you are not able to access the existing research.

Johan Findlay: It depends on where you come from. Some—but not all—research will go to the courts or the various training bodies.

Paul Martin: So is there nothing available on the internet, for example? I am sorry to labour this point, but the question is whether or not we can access research.

Johan Findlay: We can access some.

Paul Martin: I suppose that my point is that if we are seeking to procure new research we have to ensure that it will be used. I am sure that, with Google, you could find quite a substantial volume of academic research; I am also sure that a number of you are able to access other academic research. We need to ensure the quality of that research and that, when it is carried out, its conclusions are taken forward.

Johan Findlay: That is right.

The Convener: On the question of research, surely the effectiveness of different sentences can be determined by the recidivism rates of those who have received them.

Sheriff Fletcher: That is certainly one way of checking the effectiveness of sentences.

Paul Martin wanted to know who would make use of the research. I can tell him that the judiciary certainly would, because we want to know which of the sentences available to us is the most effective in preventing reoffending. We are finding ways of doing that and, if you like, looking for scientific reasons behind our choice of sentence instead of relying on what seems best to the individual sentencer.

Stewart Maxwell: Let me take you back, Sheriff Fletcher. A moment ago, in your answer to Mr Butler, you seemed to suggest that the bill changes who has the final say—that it will not be the appeal court, but the sentencing council. However, that is not strictly correct, is it? Although you will have to have regard to the guidelines, the final say will still rest with the judiciary.

Sheriff Fletcher: Sorry. I did not mean to say that the final say will not rest with the appeal court. I thought I said that I thought that it should rest with the—

Stewart Maxwell: I understand. You are saying that the final say should rest with the appeal court, as it currently does. However, surely the final say will still rest with the appeal court, even if the envisaged sentencing council is brought into being?

Sheriff Fletcher: I suppose that it will, except that the judges in the appeal court, like all other judges, will be required to follow the law, and the law requires them to have regard to the guidelines rather than whatever other things they might think it more appropriate to have regard to.

Stewart Maxwell: You will have to have regard to the guidelines but, as we explored with Lord Hamilton and Lord Gill, that does not necessarily mean that you must obey them absolutely. There could be circumstances in which, although you would have regard to the guidelines, you would come to a different conclusion. Is that not the case?

Sheriff Fletcher: Yes. "Have regard to" means exactly what you say that it means.

Sheriff Morrison: There is, however, a provision in the bill that will allow the sentencing council to exclude departure from the guidelines. It is not simply a matter of the judges having regard to them, because the sentencing council will be given that power.

Angela Constance: It could be argued that consistency in sentencing is not achievable without removing the freedom of the sentencer to take into account the various individual circumstances of a case. However, it could also be argued that that would be overstating the case, given the fact that well-formed sentencing guidelines could help to achieve greater consistency without unduly limiting the ability of the sentencer to deal with individual circumstances. I would be interested to know the

views of the panel about that, starting with Mr White.

Robin White: It is interesting that consistency is seen as the prime virtue in all of this. As our written evidence suggests, there is at least one other criterion that might be applied—appropriateness. A judge can clearly be consistent in error. Nevertheless, consistency is the prime criterion because that is perceived to be the public concern.

The problem with consistency is that, as Sheriff Fletcher said, every sentencing decision is multi-dimensional. There is a large, although not infinite, number of considerations that one might wish to take into account. We have talked about whether such decision making is an art or a science, but the phrase that I would use is "arbitrary and intuitive". I mean arbitrary not in the sense of capricious, but in the sense that there is a decision, and I mean intuitive in the sense that there is no arithmetic or accountancy to the decision—it is a decision that one must take on the basis of what one thinks is appropriate in terms of the principles of sentencing.

Therefore, although consistency is not a thing to be discarded—it is something to be concerned with—the question is: consistency with what? We have our list of half a dozen principles, which are not ranked. One clear decision that anybody who passes a sentence must take into account is which of those principles—which are often inconsistent—is the prime principle to apply. There is then the possibility of aggravating factors, mitigating factors and so on. I do not know whether that answers your question.

Angela Constance: Given the fact that the sentencing guidelines offer a framework rather than a chart, do you think that they could be helpful in achieving consistency and appropriateness?

Robin White: Indeed they could. That is their value. You spoke of charts, and you might know that in some American states, sentencing commissions produce charts from which judges can read off the appropriate sentence. Judicial discretion for anyone there is minimal. That system is conceivable—it operates—but I do not think that we would want it here. What do we have instead? We have guidelines that one would hope would demonstrate appropriateness as well as consistency.

Sheriff Fletcher: I agree. I do not think that I am suggesting that guidelines are not helpful or that they should not exist. I am worried not about the guidelines but about who gives them. We are perfectly used to guidelines being given by the High Court of Justiciary. We regularly find ourselves following them because we are aware of them, or being challenged because we have not followed them. That is not a problem; it is not difficult. I just suggest that the people who give the guidelines should be the ones with the skill to do that.

The Convener: Before we leave this point, there is one issue around the guidelines that concerns me. I would be interested to hear whether the witnesses think that the wording in the bill is inconsistent with my concern.

In your commission areas, there will be differing criteria and sentencing policies for the same offences. For example, someone who drives at high speed through a small village in the country would obviously attract a great deal more localised odium than someone who does the same thing along Great Western Road in Glasgow. As such, the penalty would be increased. In fact, within your jurisdiction, Sheriff Fletcher, it could be argued that disorder in the centre of Perth would be viewed more seriously than disorder in certain parts of Glasgow. Therefore, members of the bench might well feel that sentences should reflect the degree of public concern about certain issues.

As I see it, that point would not be picked up within the requirements of the consistency approach that is demanded by any potential sentencing body.

Sheriff Fletcher: No, and of course there have been occasions when people have thought that a serious offence in one part of the country, where there was a particular problem, required to be dealt with even more seriously than the same offence in another part of the country. I do not think that there is anything wrong with that. It is a reflection of the judiciary's ability to recognise both what is going on in their own area and what might be necessary to improve life in that particular part of the world.

The Convener: Does Sheriff Morrison consider that the wording in the bill would allow for different sentences for the same offence, bearing in mind the locus of the offence?

Sheriff Morrison: I am not sure that it does, actually.

The Convener: Yes; I think that that is a problem.

Johan Findlay: With guidelines, there is always a danger that we lose a lot of local discretion, which is so important to justices and sheriffs who sit in a local sheriffdom.

The Convener: I think that we have largely covered the material that the next two questions would have looked at. I will go to Stewart Maxwell.

Stewart Maxwell: Thank you, convener. I turn to section 5(5) of the bill, which says that the

Scottish sentencing council must include in any sentencing guidelines an assessment of the likely impact of those guidelines on various aspects of the criminal justice system, including:

"(i) the number of persons detained in prisons or other institutions,

(ii) the number of persons serving sentences in the community, and

(iii) the criminal justice system generally."

What are your views on that provision?

11:30

Sheriff Fletcher: That is partly why we are constitutionally concerned about the bill's provisions. There is little doubt that sentencers consider themselves unable to take into account—it would be inappropriate for them to do so—the kind of matters that are set out in section 5(5), such as,

"(i) the number of persons detained …

(ii) the number of persons serving sentences in the community, and

(iii) the criminal justice system generally."

We think that we should be dealing with the individual with regard to the individual offence that that individual has committed, taking into account society's view of what the sentence should be. However, we should not take into account whether there is enough room in the prison, whether there are enough community service places or what the situation is in the criminal justice system generally. We think that the person who is being sentenced is entitled to be sentenced by someone whose attention is not directed at whether there is a place available for them.

Stewart Maxwell: I think that section 5(5), which sets out the context for the guidelines, is not as prescriptive as you suggest. Do you agree that the factors that you mention are taken into account in the general thinking of sentencers? I can remember sheriffs complaining that there were not enough community service places and saying that that impacted on their ability to sentence people in that way.

Sheriff Fletcher: That is a complaint that has been made. We are forced to take that consideration into account because we cannot sentence someone to do community service if we know that they are not going to be able to do that for nine months, which was the position at one point. In such a situation, we might decide that we should send the person to prison instead. However, that consideration should never be in a sentencer's mind or, in my opinion, the minds of those who are setting the guidelines.

The Convener: Do you have anything to add, Ms Findlay?

Johan Findlay: No. I totally agree with what Sheriff Fletcher said.

Robin White: One purpose of section 5(5) might be to inform the Scottish ministers.

The Convener: That is a perfectly valid point, and I assure you that we will raise it with Scottish ministers in due course.

Paul Martin: What changes would the panel like to be made to the provisions on the Scottish sentencing council? For example, would the panel recommend any changes to the membership of the council?

Sheriff Fletcher: Sheriffs are the main sentencers in Scotland. However, as it stands, there will be two members of the council who are either sheriffs or sheriffs principal. That means that it is conceivable that the council might have no sheriffs at all but instead have two sheriffs principal, who have probably not sentenced anyone recently, as they do not carry out criminal work. They are the administrative heads of sheriffdoms and deal with civil appeals, not criminal work, except on extremely rare occasions. Some of them might be temporary judges, but that is a different matter. It seems to us that there ought to be two sheriffs on the council.

Paul Martin: Are there any other views on the membership of the council?

Sheriff Fletcher: I think that I have made it clear that sheriffs consider that there should be a judicial majority, and that that should involve at least one other High Court judge.

Paul Martin: Are there any views about the bill's proposals regarding the process for establishing guidelines?

Sheriff Morrison: As we stated in our paper, you will not be able to create a guideline unless you have researched it properly. As we point out, a considerable amount of money would have to be spent on carrying out proper research in order to produce a guideline with any value or credibility, and in which the public could have confidence. That is the critical element of the process that we emphasise.

Johan Findlay: We are very concerned that there should be a judicial majority. We mention the figure of 50 per cent in our paper, but we would probably prefer there to be a majority. Like the sheriffs, we were concerned that the bill refers to a

"justice of the peace or stipendiary magistrate."

They do very different work. There are approximately 470 justices in Scotland, and we deal with a vast amount of criminal justice. There

are only four or six stipendiary magistrates, and they are in only one area, Glasgow.

The Convener: There will be four of them, full time.

Johan Findlay: Thank you. We do far more work than those four stipendiaries. We would be extremely concerned if we did not have a say or a place on the sentencing council.

Robin White: I will reinforce that point. For what it is worth, the equivalent legislation for England and Wales concerning the Sentencing Guidelines Council specifically requires separate representation for justices. That is to say, there must be a justice of the peace on the council, as opposed to a district judge, who is the rough equivalent of a stipendiary magistrate.

As I think the Lord Justice General observed, it is not obvious why there should be any police membership of the Scottish sentencing council, or prosecution membership, for that matter. If there were to be such membership, the Scottish Prison Service should also be represented, as it has a lot more to do with sentencing than the police do. The Convention of Scottish Local Authorities should be represented, too, as community sentences are carried out by local authority employees, broadly speaking.

Stewart Maxwell: You said that proper research should be carried out before any guidelines are issued by the sentencing council. Is proper research undertaken for any guidelines that are issued currently? Could you point to that research?

Sheriff Fletcher: I do not think that it is correct to say that academic research is carried out, but the guidelines that are currently issued by the High Court of Justiciary are issued after both sides have addressed all the matters that might concern the High Court. Counsel will have researched their position.

The example that the Lord Justice General gave showed that a great deal of trouble is gone to in order to carry out research on behalf of one side or the other, so that the High Court of Justiciary can be informed in the guidelines that it issues.

Stewart Maxwell: Is it your view that the sentencing council will not carry out an equivalent level, if not a greater level, of research, whether it is academic or other research, before coming to a decision about issuing guidelines?

Sheriff Fletcher: No, we hope and expect that it will do that.

The Convener: If there are no further questions on that subject, we will now turn to the somewhat more vexed problem of short custodial sentences.

Robert Brown: In their submission, the High Court judges expressed the view that the proposed change in section 17 regarding short-term sentences will be unlikely to affect existing sentencing practice. The Sheriffs Association has also expressed a number of views in its submission about the reasons why short-term sentences, in various circumstances, have a fairly significant part to play.

Could you give us some insight into what you think the results of the changes that are contained in section 17 might be? Do you agree with the High Court judges on that matter? Do you think that any practical steps could be taken to reduce the number of short custodial sentences?

Sheriff Fletcher: It must be clear to most people that sheriffs and justices use a custodial sentence only as a last resort—I am sure that that is the case. It might be difficult always to be sure that a custodial sentence is a last resort, but that is an individual decision in an individual case. We impose a custodial sentence only when we can do nothing else, or when we think that society requires that, because it will not put up with repeated offending by someone while, apparently, nothing is done about it.

Robert Brown: Does that boil down to saying that you agree with the High Court judges that the provision might not make much difference?

Sheriff Fletcher: I do not think that it will make much difference. However, it will make a difference to the practice, because the sheriff or anyone who is sentencing somebody to less than six months will have to state their reasons for doing so. That might sound simple because, usually, when one is sentencing someone to imprisonment, one says something like, “There is nothing else that I can do with you, so I’m going to send you to prison.” However, if we are required to do that by statute, the unintended result might be to slow down the court system while the judge makes up the statement that he has to make. If he has to do that regularly, that will slow down the process. Throughout the bill, there are many other provisions under which sheriffs will have to give reasons for what they do when they do it. Each time they have to do that, that will slow down the court process.

Robert Brown: We will take that warning seriously but, nevertheless, do you not accept that, for reasons to do with the public perception of consistency and appropriateness of sentence and with the ability to consider the effectiveness of sentences, there is a considerable advantage in a requirement to state reasons for the decisions that are made?

Sheriff Fletcher: As I said, reasons are almost always stated. I do not think that people are sent

to prison without the judge giving reasons. Those might not be the type of reasons that will have to be given when the bill is enacted but, nonetheless, reasons are given. The trouble is that the audience is not necessarily the general public. In many cases, nobody hears the sentence except the person who is the recipient of it. I am not sure that the general public will be helped by the measure, because they might not find out about the reasons.

Johan Findlay: Sheriff Fletcher is absolutely right. I have heard sheriffs say that they write up a reason carefully for specific offences but there is nobody in the court to hear it. The newspapers publish what they want to anyway—they do not always publish exactly what the sheriff said. The same is true of justice of the peace courts. It is rare to have a press presence in those courts, so it is difficult to know who will hear the reasons.

Robert Brown: Your submissions mention the important issue of funding for community sentences. If there is to be an emphasis on community payback orders, they will need to be funded. Sheriff Fletcher said that funding issues ought not to affect the judgment of sentencers but, in practice, they sometimes do. Will you elaborate on your concerns about the important issue of funding?

Sheriff Fletcher: When we deal with a community service order, which is the equivalent of the order that you mention, it is extremely important that the person who is put on community service starts it quickly after the sentence is imposed. It is fair to say that, for a time, that did not happen in most parts of the country. When the community service does not start quickly, the impetus to carry out the sentence is lost. One of the main impetuses is that the person is relieved to be told that they are getting a community service order instead of a custodial sentence. The result was that they were in the mood, if you like, to carry out the order. If the community service starts a long time later, that impetus is lost. We think that a large number of orders are breached as a result. If, once you make the order, off the people go to do the community service, there is a much better chance that the order will be fulfilled.

11:45

Robert Brown: I want to ask about the suitability of the sentence. The point was made earlier about research. Under the general heading of community disposals, there are quite a lot of different types of disposal ranging from probation to drug treatment and testing orders, with various nuances in between. The purpose of getting rid of short-term sentences is to try to reduce the reoffending rates, which are said to be lower with community sentences. In making judgments on these matters, do sheriffs and magistrates have a clear view in their own mind about the potential effectiveness of different sorts of community sentence for particular individuals? How do you inform yourself about that and about the availability, if appropriate, of particular forms of treatment? DTTOs are a fairly obvious form of treatment, but there is also alcohol treatment and anger management. A series of issues can lie behind the referrals to community disposals.

Sheriff Fletcher: Yes. We are not able to impose any of the sentences that you mentioned without first obtaining a social inquiry report, which deals with the background of the person and, more important, deals with problems that the social worker identifies as ones that might have caused the offence to be committed or which might be likely to cause the offender to reoffend. The report helps the sentencer to decide which disposal is appropriate. The report might say that the offender has a drug problem that they might consider trying to do something about, and that we could consider using a drug treatment and testing order. It might say that an offender is ineffective at running their life, which is in a shambles, and that we could try a probation order to see whether that will help. Such recommendations are made in the report to help the sentencer to decide which disposal is appropriate.

Robert Brown: On the information that comes before the court, to what extent is the availability of certain types of community sentence made known to you? Would you become aware of that through previous practice and difficulties and through people coming back to you later?

Sheriff Fletcher: The local sheriff in Perth, for example, will know about the times when there have been difficulties with community service. Social inquiry reports have told us that community service would be a good idea but that it would be nine months until the person could do it.

Robert Brown: Do you have a different view on that, Sheriff Morrison?

Sheriff Morrison: No.

Robert Brown: There have been issues in Edinburgh, have there not?

Sheriff Morrison: We get information packs that tell us about the particular types of programme that are available. Individual courts hold meetings with the sheriffs and the social work department to tell us about new initiatives or changes in current initiatives. As well as relying on social inquiry reports to indicate what might be an appropriate disposal, we are also made aware of and kept up to date about individual programmes.

Robert Brown: Is the position in your jurisdiction the same as the position that Sheriff

Fletcher described in respect of the availability and timeousness of community sentences?

Sheriff Morrison: Yes. We are told occasionally that there is a problem and that there will be a delay. There is no problem currently in Edinburgh. I believe that there is a problem in Glasgow, because of a strike—such things can affect the situation. A programme might stop. A community programme for sexual offenders was stopped when the people who had been running it stopped, and it was some time before it was replaced. Such problems arise from time to time.

Johan Findlay: We do not have community service. I believe that only one court in Scotland has it. Under summary justice reform, we have been promised that we will have different types of community disposal, and we look forward to that. However, at the moment, courts have very few disposals available to them. We have argued long and hard—indeed, for more than 400 years—that we need more disposals.

The Convener: I am sure not you personally.

Johan Findlay: Sometimes it feels like it.

The Convener: I will play devil's advocate for a moment, Sheriff Fletcher. You dealt with the increased time on report writing that will be necessary under the proposals. Surely the matter is fairly simple. The most telling phrase for a sheriff to use is, "In light of the seriousness of the offence and the accused's pattern of offending, a custodial sentence is justified." Would that not fit the bill?

Sheriff Fletcher: I do not know the answer to that. I do not know what the High Court of Justiciary would think—

The Convener: I am interrupting you but, when I did these things, I used that phrase consistently in my stated cases and notes of appeal, and I never had any problem.

Sheriff Fletcher: Perhaps we can follow your example.

Angela Constance: I want to follow up on Robert Brown's question on the wide body of research informing decision making. As someone who, in a former life, has written more social inquiry reports than you have had hot dinners, I understand how such reports may—or may not—inform the decision making. We know fairly conclusively that only one in four of those who are given short sentences will be conviction free two years on. However, if they are given a community disposal, the figure goes up to three in five. How does the broader information inform decision making? Of course, I understand that it has to be balanced with the individual circumstances of the case.

Sheriff Fletcher: I understand what you mean by the research, but we have to take into account the fact that people who get non-custodial sentences are those who have not reached the same stage in their criminal career—if I can call it that—as those who are sent to prison. By the time someone is sent to prison, it is probably less likely that they will not reoffend. They will have been through all the non-custodial sentences and are now being sent to prison—neither the non-custodial sentences nor their time in prison has stopped them. I am not surprised at that. It happens. On the other hand, a number of people who get caught further down the scale can be reformed and do stop offending. I do not find the statistics as convincing as others do. We continue to require the ability to send someone to prison for a short sentence. On some occasions, it works wonders. Despite what the statistics say, we will never see that person again. I am sure that that is the experience of every sheriff.

What do we do with someone who does not carry out their community payback order? Every week, we have boys like that standing in front of us. We can tell from the way that they look at us that they are not going to do it.

Angela Constance: Perhaps there is a role for the Scottish Prison Service in any sentencing council. Mr White picked up on that earlier. We have had much discussion this morning about training and the need to listen to the experience and knowledge of those in other disciplines, whether psychology or social work. What contact do sheriffs have with the Prison Service? As part of their training, do sheriffs go into prisons and look at the impact of short-terms sentences on the individual and the churn in prisons, with all the difficulties that that causes?

Sheriff Fletcher: Part of a sheriff's training is to visit the nearest prison. I am not suggesting that it happens regularly, but sheriffs are always asked to visit a prison at some point in their training. Some sheriffs continue to make such visits, simply to keep themselves informed of what is going on in prison. Sheriffs have contact with the Prison Service at least once in their careers, but probably more often than that.

Angela Constance: Would the views of prison officers be thought to be valid? You said that social workers and psychologists would be listened to.

Sheriff Fletcher: If they came and gave a talk to sheriffs during their training, they would certainly be listened to.

Sheriff Morrison: In my time as director of judicial studies, people from the Prison Service lectured to sheriffs regularly.

The Convener: Are there any other questions at this stage?

Cathie Craigie: I have one about short periods of imprisonment. In your submission, you point out that sometimes a

"custodial sentence is the only punishment that an offender cannot avoid undertaking."

You also say that it is clear that

"short sentences have a value since a custodial sentence of up to 30 days is to be a sentencing option for breach of a level 1 community payback order".

Will you say a bit more about how that will balance out?

Sheriff Fletcher: The point is that the bill suggests that custodial sentences are a possible disposal when such orders are breached. I tried to make the same point earlier—if we have such orders, we must remember that there are some people who will simply not do them. The fact that some people will not do them gets around in places such as Perth and Dumfries, where I sat as a sheriff. The tic-tac was obvious. If something was going wrong with the system, the people who were used to coming to the court soon got to know that. The result, quite frankly, is that we are left a laughing stock.

Robert Brown: I have a comeback that is inspired by what you have just said. At the end of the day, the Scottish Prisons Commission and others have laid down a challenge for us to address, which is that short-term prison sentences, aside from whatever deterrent effect they might have, are not long enough to allow anything useful to be done with offenders. Something like two thirds of people reoffend within two years of serving a short-term sentence, and I think that I am right in saying that about 92 per cent of the prisoners at Polmont prison have been there before. By anyone's reckoning, those figures do not indicate that short-term prison sentences are a success, however one defines that. Do you have any views on how we can improve what happens in prison or develop alternatives that are more effective in achieving society's ends?

Sheriff Fletcher: The problem, of course, is the short-term nature of sentences. We recognise that people do not have time to settle into prison and do a course of any length or significance. I do not think that it is for me to suggest how prison ought to be run.

I agree that many people who serve short-term sentences return to prison, and I have given one possible reason for that, but there is another group of people for whom prison is a much more serious problem than it is for most of the short-term prisoners whom we are talking about. Some of the people in that group might be relatively young or at a relatively early stage in their criminal careers. Sometimes everything can be nipped in the bud through the use of a short-term sentence, because the person suddenly realises that we mean business and that they will not be able to carry on living in the way that they have done because, if they do, they will end up in prison. Every now and then, a success is achieved that is a shock to the system, in that a complete change in a person is suddenly observed, simply because they went to prison or into detention at an earlier stage than one might think.

12:00

The Convener: To follow up Robert Brown's point that short prison sentences can be ineffective, do you adhere to the argument that is made in paragraph 2.3 of your submission, in which you point out the issues that arise when a prison sentence is in fact much shorter than the sentence that has been imposed by you in court?

Sheriff Fletcher: Yes.

Sheriff Morrison: I do not want anybody to think that we as sheriffs want to impose prison sentences—even short ones—but sometimes we have to do it. I accept that not much can be done with people when they are sent to prison for short-term sentences but, as we explained in our paper, to which the convener has just drawn attention, we sometimes have to impose such sentences.

Sometimes it does work. My attention was drawn the other day to someone who was given a drug treatment and testing order. He was not following it properly, and he committed an offence of house-breaking for which he was sentenced to a short period of imprisonment. During that time, he reflected on his life and his offending and, according to the social worker's report, saw the error of his ways. He came out of prison, and he is now doing extremely well on his drug treatment and testing order and making a success of it. A short sentence is not always negative.

Cathie Craigie: I just want to clarify something. As has been mentioned, the bill states that there will be a presumption against imprisoning someone for less than six months. However, given that an accused who pleads guilty is allowed a discount on their sentence, does the presumption in effect cover sentences of nine months?

Sheriff Fletcher: Yes. If a person pleads guilty at a very early stage, a discount of one third is not uncommon. That means that if we were to sentence someone to nine months, the actual sentence that would be imposed would be six months. We are telling them, "I would have given you nine months, but I am giving you a discount of three months, so you will go to prison for six

months." That would bring us within the realm of that section of the bill.

The Convener: But that person would serve a maximum of three months.

Sheriff Fletcher: Yes, he would serve three months at the most.

The Convener: Are there any other questions?

Stewart Maxwell: Just for clarification, with regard to the circumstances that you mention—or circumstances in which someone might be sentenced to less than six months—you would, even if the bill was passed unamended, still have the right to impose short sentences. There would be a presumption against it under the bill, but you would still have that right. Just because a sentence might happen to be six months, or end up as six months because of various procedures, it would not mean that a person would automatically not get a prison sentence.

Sheriff Fletcher: They might not automatically—that is true. However, all sheriffs and justices would have regard to that rule, because we are bound to do so. It would cause us to hesitate, because we would have to think about whether we can truly justify giving such a sentence.

The Convener: As there are no further questions, I ask Ms Findlay whether she has anything to say in conclusion.

Johan Findlay: No, thank you—everything has been said.

The Convener: Sheriff Fletcher?

Sheriff Fletcher: I have nothing to add—thank you.

Robin White: I would like to add something that has not so far been touched on. It is not often realised that the majority of criminal sentences these days are passed not by courts but in the form of conditional offers. If there are to be guidelines on court disposals, it seems that there should be guidelines on conditional offers, including fiscal fines and so on. There are guidelines, but they are of course unpublished, as they are internal to the Crown Office. It seems strange that we are arguing for open and transparent sentencing by courts, while accepting behind-closed-doors sentencing by fiscals and police.

The Convener: You have included that in your submission to the committee, Mr White.

I thank Mr White, Ms Findlay, Sheriff Fletcher and Sheriff Morrison for their contributions this morning, which have been extremely valuable. I suspend the committee briefly.

12:04

Meeting suspended.

12:07

On resuming—

The Convener: We resume consideration of the Criminal Justice and Licensing (Scotland) Bill. I welcome our third panel of witnesses. The right hon Lord Cullen is a former Lord President of the Court of Session and Lord Justice General. Professor Jan McDonald, from the Royal Society of Edinburgh, is a retired professor of humanities. I understand that Professor McDonald will give a brief opening statement.

Professor Jan McDonald (Royal Society of Edinburgh): The Royal Society of Edinburgh is a rather different organisation from those that you have met this morning. Founded in 1783, it was a product of the Scottish enlightenment. We see ourselves as Scotland's national academy of science and letters, and our fellowship is about 1,400 people who are appointed by peer review. It is particularly germane to our discussions today that those fellows are drawn from a very wide range of disciplines—science, medicine, theology, the arts and humanities, the social sciences, business and industry, and the law.

The Royal Society of Edinburgh is a completely independent body with no political affiliations whatever. Our principal function is to provide public benefit through research and scholarship and to promote research and scholarship within Scotland and internationally. We also have a strong outreach programme in primary and secondary education, as well as in the higher echelons of research. In addition, we instigate and carry out major inquiries on our own initiative.

We also respond to Government consultation papers, the process of which may be of interest to the committee. Once senior officers decide that a consultation is germane to our interests and that we have the expertise to deal with it, the general secretary and the appropriate vice-president instigate a consultation. All the fellows are contacted and any fellow may respond. As is natural, people cluster to their expertise, but it will have been by no means uncommon for non-lawyers to contribute their views on the bill. After views are submitted, a small committee is usually established—Lord Cullen chaired the committee on the bill. A report is then prepared, sent for consultation to those who contributed their views and formally passed by the general secretary and the appropriate vice-president.

That is all that I want to say to give members an idea of the context of our submission and the procedures that gave rise to it.

The Convener: Thank you. It is important that we know the basis on which the society operates.

Cathie Craigie: Good afternoon. I note from your submission that you are concerned about the validity of setting out in section 1 the purposes and principles of sentencing. Will you say a bit more about that?

Right Hon Lord Cullen (Royal Society of Edinburgh): Our view is that there is no need for the statement, which is probably incomplete, as it misses out at least one quite important factor. We wonder what benefit the public will obtain from knowing of the statement.

We notice that the proposed sentencing council will have the power to issue guidelines that might have something to do with sentencing policy and principles. That might suggest that what is in the bill is not the complete statement, as it might be altered by the body whose formation is under consideration.

Cathie Craigie: Would leaving the statement in the bill benefit the justice system and the public?

Lord Cullen: No.

Cathie Craigie: If the statement were left in the bill, should anything be added to it?

Lord Cullen: The trouble is that that would be like adding one unnecessary thing to a lot of other unnecessary things. However, I can think of a few additions. For example, we mention in our submission the absence of any reference to the significance of a guilty plea, which is a potent factor.

The Convener: That is fairly clear.

Stewart Maxwell: Lord Cullen says that the statement has no benefit. Would publishing such a list or putting it in statute do any harm? Would having such a list in the public domain do the public any harm?

Lord Cullen: Probably not, apart from the fact that—as I mentioned a moment ago—the sentencing council might be able to alter the principles and purposes in a way that none of us sitting round the table knows.

The Convener: We turn to consistency in sentencing and the sentencing council's activities.

Bill Butler: Good afternoon. The Sentencing Commission for Scotland suggested that, although the empirical evidence for significant inconsistency in sentencing is limited, there is a public perception of inconsistency, which needs to be addressed. Do you agree with that assessment?

Lord Cullen: I am not aware of anything that would give a foundation for that view, and I wonder where it was drawn from. What is in the press does not perhaps represent an accurate picture of what the public think. I cannot confirm whether a perception of inconsistency exists. If it does exist, there might be ways of tackling it, but that is another matter.

Bill Butler: Is the view that I described mere assertion?

Lord Cullen: I would not accuse the Sentencing Commission of mere assertion; I just wonder what the basis for the view is.

Bill Butler: The commission's comment is baseless—you can find no basis for it.

Lord Cullen: I am not sitting in judgment on that matter; I am simply saying that I am not aware of any general lack of confidence in the consistency of the sentencing process. That is purely a personal view.

Bill Butler: I understand that, Lord Cullen. Do you want to comment, Professor McDonald?

12:15

Professor McDonald: One of the earlier witnesses made a sensible point when asking whether inconsistency would be a bad thing, were it to exist, because each particular case might require a particular judgment.

As far as perception is concerned, I agree with Lord Cullen, but managing perception is rather more subtle than the bill perhaps allows.

Bill Butler: I take that point. I will move on to another issue. It has been argued that the bill's proposals for a Scottish sentencing council would undermine the judiciary's independence. Of course, we all agree that it would be inappropriate for politicians to interfere directly with sentencing decisions. However, why might it be considered unconstitutional for a Parliament to establish an independent body to produce general sentencing guidelines?

Lord Cullen: If you are talking about a body to produce general sentencing guidelines, that is a statement in the abstract, so to speak. Our view on the proposed sentencing council is rather different from our attitude to a possible advisory body. I know that earlier witnesses took you over much of this ground, but I think that we could see a case for an advisory body. Our concern is about the bill's proposal for a sentencing council, which raises the crop of difficulties to which you just referred.

Bill Butler: Do you agree with Lord Gill's statement earlier that there is a place for a sentencing council but not the one in the bill? He suggested that a research and advisory body might be more appropriate.

Lord Cullen: That is more or less the view that I have just expressed.

Professor McDonald: I agree with that view, although I sympathised with the committee member who made the point earlier that when in doubt, say research. A research and advisory body might play a larger role in disseminating information to improve public perception than in researching and advising. More informed dissemination might give us a more informed public with more acute perception.

Bill Butler: Yes, and that is worth striving for.

Professor McDonald: Indeed.

Bill Butler: I am obliged.

Lord Cullen: I do not want to take the committee over ground that it has already gone over this morning, about what inconsistency is, but one could identify it if one found that a sentence in a particular case was significantly out of line with what one would expect for similar circumstances. That is perhaps a clear way of putting the question of inconsistency, and that is what the appeal court effectively exists for. In other words, if a sentence appears to be excessive for the given circumstances of a case, the appeal court will deal with it and substitute an appropriate sentence.

Bill Butler: So you are saying that it should be left to the appeal court.

Lord Cullen: That is one way of approaching the matter. However, if one has a vague idea that there is something inconsistent in sentencing, one must be specific as to what inconsistency is.

Nigel Don: Lord Cullen, I think that you were in the public gallery earlier when one of the sheriff witnesses said that he thought that it was appropriate for the local situation to be taken into account in sentencing. The inference is that a particular behaviour might be penalised differently in different places. I did not challenge that view at the time, but does it strike you, as it now strikes me, that that would be an unfair inconsistency in sentencing? For example, if I did something illegal in the middle of Perth or Edinburgh—of course, I would not do so—surely I should expect that, at least in principle, I would receive the same penalty in either place.

Lord Cullen: I was not surprised by the sheriff's comment, and I think that he was probably correct. After all, the local sheriff knows the local conditions and he knows the sort of things that are causing trouble locally and need to be stamped on. I can quite understand that the significance of an offence committed in a particular part of Scotland may be far greater than the significance of the same offence committed somewhere else.

Nigel Don: Is that not inconsistency?

Lord Cullen: No, not at all.

Nigel Don: Discrimination?

Lord Cullen: Absolutely not. It is bringing in a local factor that has a bearing on what the appropriate sentence should be.

Bill Butler: So it is simply a matter of using good judgment.

Lord Cullen: Yes—and that illustrates how wide and varied the factors are that any sentencer has to take into account. The local impact of a particular kind of offensive conduct is one of many such factors.

Robert Brown: Underlying the approach that the committee and others take to the bill and to other matters of criminal justice is the question of the effectiveness of the remedies that are imposed by sentencers. That is one reason why research is so important.

Will Lord Cullen or Professor McDonald comment on the general pessimism that is caused by the unpleasant statistics on the high reoffending rates of short-term prisoners and the high, but not quite so high, reoffending rates of people serving community sentences? In considering the effectiveness of sentencing, the statistics are pretty depressing. Has the Royal Society of Edinburgh researched how to increase the effectiveness of disposals that are given to people who cause society problems at various levels? Have you any general comments?

Lord Cullen: I find it hard to give a firm answer to your point, as it is some three years since I was a sentencer. However, before one embarks on profound changes to any disposals system, there ought to be well-informed research. That is really all that I can say.

Robert Brown: Does the Royal Society of Edinburgh believe that there is a considerable need for different kinds of new research?

Professor McDonald: As it happens, we are holding a forum on this topic on Thursday. The sheriff made a very good point earlier.

Robert Brown: The sentencing council would prepare guidelines. Is it the case that while you are not against there being guidelines, you are concerned about the constitutional issue of where the guidelines come from and what their standing is in relation to sentencers? Is that a fair interpretation of your views?

Lord Cullen: That is accurate. An advisory body is one thing, but what is being proposed is another.

Robert Brown: How do you interpret the phrase "have regard to", which we discussed earlier? In other words, how much discretion would a court

have to depart from that phrase—and from the guidelines—when applying justice in individual cases?

Lord Cullen: I heard the previous discussion, which was quite interesting. One has to bear in mind the fact that the expression "have regard to" may be used in a number of completely different contexts. One context—although not the one that is in the bill—is that of a court being required to take something into account as a factor. In such a context, the court can attach as much or as little significance to the factor as it thinks appropriate. All the court has to do is honestly apply its mind to the factor.

The context here is rather different. If we consider section 7, we see that the court must not only "have regard to" the sentencing guidelines but state its reasons for not following them. In effect, the court will be much more restricted: if it decides not to follow the guidelines, it will have to give positive reasons for its decision.

If we read on in the bill, we see that if the court does not approve of the guidelines, it may ask the sentencing council to review them—which I think means have another look at them. However, there is no way in which the court will have the last say; the council will have the last say.

Robert Brown: I think that Lord Cullen mentioned section 2(2) and the situation of the sentencing guidelines being inconsistent with the guidelines in section 1. Do you envisage any real limitation—if I may put it that way—in the power of the proposed sentencing council's sentencing guidelines to depart from the theme of section 1?

Lord Cullen: It is plain that the council will be given wide powers. In that context, I point out that guidelines may include a statement of the circumstances in which guidelines may be departed from. The council will be able to restrict the scope of a court to depart from guidelines.

Robert Brown: One submission made the point that guidelines may specify the circumstances in which they may not be departed from, which might have even more significant consequences.

Stewart Maxwell: I would like to follow up on the issue of who has the final say, which we discussed earlier. Are you making the point that the sentencing council will have the final say on guidelines? Surely you are not suggesting that it will have the final say on sentences. At the end of the day, that is a matter for the judiciary—the sentencer—which can depart from guidelines.

Lord Cullen: Of course, the overall position is that the court has the final say on sentences. However, the guideline that restricts the scope of the court's discretion has now entered the scene, in such a way that the court has no ultimate way of displacing it. Even if the court asks the sentencing council to review the guidelines, the council does not have to comply with any view that the court expresses.

Stewart Maxwell: Is that any different from the current situation with regard to guidelines?

Lord Cullen: At present, guidelines are issued by the appeal court. From time to time, they may be modified or altered, but the court remains in charge of them. The significance of the guidelines is that they are applicable to and require to be obeyed by sentencers in the High Court, the sheriff court or the justice of the peace court, as the case may be. We are dealing with a constitutional point—whether the court remains in charge of its original and proper constitutional responsibility to determine sentences.

Stewart Maxwell: We are also discussing the right of Parliament to determine policy on sentencing, as opposed to individual sentences, which the judiciary has the absolute right to impose with variation. The bill does not take away that power.

Lord Cullen: The route is through Parliament, but it will produce a body that is neither Parliament nor judiciary and that will be given the degree of control and latitude for which the bill provides.

Stewart Maxwell: In other words, the body will be independent of both the judiciary and Parliament.

Lord Cullen: It will not be subject to control. Parliament could decide to abolish the sentencing council, but for the moment it has let loose the tiger.

Stewart Maxwell: I am not sure that I agree that independent bodies are necessarily tigers in such situations, but I will move on.

The Convener: Before you do so, Paul Martin has a question.

Paul Martin: You will have noted from my questions to previous witnesses that I am interested in the research. First, what research would you like to be done? Secondly, have we explored the research that is currently available to us? I would be astounded if research had not been done into community disposals—in fact, I have seen many such studies.

Lord Cullen: I do not pretend to be aware of what research is available. I am not saying that I want research to be done, only that it would be useful for you to ensure that you have a sound evidence base for any important change to the control of the sentences or sentencing practice that you are considering.

Paul Martin: So you are suggesting that we explore the evidence base, rather than that we

procure or launch a new academic research programme.

Lord Cullen: Indeed.

Professor McDonald: Some research centres already exist; there is one at the University of Strathclyde.

Paul Martin: Given what we have heard from previous witnesses, do you accept that we are not always best at exploring the research that is available and that we are too quick to launch new research?

12:30

Professor McDonald: There could be more opportunities for knowledge transfer than exist at present.

Lord Cullen: I seem to recall from the consultation paper—it may also be in the bill—that it is intended that the proposed sentencing council will carry out research to underpin what it does. No doubt, the same would apply—perhaps even more strongly—to an advisory body.

Stewart Maxwell: You will be aware of the existing guidelines regime in England and Wales and the Coroners and Justice Bill that is going through the Westminster Parliament. That bill includes provisions that would alter the legal effect of guidelines in England and Wales. Instead of the courts being required to have regard to the guidelines, they would be required to follow the guidelines unless

"it would be contrary to the interests of justice to do so".

Do you have any thoughts on the proposed changes in England and Wales, particularly in relation to the bill that we are discussing?

Lord Cullen: It would take some time to work out the precise difference between the proposed English formula and the proposed Scottish formula. The English version is perhaps slightly stronger than the proposed Scottish version, but I would not go any further than that.

Stewart Maxwell: I have not been involved with the Coroners and Justice Bill, but I assume that a direction to follow guidelines would be stronger than a direction to have regard to them.

Lord Cullen: Yes. It all depends on how much is built into the tail-end of the proposition, about it being not in the interests of justice. It depends on how that is interpreted.

Stewart Maxwell: Does Professor McDonald have any knowledge of or views on that change?

Professor McDonald: I am sorry, but I do not.

Cathie Craigie: Lord Cullen pointed out that the bill as it stands would give the sentencing council the power to amend the guidelines and come up with different guidelines. Is that right?

Lord Cullen: Yes, the sentencing council will do that. I think that it will have to review guidelines from time to time. That will be part of its practice.

Cathie Craigie: Stewart Maxwell talked about the situation in England and Wales. There, instead of being asked to have regard to the guidelines, the courts will be asked to follow them. Is there any chance that we could find ourselves in the same circumstance?

Lord Cullen: I think that that would be a step too far for the sentencing council. It would have to seek some legislative alteration, but that would be to alter the basic framework within which it had been created.

Paul Martin: Should the public be provided with more information on the sentencing of offenders?

Lord Cullen: There is a case for providing more information to the public on the range of sentences that is passed. That might address some of the concerns that have been expressed with regard to the bill and the consultation paper. It may get rid of the perception that there is inconsistency in sentencing or that the public do not quite understand what might be expected if a person comes before the court on a certain charge. I think that there is something to be said for that.

Paul Martin: Do you believe that the sentencing council will have a role to play in providing that information?

Lord Cullen: It probably will. However, equally, the information could be provided by any other means, such as good public information leaflets. Something for the public to read, with all the information in one document, might be a useful thing to produce. I do not know how a sentencing council or an advisory body would go about its work, but it might do it in a piecemeal way and it might be useful for the public to get the complete picture by looking at figures that indicate the range of possible sentences. As they will realise, every case will depend on its individual circumstances and the various factors in operation.

Nigel Don: Paragraph 7.4.2 of your written submission suggests what the membership of the sentencing council might be. You heard the previous discussion—in particular, I am thinking of Mr White's comments about the sentencing council being given a certain independence and natural respectability if the judiciary were to form a minority of its membership, and the point about the SPS. Is that a reasonable argument? Has your take on the membership, as expressed at paragraph 7.4.2, changed slightly?

Lord Cullen: No. I am not persuaded that having a minority of people with experience of

sentencing would be a good idea. We are talking about a body that will have to reflect, for certain purposes, what actually happens; it is not being introduced to bring about change, and it will not change practices. In essence, it will simply reflect what happens. If we are to have a sentencing council, surely we would look to sentencers as the people who are best equipped to play a part in the formation of guidelines.

Nigel Don: Thank you; that is very clear.

The Convener: Is there anything that you would like to say in conclusion, Professor McDonald?

Professor McDonald: I agree strongly with Lord Cullen's last point. There is very little point to involving non-experts in making expert decisions. If the problem is public perception, and we then involve members of the public without improving public perception, perhaps we need to educate our masters, if such they are to be.

Lord Cullen: One matter that is reflected in our submission, but which has not been touched on, is the possible influence of the Scottish Executive. We have noticed that the proposed sentencing council will have a duty, in preparing guidelines, to consult Scottish ministers and the Lord Advocate. As you have heard this morning, the proposed sentencing council will be concerned with such matters as the effect of sentences on prison populations. The impression has been given that the Scottish Executive will have some influence on the shape of guidelines. As we say in our submission, that seems to us to be inappropriate, unconstitutional and wrong.

Bill Butler: I have a question regarding something that Professor McDonald said. If there is to be such a body, are you against any non-expert being on it? I am sure that you did not intend it to be so, but your assertion seemed very antidemocratic. You used the phrase "educate our masters" and, as you know, that phrase was used against the Reform Act 1832. I am sure that you did not mean that, did you?

Professor McDonald: I think it was the later act, but that does not matter.

Bill Butler: It might have been 1868.

Professor McDonald: It was 1867, but that does not matter.

Of course I am not against the body having lay members. However, considering that we have a body of High Court judges, it is important that the expertise of lay members is not dominant in the proposed body. That must be the case.

Bill Butler: Thank you for clarifying that for me.

Professor McDonald: I am sorry if I misled you.

Lord Cullen: The proposed composition of the sentencing council is a bit of a mixture, in the sense that it will be a hybrid that is made up of a body that is controlled by the judiciary and an advisory body. We might well expect an advisory body to include members of the community, but what would they be doing on a body that will lay down the law and have the final say? That is one of the problems that is fleshed up when we consider the proposed composition of the body. There is certainly room for using the expertise of members of the community, but in a different way.

The Convener: Thank you, Professor McDonald and Lord Cullen. We are much obliged to you for giving your evidence so clearly and, if I may say so, in a very entertaining manner. Thank you.

12:39

Meeting suspended.

12:40

On resuming—

Subordinate Legislation

Victim Notification (Prescribed Offences) (Scotland) Amendment Order 2009 (SSI 2009/142)

The Convener: Under agenda item 2, we have one Scottish statutory instrument for consideration under the negative procedure. No points were raised by the Subordinate Legislation Committee. As there are no questions, are members content to note the instrument?

Members *indicated agreement*.

Budget Process 2010-11 (Adviser)

12:40

The Convener: Item 3 relates to the 2010-11 budget process. The Scottish Government's draft budget for that year is expected to be published in September 2009. This year, it is hoped that subject committees will be able to take evidence during September and October and to consider their reports in early November. The matter is likely to be fairly complex this year, and the committee is asked to decide whether it wishes to seek the appointment of an adviser. I think that we would want to have an adviser.

Robert Brown: I have a point about the cost of short-term sentences. That issue, which arose in evidence today, will be central to the consideration of next year's budget. We will need someone who has a feel for how to work out that cost and what the implications are in that context.

The Convener: That is a very apposite point, which we can consider later. Do we agree to have an adviser? Whoever that may be will be determined in due course.

Members *indicated agreement*.

Annual Report

12:41

The Convener: Item 4 is our annual report. We are required to produce a report, of a specified format and length, on our activities during the parliamentary year. The draft report that is before us demonstrates that the committee has done a tremendous amount of work in a fairly limited time. It seems to me to be fairly straightforward. Are there any comments?

Nigel Don: Looking at the report gives me an opportunity to thank our clerks for their hard work during the year. An enormous amount of work, which we tend to ignore, goes on behind the scenes, so every now and then we might say thank you.

The Convener: I think that that would be agreed by acclamation. The clerks have done a tremendous job, as has the committee. I know how much hard work and effort goes into this committee's activities. Do we agree the report?

Members *indicated agreement*.

The Convener: We move into private session.

12:42

Meeting continued in private until 13:01.

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