JUSTICE COMMITTEE

Tuesday 26 May 2009

Session 3

£5.00

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

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JUSTICE COMMITTEE
16th 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:

Jim Andrews (Victim Support Scotland)
Chief Constable Stephen House (Association of Chief Police Officers in Scotland)
Susan Gallagher (Victim Support Scotland)
Nico Juetten (Scotland's Commissioner for Children and Young People)
Maire McCormack (Scotland's Commissioner for Children and Young People)
David McKenna (Victim Support Scotland)
Gordon Meldrum (Scottish Crime and Drug Enforcement Agency)
Tom Roberts (Children 1st)
Dr Jonathan Sher (Children in Scotland)
Chief Constable David Strang (Association of Chief Police Officers in Scotland)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 26 May 2009

[THE CONVENER *opened the meeting at 10:05*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I ask everyone to ensure that mobile phones are switched off. No apologies have been received.

Agenda item 1 is a decision on whether to take in private agenda item 4, which is consideration of our approach to the scrutiny of the draft budget. Does the committee agree to take item 4 in private?

Members *indicated agreement*.

Criminal Justice and Licensing (Scotland) Bill: Stage 1

10:06

The Convener: Agenda item 2 is further consideration of the Criminal Justice and Licensing (Scotland) Bill. As the committee has taken evidence only on part 1 of the bill so far, we have concentrated on the proposed sentencing council, minimum sentences and community payback orders. In today's session, we will concentrate on other criminal law and procedure provisions in the bill.

I welcome our first three witnesses: Chief Constable Stephen House of Strathclyde Police and Chief Constable David Strang of Lothian and Borders Police, both of whom are representing the Association of Chief Police Officers in Scotland; and Gordon Meldrum, who is the director general of the Scottish Crime and Drug Enforcement Agency. I should perhaps mention that Chief Constable Strang was a member of the Scottish Prisons Commission.

Our questioning will be opened by Nigel Don.

Nigel Don (North East Scotland) (SNP): Good morning, gentlemen, and thank you for coming along. With reference to sections 25 to 28 of the bill, can you describe to me what is wrong with the present state of the criminal law that requires the proposed provisions on serious organised crime?

The Convener: Mr Meldrum can open on that.

Gordon Meldrum (Scottish Crime and Drug Enforcement Agency): The specific offences that the bill introduces—namely, being involved in and directing serious organised crime—will be useful additions to the existing criminal law, in that they will cater for the people whom the popular press often refer to as the Mr and Mrs Bigs. Such people do not get too close to the front-end criminality, but they are most certainly involved in the background in what I might describe as orchestrating the business.

Under the existing criminal law, it is difficult to embroil those people in any particular operation or arrests that might take place, other than on charges of conspiracy. At the moment, such people may sit in the background to organise and orchestrate crimes such as drug trafficking or human trafficking, but they do not come close enough to the front-end criminality to enable us to gather evidence against them that could put them into the criminal justice system. The proposed offences will help.

Nigel Don: Can you clarify where the law of conspiracy fails us?

Gordon Meldrum: The current law does not necessarily fail us, but it can be difficult to prove that someone who appears not to be overtly involved is engaged in a criminal conspiracy. Often, we have only covert intelligence on the individual that we cannot share with the courts. The current criminal law does not completely fail us—we can use the charge of conspiracy—but it is difficult to prove that such individuals have been involved in a specific offence, whereas the provisions in the bill will create the specific offences of being involved in and directing serious organised crime.

Nigel Don: Is not the problem finding the evidence that such people are involved in serious organised crime rather than finding the offence with which they can be charged? In other words, is not the issue a matter of the evidence rather than of the offence under which they are prosecuted?

Gordon Meldrum: If I am honest, it is sometimes a case of both. On some occasions it is a matter of evidence, and on others conspiracy is so broad that what constitutes a conspiracy comes down to a subjective assessment. I return to the point that the proposal in the bill creates for the first time the specific offence of being involved with and/or directing serious organised crime.

Nigel Don: But the evidence that will enable you to prosecute somebody for being involved or directing is surely the same evidence as would found a charge of conspiracy, is it not?

Gordon Meldrum: It most certainly could be, but on occasion it would be useful to have that alternative to criminal conspiracy. From my perspective, if we in this country are serious about tackling serious organised crime, serious organised crime groups and serious organised criminals, the proposal in the bill sends out a message to them that the country is prepared to create legislation to deal specifically with them and the threat, risk and harm that they bring to communities in Scotland.

Nigel Don: I am conscious that I am speaking to senior serving police officers, but I suggest that sending messages is done by taking people to court and the consequences that come from that, rather than from the words that we use in statute.

Others will address the width of the provisions, but I notice that in your submission, Mr Meldrum, at least as I read it, that you seem to suggest that you would have preferred the offence to be even wider. Is there not a risk that we are simply creating offences that help the police to come up with some prosecution when they feel like it rather than generating a law that makes it clear that serious and organised crime is verboten?

Gordon Meldrum: Much of what I said in my submission about sections 25 and 27 to 28 was to seek some clarification as to what might constitute, for example, agreement or an act of serious violence, because some of the definitions are open to interpretation. The part of the submission where I might have pushed the bounds and raised a slightly wider issue with the bill is where I suggested bringing it in line with the Proceeds of Crime Act 2002 so that we can introduce a retrospective element. As we start to understand serious and organised crime better by virtue of work that we are doing in policing and law enforcement, is there an opportunity to apply the bill retrospectively to those individuals who we believe are involved in and/or directing serious and organised crime?

Nigel Don: If I might just take a slightly different tack, gentlemen, I wonder whether you can explain to me why we need to have a specific statutory provision that being involved in organised crime generates an aggravated offence—effectively, that aggravation can be taken into account—when it can be taken into account by the courts anyway. Am I misreading it, or is there something in the proposal that I do not understand?

Chief Constable Stephen House (Association of Chief Police Officers in Scotland): It is a valid question. In the early discussions with the people who developed the legislation, in which Mr Meldrum and I were involved, we talked about exactly the issues that Nigel Don is probing. The discussion was about how we take the intelligence that we have that somebody is involved with serious and organised crime and convert it into something that a court can consider and make a judgment on. That is the difficult area that we have to deal with.

What is in the sections under discussion is an attempt to broaden things out—Nigel Don used a similar phrase—so that we can have a better understanding of involvement in serious and organised crime, even if it is at arm's length.

In relation to a number of activities in Scotland, it is felt that people are involved in serious and organised crime but are sufficiently removed from it that the current legislation is not getting to them. You asked whether involvement in such crime is already covered by the law. That challenge was made, and the view from the people who form the law, who have far more experience in law than I do—and probably any of us does—was that there is a need for something that goes beyond the current provision.

All I know is that there is an element of frustration, because there are people who our intelligence suggests are involved in serious and organised crime but the current legislation is not sufficiently flexible to allow us to bring them to the

attention of the fiscals so that they can determine whether they should be prosecuted.

10:15

Nigel Don: I am sure that colleagues will want to explore this. Can the witnesses define "serious" and "organised" in the context of the bill? The bill does not define those terms.

Gordon Meldrum: In preparing to give evidence I used the definition of "serious organised crime" in section 25(2), which is:

"crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of serious offences".

Nigel Don: Is that adequate?

Gordon Meldrum: That is a difficult issue. For many years, people who are involved in law enforcement have been debating what constitutes serious crime, organised crime, serious and organised crime, and so on. The definition in section 25(2) is broad, but trying to make it tighter could be problematic. I am speaking personally when I say that the definition is reasonable.

Nigel Don: Therefore, what is serious and what is organised will have to be defined by the courts. Are you happy with that?

Gordon Meldrum: Yes.

Nigel Don: The definition seems to be circular, given that it refers to "serious offences".

The Convener: The committee has a problem with the definition, which will emerge in due course.

Robert Brown (Glasgow) (LD): It has been suggested to us that the definition of "serious organised crime" in the bill

"will cover most common law crimes and many statutory offences where a person acts with another with the intention of securing a material benefit."

In its submission, the Sheriffs Association suggested that two people who conspire or agree to steal a meat pie from a shop to give to a beggar would commit an indictable offence, which would therefore fit the category of "serious offence" in the context of section 25(2). It is clear that the bill is not trying to get at such offences. How adequate is the distinction between serious organised crime and the petty crimes that are not intended to be caught by the bill?

Chief Constable House: I am sure that no one here would categorise the stealing of a meat pie as serious and organised crime. I do not come at the issue from a legalistic point of view; I take a more practical approach, which involves considering whether we should devote resources to a case and whether the public would approve of our doing so. In the case that you described the answer would be no; we would not divert a huge amount of resource to such a crime.

If we tighten the definition too much we will miss issues and new crimes. Criminals might even exploit the definition to ensure that activity does not fall within the definition of "serious organised crime" and therefore cannot attract the powers that we are talking about. Definitions have been exploited in that way in the past.

I am sure that we are all happy to explore the definition, but tightening it would be problematic. If we apply a value to it, we might miss one end of the extreme. If we include violence, we will miss the huge amount of serious and organised crime to which violence is not attached. If we say that more than 10 people must be involved, we get back to intelligence and questions about how many people we can prove are involved. A tighter definition would make the bill much more inflexible and make it much more challenging for courts to make rulings.

Robert Brown: Does the panel agree that the areas of conspiracy and crimes that are associated to the main crime have always been difficult for the law and that, over the years, there has been criticism when the courts have taken too wide a view of such matters? I am not trying to get you to come up with a definition, but in practical terms is there a distinction between those offences that are likely to be prosecuted, as they will result in a significant jail sentence, and those that theoretically could be? Is there a cut-off point in terms of the seriousness of the case? Is that what you have in mind?

Chief Constable David Strang (Association of Chief Police Officers in Scotland): The fact that the definition is in section 25 does not mean that, from an operational and practical point of view, it will be applied in every case. It could be—that is where the exercise of judgment and discretion on the part of the procurator fiscal comes in.

The definition in section 25 allows us to tackle people who are involved in serious and organised crime, so it is useful legislation. However, it does not mean that we will automatically apply it to everything that technically falls within that definition.

Robert Brown: You would, perhaps, agree that it is not a terribly satisfactory situation if the police and prosecuting authority in a democracy have a theoretical power to prosecute people for all sorts of minor things against a background of a law that is intended to target serious organised crime. Do you agree that there is a problem with that concept?

Chief Constable Strang: I think that people understand what serious and organised crime

means. I understand the difficulty that you have and your desire to clarify the definition further, but the notion of serious and organised crime has a meaning that would ensure that the provisions were not applied inappropriately or widely.

Robert Brown: It does not have a narrow meaning. The bill says:

"'serious offence' means an indictable offence".

That means that many of the routine common-law offences are covered, which means that it is a wide definition.

Chief Constable Strang: Yes, but in terms of the standard that is applied by the police or prosecutors, it would never be the intention to apply the provision to what would be seen as a minor offence, on the scale of things, regardless of whether it fell within the technical definition as an indictable offence.

Robert Brown: On the other side of the coin, the written submission from the Scottish Crime and Drug Enforcement Agency expressed worries that the definition of violence excludes the fear of violence and the intimidatory aspect of people's behaviour that might exist in the background. Could you elaborate on that point?

Gordon Meldrum: In witness statements or through intelligence, we pick up on the fact that serious and organised crime groups operate through a culture of fear, intimidation and threats. On occasions, there might not be a physical act of violence but there will be threats, intimidation and all sorts of other non-violent abuse. That is how those groups manipulate people from all walks of life in order to get their own way.

Robert Brown: Would you like the definition of serious violence to be widened to cover that kind of situation?

Gordon Meldrum: It would be helpful if it were widened to include threats and intimidation.

Robert Brown: Section 28 deals with failure to report serious organised crime. Earlier, you referred to people being involved in such crime or directing it, but you seemed to steer clear of the failure-to-report aspect. Does that indicate a degree of unhappiness with that particular charge—which in some ways is a bit novel in the law—as it goes beyond people doing things positively and says that people are guilty of criminal offences merely by their presence or their knowledge?

Gordon Meldrum: My failure to mention the failure-to-report aspect was due entirely to my ineptitude; no other issue was attached to it.

The Convener: Refreshingly honest, if I may say so.

Robert Brown: Nevertheless, are there concerns about that offence? It seems to me that it might be a bridge too far, as it goes beyond people's actions and includes people who just happen to know about things. That is quite a novelty in the law and raises a lot of issues about establishing facts and the background.

Gordon Meldrum: Speaking on my own behalf and from the perspective of the SCDEA, I support that offence. I draw a parallel with what we call the suspicious-activity report system that operates throughout the United Kingdom. Anyone who is involved in financial transactions has a duty to report if they feel for any reason that a transaction does not add up. That system involves the sort of failure to report that you are talking about.

As far as I understand the provision—I am sure that the Crown will have a much better perspective on it—it is designed to catch the individuals whom I have often publicly described as the consultants and facilitators. They oil the wheels of organised crime but do not necessarily get close to the front-end criminality—they might be involved in the banking profession, the legal profession, the accounting profession, the haulage industry and so on. I am not saying for a second that all of those people are corrupted by organised crime, but some of them might be. Often, they have a knowledge of the business of serious organised crime, if not necessarily the daily transaction of the criminality. The fact that they fail to report that knowledge often inhibits us. Having an offence around failure to report knowledge of serious and organised crime would be helpful with regard to those people.

Robert Brown: Section 25 makes it an offence for a person to agree with another person to become involved in serious organised crime. That seems to give you the power that you might need to deal with the people about whom you are talking.

Perhaps I should declare my interest as a former practising solicitor in this context—or not in this context, I should say.

Gordon Meldrum: Although I accept that section 25 says what it says, I think that the specific provision around failure to report, as opposed to simply agreeing in general, is helpful. I know that I would say that, as I am the director general of the SCDEA, but I genuinely feel that it is useful.

Robert Brown: With regard to the people who have the connection that is defined in section 28(1)(b), could you define the difference between "involvement" and "knowledge or suspicion"?

Gordon Meldrum: I am sorry; could you state the specific question again?

Robert Brown: Could you define the difference between "involvement" in section 25 and "knowledge or suspicion" in section 28, given that section 28 states that there has to be some professional or personal relationship in order to land someone on the front line? If someone has knowledge of such crime, is not the notion of involvement adequate?

Chief Constable House: I will give you a practical example that is very much on my mind at the moment, as I am trying to buy a house in the west of Scotland. The legal company that is handling matters for us wrote us a formal letter to ask where the money is coming from because it needs to be sure about that. As Gordon Meldrum has said, we are talking about an extension of that.

On your specific question, for example, if a junior member in a legal practice facilitates the purchase of a house for £500,000 in cash and is well aware that the money is probably dodgy and comes from drugs or serious and organised crime, in my view that person is involved. The senior partner in the company may not be involved but will have knowledge of it, and section 28 would mean that they had a duty to report it.

10:30

Robert Brown: Is that not covered by the regulations on money laundering anyway?

Chief Constable House: Yes, but I am using it as an example. We could use the example of an accountant or haulier, as Gordon Meldrum did. If someone knew that something was suspicious, section 28 would lay on them a duty to report it.

Robert Brown: Can you give us examples that go beyond existing legislative and administrative requirements to demonstrate that section 28 is necessary? The example that you have given seems to me to be covered by money laundering legislation. The offence that section 28 proposes does not seem to add anything to that.

Chief Constable House: Organised crime groups require or want other services that are not connected with money laundering but facilitate their work, such as getting hold of premises. They will go to estate agents to look for premises to put into use as a cannabis factory. That is a pretty current example. Knowledge and involvement may be two separate matters in that instance.

Robert Brown: Are they? If somebody has knowledge of that position, they are manifestly involved. They have gone beyond thinking about it to taking the matter forward, have they not?

Chief Constable House: No, I do not agree. There is a difference in the definition. If someone has hands-on involvement in setting up the lease and rental of premises, they are clearly involved. However, if someone else in the company knows about it, their defence in law would be that, although they may have had some suspicion or known that it was going ahead, they were not involved. Section 28 says that, if somebody is aware of such activities and has suspicions, they are required to report them.

Robert Brown: That seems to me to be a charter for getting at the minions in firms rather than the senior directors. Is that right?

Chief Constable House: We are asking for new legislation—I said that we were widening the legislation and making it more flexible—simply because we have to get at serious and organised crime in any way that we can. The people who choose to become involved in it make a conscious choice. Therefore, they are ready for it and are getting into a defendable position. We get to those people through others who are involved in it but may be on the fringes—I would not use the word minions. In section 28, we are saying that, if such people have suspicions or knowledge, they need to step forward and, if they do not, they commit an offence.

Robert Brown: I suggest that section 28 is an astonishingly wide power that, in addition to perhaps—I use the word "perhaps" consciously—covering a number of positions beyond being involved, puts a considerable amount of power in the hands of the state and the prosecution to go after many other people who may not be involved in serious organised crime.

Chief Constable House: Yes, I understand your position. My position is that the state is not trying to go after those smaller people but, through them, is trying to get at serious and organised crime groups and gangs. I am afraid that the tentacles of such gangs reach out a long way. Many people make money from, and have business that is associated with, organised crime; that needs to be challenged with some new legislation. The legislation may be considered challenging, but we need it. We support it strongly because there is a strong public need to tackle serious and organised crime. We cannot continue to do that in the conventional way because it proves incredibly difficult to attack the Mr or Mrs Bigs, to everybody's detriment and suffering.

Robert Brown: I understand the motivation, but I remain concerned about the means of pursuing serious and organised crime under section 28. Might ACPOS and the SCDEA be able to come back to us with a bit more background detail on some practical examples? That would be extremely useful.

The Convener: Perhaps we can hear from Mr Meldrum on the general context.

Gordon Meldrum: I do not know whether this information helps, but in our operations against organised crime we continually come up against a group of people who do not go anywhere near the front-end criminality but who facilitate the business on behalf of more than one organised crime group. The organised crime groups themselves can take their criminality only so far before they have to go somewhere for assistance. There seems to be a group of people to whom serious organised crime groups tend to head back, for whatever reason. As a police officer, my view is that those people undoubtedly know that they are involved in serious and organised crime, but there is never any disclosure of that. Practically speaking, that is the group whom we are trying to identify and capture with the provisions in section 28.

Robert Brown: My final question is on ACPOS's comment on section 18 that

"the good work achieved to date in relation to the deterrence of knife crime would be lost if knife crime is not separated from"

the legislation on short-term custodial sentences. Will you elaborate on that? There is obviously a bit of a challenge there. Does knife crime raise different issues from other sorts of violent crime or other crimes that might be caught by the legislation on short-term sentences and community sentences?

The Convener: Perhaps that is a question for you, Mr House.

Chief Constable House: It would be if I could find the part of our submission to which Robert Brown is referring, but I cannot.

Robert Brown: It is at the bottom of page 1.

Chief Constable House: I am not certain that the submission was written by the violent crime reduction unit, but I think that it is saying that knife crime is a particularly serious issue for us in Scotland and that it has to be addressed properly. However, I am not sure that I would be as keen as the submission suggests to separate out particular kinds of crime.

Knife crime is horrific in the west of Scotland. This weekend, we had three homicides and 40-odd serious assaults, and knives would have featured heavily in all of them. We have to deal with the possession and use of knives sensitively and intelligently, rather than in a dramatic, headline-grabbing way that sounds like the obvious answer. The obvious answer initially is that everybody who is convicted of knife possession as a first offence should receive a term of imprisonment. A great many people probably should receive that sentence, but creating legislation that says that everybody should receive a custodial sentence in the first instance would open up the law of exception, in that exception after exception would come forward.

I guess that the submission is saying that knife crime needs sensitive and sensible treatment and that there has to be a separate debate on it, which I think involves, quite rightly, a number of people around the table.

Robert Brown: If I understand you correctly, you are saying that whatever the original view that led to that statement in the ACPOS submission, you are not convinced that there is a need to separate out knife crime when we are considering short-term sentences, and that one can look at the arguments about punishment, deterrence and rehabilitation in a more general way. Is that an unfair summary?

Chief Constable House: It is not. I am not clear why we would have to separate out knife crime in particular. We have not yet got to the views on short-term sentencing in any case, although I am sure that we will do so in due course. I am happy to talk to my colleagues about this, but I am not sure why knife crime was separated out. It has to be dealt with sensitively and intelligently, because it is a massive issue for the country, but I am not certain what lies behind the idea that it should be separated out from the debate on short-term sentencing.

Nigel Don: I wonder whether I could wrap up the thinking on serious and organised crime by reflecting what I think you have said. These are my words, not yours. You would like sections 25 to 28 to be drawn more widely, so that they can be used sensitively, rather than more narrowly, so that they restrict you. Is that a fair comment? You are looking for prosecution discretion on wide-ranging offences. I see three nodding heads—you agree with that.

Gordon Meldrum: Yes.

Nigel Don: Would it also be fair to say that you recognise the problem that we have, as custodians of the legislative process, of creating unnecessarily wide offences? Do you recognise that we are reluctant to do that because, at the end of the day, it could be us?

Chief Constable Strang: In our view, the drafting should not be unnecessarily wide; we are arguing that it should be necessarily wide. I understand why you want to avoid drafting an unnecessarily wide piece of legislation, but we argue that wide drafting is necessary if we are to get at the heart of serious and organised crime in Scotland.

Chief Constable House: The points that you make, sir, are to the point. We initially looked for some way for us all—police, fiscals and defence—to agree that an offence was within the definition

of serious and organised crime and therefore the provisions would apply, which would get us past the criticism that the legislation was incredibly wide and could be used for anything, including the theft of a meat pie. If we could overcome that and define a far narrower range of offences to which the provisions would apply, we would probably all be happier with them. The difficulty is that serious and organised crime reaches into so many different areas. We have heard recently about security companies, taxi companies, bus companies and a variety of other companies that are all within the ambit of serious and organised crime. That is why it is difficult to provide a definition with which we would all be much happier. Police officers like working within definitions; we are not particularly comfortable with broad-ranging things, either. However, providing such a definition is very challenging.

Bill Butler (Glasgow Anniesland) (Lab): I, too, like working with definitions that I accept and that are clear to me, but I am a bit troubled by what I have heard. Chief Constable House just said, in response to Robert Brown, that he does not necessarily agree with ACPOS's written submission on the need to separate out knife crime. You are speaking for ACPOS today, so which is ACPOS's position on the matter? Is it your position this morning or the position that is outlined in the written submission? We need to be clear about that. If you are unable to give us that information today, we need to get it in writing. We cannot have two positions from ACPOS.

Chief Constable House: Convener, I am happy to take your guidance on the matter. If you would like me to provide written confirmation of our position, I would be happy to do so. I do not understand the exact meaning of the submission in terms of the need to separate out knife crime. For what reason would that be done? If you would prefer it, I would be happy to write to the committee, confirming ACPOS's position.

The Convener: We need some clarification, as there appears to be a split on the issue. You have given your personal view, which is fine, but you are representing ACPOS today and we need ACPOS's position to be defined for us.

Chief Constable House: That is true, convener. Thank you. However, as the chair of ACPOS's crime business area, it would not have been right for us to turn up here and say that we did not need to answer any questions because ACPOS had given the committee a written submission. The benefit of giving oral evidence is that it challenges issues and makes us come back and be a bit clearer about what we are saying.

The Convener: Written clarification would be welcome.

Bill Butler: It is always helpful. You are right to say that it is in the interaction here, at committee, that we find out what needs to be clarified—as do you. If you could submit that clarification, we would be absolutely delighted.

The Convener: That takes us to fingerprint and DNA data.

Bill Butler: As you know, the bill will extend existing police powers on the retention of fingerprint and DNA data. However, it will not allow the police to retain such data where a case is concluded by an alleged offender accepting an alternative to prosecution, for example a fiscal fine or a fixed-penalty notice. In its written submission, ACPOS raises that as a concern. Why is ACPOS concerned?

10:45

Chief Constable House: Our concerns are to do with the fact that the legislation on fixed-penalty notices was introduced to provide alternatives to prosecution and a more flexible, speedier system, and to reduce paperwork. That is working, but it means that there is a slight reduction in the number of people whose DNA is taken. That is a fairly fine, practical point.

In certain police force areas, fixed-penalty notices for minor disorders such as drinking or urinating in the street are often issued on the street. In such cases, the requirement on—but, more important, the ability of—the police service to take DNA is zero, because we do not require our officers to take buccal swabs on the street. DNA is taken in the fixed-penalty notice disposal process only when people are taken back to the police office, which allows photographic, fingerprint and DNA evidence to be taken. Our view is that when there is a return to the police office and DNA is taken under a fixed-penalty notice for a minor offence, it sometimes indicates the sort of person from whom we would want to take DNA. The view has been expressed that the more people we take DNA from, the larger the DNA database and the higher the chance of catching people earlier in their cycle of offending. Our concern is that if we are not allowed to take DNA from anyone who receives a fixed-penalty notice, we will miss out on a section of people who it would be worth while having on the database.

Bill Butler: I hear what you are saying, chief constable, but could it be argued that that omission—if it is an omission—is deliberate, because alternatives to prosecution are extremely unlikely to be used in cases in which the offence is serious, so why the need to take and retain DNA?

Chief Constable House: That takes us to a fairly wide political, philosophical and law enforcement point, which is that the wider the DNA

database, the greater the chance of catching people. If the database is narrow, we have less chance of catching people. There is a balance between that issue and the civil liberties issue. It is about proportionality.

Bill Butler: The extended powers in the bill originate from a need to keep us consistent with the European convention on human rights, specifically in relation to the case of S and Marper v the United Kingdom, in which the European Court of Human Rights criticised the blanket retention of DNA in England and praised the specific and targeted Scottish regime on DNA profiles. I hear what you are saying, but I am not convinced by it.

Chief Constable House: Let me try again. We are not in any way proposing that we move to the English model. It seems far more likely that, despite Government resistance down there, the English model will move towards a Scottish/ECHR-compliant model, which is as it should be.

This is a practical, policing point of view. Someone who drinks or urinates in public might come to the notice of a police officer, but for efficiency reasons, and to cut down on paperwork, we no longer take them into custody and put together a full file. That is why we are not getting DNA from them. That is a change in administration; it is not a change in the way that society views such crimes. In practical terms, the majority of fixed-penalty notices for such offences are issued on the street, and the police do not take DNA on the street. However, I think that such people should still come within the ambit of our ability to take DNA, and that we should be allowed to take the person to a police office, to do the work there and to take DNA.

Bill Butler: Why would you need to retain the DNA of someone who urinated in the street? Surely that is a minor offence. We are not talking about people who have been prosecuted for but not convicted of violent sexual offences. Surely those offences are not comparable.

Chief Constable House: The offences are not comparable, but the first example still involves a breach of the law.

Bill Butler: Is it not simply the case that taking the DNA would be more administratively efficient for you? The offences are not comparable in seriousness.

Chief Constable House: The issue is nothing to do with administrative efficiency; it is to do with catching people who have committed serious crimes as early as possible. I will give an example that is not from Scotland, but from down south. An individual was arrested in Brighton for what could be considered a fairly minor offence. They were taken back to the police station, where they were photographed and fingerprinted and their DNA was taken. The custody sergeant decided to refuse charge, so that person was released without further police action being taken. That person's DNA was retained—that is allowed under the English legislation at the moment—and their information was put on the DNA database. That person is now in custody for the particularly brutal rape and murder of a woman in London. That was the only way in which that person could have been caught, because the investigation was two or three years old and was, in effect, on hold, because no other lines of inquiry existed.

Exactly the same issue applies. I return to my point that a decision must be made between what some see as civil liberties issues and the effectiveness of investigation. There is no doubt that if the DNA database is extended as widely as possible, it will allow us to detect offenders who have committed serious crime more quickly in their cycle of offending. If the database is narrowed, the ability to detect will be reduced. If the DNA of somebody who comes to the notice of the police because they have committed a relatively minor offence on the street is allowed to go on the database, and they commit a more serious offence or have already committed a string of more serious offences for which they have not been caught, they will come to the notice of the police and be put in custody.

Bill Butler: Forgive me—that is a perfectly coherent and comprehensible philosophical position, but the bill does not advocate blanket retention. Because of concerns about wider provisions on the retention of DNA down south, the bill goes for more specific retention in two instances. I might be wrong, but I think that you are arguing for blanket retention. My question is specific to the bill, which says that we need a targeted extension that remains within ECHR. Do you agree with that?

Chief Constable House: You are right to correct me. Actually, I am arguing not for blanket retention but for a public debate so that the public understand what they would have if blanket retention were introduced and what they will not have if it is not introduced. We are back to the balance that must be achieved.

We have adopted a system of issuing fixed-penalty notices for some offences, to be more efficient and effective. That is good and it is working, but all that I am saying is that changing to that system should not stop us taking DNA from someone from whom we would have taken DNA if we had not introduced that system. The commission of relatively minor offences often indicates a lifestyle that might include violence and a proclivity to violence. The issue is not always

what will happen in the future; the first time that a serial offender comes to the notice of the police—the first time that we catch them doing anything—might be when they are drinking in public. If we can take their DNA at that time, we can find that they are an offender. If we cannot take their DNA, we will lose the ability to sift through such people.

Chief Constable Strang: It is worth remembering where fixed-penalty notices came from. They were a part of summary justice reform to reduce delays and the number of cases that were reported. The non-taking of DNA was an unintended consequence of introducing fixed-penalty notices.

Bill Butler: Do the witnesses feel that the proposals in the bill achieve an appropriate balance between the rights of individuals and the ability of police officers to carry out their work efficiently and effectively?

Chief Constable House: In general, we do, but we are concerned about the issue that you have highlighted, Mr Butler—that of fixed-penalty notices—and we are concerned about children who go to children's hearings. Our submission makes a point that I think is common sense: if someone admits guilt and goes to a children's hearing, it should be possible to take their DNA.

Chief Constable Strang: I understand people's concerns, but I think that the balance is right. In any new legislation that introduces requirements or restrictions, you need to weigh up the benefits. Every piece of legislation restricts freedoms in some ways, so you have to judge whether the price is worth paying. In the cases that we are talking about, there would be security benefits from detecting crimes. I feel that the proposals in the bill are properly balanced.

Bill Butler: That was the general response that the committee received in written evidence. However, I raise the issue because the witnesses suggested in their submission that there was a loophole or gap. I get the clear impression from the witnesses that that gap should be bridged. Is that correct?

Chief Constable Strang: Yes, absolutely. There was perhaps an oversight in earlier times, and it needs to be resolved.

Bill Butler: I am obliged.

Paul Martin (Glasgow Springburn) (Lab): I would like to ask Chief Constable House about practical examples of DNA retention. It can be difficult to talk about specific cases, and we have to use the information that is available, but I will ask about the case of Peter Tobin. You talked about the possibility of preventing crimes. Social profile information is now available on Tobin, and it is known that he was a petty offender earlier in his life. Had DNA retention been in place as a legal remedy, could Tobin have been detected much earlier?

Chief Constable House: That is a specific example, and I have talked about a specific case down south, but there is a general issue. We should not pretend to the public that DNA retention would stop all offending, because it would not. However, if DNA were left at the scene of an offence and were properly gathered, it would allow the police to match it with information on the DNA database. That could stop somebody early in their cycle of offending, if they could be found. The evidence from areas where DNA is retained is that it allows officers to step in effectively at an early stage. In areas where that is not done, series of crimes can go on and on, with tragic results.

Paul Martin: If he had been detected for housebreaking at an early stage in his criminal career, and if DNA had been retained at that point, he could have been detected for crimes that followed that initial housebreaking.

Chief Constable House: I am not trying to avoid the point that you are making, but I want to be clear. If someone were arrested for housebreaking or for any minor offence, and if DNA were taken, it would be on the database. If the person committed a further offence and left DNA—for example, if they committed a rape—the DNA could be matched. That would not stop people offending, but it would allow us to step in earlier in cycles of offending. If everything was managed effectively and efficiently, the cycle of offending would be stopped much earlier—after the first serious offence, we would hope.

Angela Constance (Livingston) (SNP): Chief Constable House gave us an example from down south, and we have just heard about the Peter Tobin example. Has any research been done into whether people who commit minor misdemeanours on the street and receive a fixed-penalty notice, are, by and large, law abiding, or is it the case that a significant proportion of serious offenders also commit minor misdemeanours? Does research exist that gives an evidence base for the need to retain DNA from people who receive fixed-penalty notices?

11:00

Chief Constable House: I am convinced that there is a huge body of work around that. I cannot quote any of it right now, but I can tell you that what we know about criminals is that they break the law, and they tend not to break only one law. They do not think, "I am a housebreaker, therefore I will only ever do that." You see that in Hollywood films, in which people are professional criminals and they commit one type of crime, but that is not

the case in reality. For example, research that was done on who illegally uses disabled bays at supermarkets—we all get furious about that—found that many of them had criminal records. Research that was done on the diaries of heroin users—drugs may be a slightly different issue—indicate that they will turn their hand to anything; they do not think to themselves, "I will just do this."

I suggest that the same applies to other criminals. People get caught for the strangest reasons and in the strangest circumstances. For example, Peter Sutcliffe was intercepted by uniformed officers on the street because of his car tax, or for driving the wrong way down a one-way street, or something like that.

People break the law. My proposal, to come back to fixed penalties and low-level crime, is that if we lived in a world with no crime, we would not have to take any DNA, but that is not the case, so we must try to prevent crime as much as possible. In my professional view, the taking and retention of DNA is a useful weapon for the police in preventing series of crimes. That must be balanced against human rights and an overbearing state. Frankly, it is for you to decide where that balance lies.

There have been proposals—I make it clear not from me—that we should take DNA from everybody in the country at birth. There would therefore be no prejudice and no need for guilt to be proven before taking someone's DNA: we would take DNA from everybody. It would be something that the state did and the DNA would be retained in a bank. If that were done, there would undoubtedly be a reduction in crime, but do we want to do that? That is a matter for the public.

If you restrict the DNA database to people who commit very serious offences, the chances are that we will catch some people but new people into the market who have precursor offences will not be caught. It is a well known fact—talk to any analyst or academic in the field—that when it comes to sexual offences it is very rare for someone to step in straight away and do a full-blown abduction and rape. They will usually go through precursor offences of indecent exposure, indecent assault and stealing underwear from washing lines. All those offences are precursors—they work up to the very serious offences. They do a little bit of exposure, then abduction and then full-blown sexual assault, often leading to murder. The earlier you get the DNA, the earlier you can interpose into that process.

The Convener: We need to move on, but Mr Meldrum wants to make a quick point.

Gordon Meldrum: I have a brief point in response to the question about serious criminals committing less serious offences. We often see that with the individuals and groups that the SCDEA examines. To be frank, we are often mesmerised by the fact that while they are involved in serious crime, on another day for another reason they will commit, for example, minor road traffic offences, shoplifting offences and common assaults. We often see evidence of serious criminals committing minor offences.

The Convener: We turn to the issue of disclosure; Stewart Maxwell will lead the questioning.

Stewart Maxwell (West of Scotland) (SNP): Good morning, gentlemen. Does the current regime for the disclosure of evidence in criminal cases cause any difficulties for the police? If so, could you explain what those are?

Chief Constable House: The issue is that the law must be seen to be transparent, fair and open. What we must not do is to present the evidence that we want to be presented, while not presenting other bodies of evidence that contradict what we are saying or suggest that a suspect is innocent. I hold up my hands and say that my experience of Scottish policing is about 19 months old, so I am not sure that I am well placed to say whether the current situation causes major difficulty. From what I have seen in Strathclyde it does not, but my colleagues who have more knowledge might be better placed to speak on that aspect.

The Convener: That is fair. Does anyone contradict that view?

Gordon Meldrum: The SCDEA has a slightly different perspective, because we work alongside the national casework division of the Crown Office in relation to our prosecutions, so a senior procurator fiscal is attached to our investigations at an early stage. However, I do not contradict or take exception to anything that Chief Constable House said.

The Convener: Do you agree, Mr Strang?

Chief Constable Strang: Absolutely. We are content with how things are. They do not cause difficulties.

The Convener: That is fine. Thank you.

Stewart Maxwell: The bill creates a statutory framework for disclosure. Does that represent an improvement on the current situation? You seem to suggest that there is no problem at present.

Chief Constable House: I am afraid that I will sound boring and repetitive. Our main worry about the bill is the resources that will be required. I have considerable experience in the area because I worked in the English and Welsh system for 27 years, and disclosure was a massive drain on police resources. It was introduced for valid reasons—which have not necessarily been

demonstrated in Scotland—but it was a monster, to be frank, and one from which England and Wales have stepped back significantly.

Disclosure was the subject of massive amounts of training down south, which will also be required up here. We will have to train every police officer in disclosure because it will affect them all. We understand that it will not affect every court case because it will apply only to solemn cases—sheriff-and-jury or High Court cases—but there will be implications for all officers because we do not always know where cases will go in the end.

We are also concerned that too much is being dealt with in the bill. We would like more to be covered in the code of practice, because we believe that that is the appropriate place.

Stewart Maxwell: I notice that you make that distinction in your written evidence. Why would it be better for the matter to be dealt with in the code of practice?

Chief Constable House: It would be more appropriate for the scheduling processes if it was dealt with in the code of practice rather than being locked into the words of the bill and defined there.

Stewart Maxwell: Is it an issue of flexibility?

Chief Constable House: Yes. Putting the details in the code of practice would allow more flexibility and probably a bit more debate on the issue, which would be appropriate for the scheduling. There are also questions about the definitions of "sensitive" and "highly sensitive".

Stewart Maxwell: I will come to that in a moment. Do you agree that a case can be made that what should and should not be disclosed and the definitions thereof should be included in the bill and that codes of practice or guidance are not the appropriate place for such important details?

Chief Constable House: All I can say is that our view is that that should be contained in the code of practice, which is a better place for it. We have spoken to people down south about that, and I repeat that we believe it is more appropriate for it to be in the code of practice than in statute.

Stewart Maxwell: I am just trying to explore why you think it would cause difficulty if it was in the bill rather than in the code of practice. How often do you expect that the legislation would have to be changed? Obviously, if it was in the legislation, that would have to be changed rather than the code of practice. What specific practical difficulties would result?

Chief Constable House: If the provisions on scheduling remain in the bill, we would want a requirement for consultation if the prosecutor disagrees with the police assessment of the level of sensitivity of an item of information. I am not sure whether that point was sufficiently emphasised in our written submission. Currently, the bill provides that the prosecutor must return the schedule to the police to adjust the determination, with no scope for review or consideration. That means that the police officer can give a professional opinion, the lawyer can say no and that will be the end of it, although the police officer's opinion has not changed.

Stewart Maxwell: That is an argument about amending the bill, as opposed to removing the provisions from the bill and putting them into guidance, is it not?

Chief Constable House: I think that the whole thing would be better if the requirements on scheduling were in the code of practice.

Stewart Maxwell: What are the views of Chief Constable Strang and Mr Meldrum on this matter?

Chief Constable Strang: Chief Constable House, as the chair of our crime business area, is presenting the ACPOS view on crime, so that is the ACPOS position. However, I understand the argument that the primary legislation need not be amended and that there are advantages of flexibility in having provisions on disclosure in the code of practice.

Gordon Meldrum: I agree with what Chief Constable House said.

Stewart Maxwell: May I delve into the issue of resources? Chief Constable House said that when a similar disclosure provision hit England, a huge amount of training and other resources had to be applied to it, which created a lot of difficulty. However, do the police not undertake disclosure, anyway? Chief Constable House seemed to suggest that there would be a manifestly huge difference between what currently goes on and what would go on in the future if the bill was enacted as it stands. Can you explain that to me? I am having difficulty in understanding that point, because I imagine that the police undertake much of the bill's disclosure provisions, anyway.

Chief Constable House: Much of the provisions are undertaken currently, but the bill will place a burden on the police officer that will mean that every significant inquiry—this will impact massively on serious and organised crime—will have to put aside a number of officers to ensure that the disclosure legislation is complied with and that everything that comes into the possession of the police officers is assessed to determine whether the police will use the information as part of the prosecution, how it will be held and whether it will be presented as part of the case. All the information will have to be listed and scheduled so that it is available for examination by the defence.

To return to Mr Maxwell's original point, the question is what is wrong with the current system of disclosure that means that the bill's provisions are required. The current system depends on the police conducting an investigation and building a case, which is presented to the procurator fiscal and taken to court. There must be trust on all sides that what is presented is the meat or crux of the matter and that the police do not have files of undisclosed reports or have not suppressed a witness statement. For example, the police could interview 150 people in a murder investigation and all might say the same thing apart from the 150th, who might say that he does not think that the accused person was there at all. There is an issue around how much is disclosed and how much is held back. Currently, that is done pretty much on professional trust and integrity. The bill is trying to codify that and to say, "Never mind all that. You will provide all this information in the more serious cases."

Again, if Scotland has got to where England and Wales already are in that regard, that is one issue. We are not opposed to the proposal across the board. However, there are huge implications for resourcing the proposal because more and more police officers will have to sit down and work out what material they have, what they need to present, how they should schedule it, what pieces of paper they will send to the fiscals and so on. That will all go on in far more detail than it does at present.

Stewart Maxwell: You seem to accept the point that you undertake that process currently because you have to. I understand that the bill proposes a more formal process that will be laid down in statute, as opposed to the current arrangements. I am not sure that there is such a massive difference.

11:15

Chief Constable House: I think that there is. From my personal experience, I found huge differences in the law when I came north of the border, because the Police and Criminal Evidence Act 1984 and disclosure requirements do not apply here. The amount of time that my officers spend on paperwork—although they complain about it bitterly—is significantly less than is spent by their colleagues down south. One of the major reasons for that is the disclosure situation. The disclosure requirements would take police officers off the street because each major case would need a disclosure officer—perhaps two for a murder investigation—who would deal with nothing but the disclosure issues. The disclosure requirements would also eat into the time of officers on, frankly, every case. Because we do not know where a case will end up, officers would need to comply with the legislation. The requirements will make a significant difference to the number of officers on the street. I have no doubt about that.

Gordon Meldrum: On the issue of resourcing, let me support what Chief Constable House has said. As I said in the agency's written submission, we have scoped the issue as best as we could and as scientifically as we could. We did that by speaking to both the Metropolitan Police specialist crime directorate and the UK Serious Organised Crime Agency. Our assessment—it is a guesstimate to a certain extent—is that we will require 15 full-time disclosure/revelation officers within the agency. As members will appreciate, the number of cases that we report into the criminal justice system over the course of a year is minuscule in comparison with the rest of the Scottish police service. However, we believe that we will require that number of people simply because of the scale and complexity of our operations. Let me give a practical example without going into too much detail. One of our current operations involves somewhere in the region of 200,000 documents. An assessment would need to be made on the disclosure and scheduling of each of those documents.

Although the spirit within policing in Scotland and within law enforcement agencies such as the procurator fiscal has been to disclose information, formalising that as a requirement in the statute book will introduce an additional layer of complexity to the disclosure of material. There will need to be an assessment and ultimate signing off in deciding whether information is disclosable. That will require more people, over and above the people who are doing the day job at present.

Stewart Maxwell: The fundamental point that I am genuinely trying to understand is the difference between what happens currently and what will be required in the future. If a case involves 200,000 documents, each of those documents needs to be examined anyway. I would have thought that the police need to do much, if not all, of the work that is being formalised under the bill. I am trying to discover what the difference is between what happens currently—it seems to me that most of this stuff happens anyway—and what will be required if the bill is enacted as it stands. Given that the work needs to be done anyway, I do not understand why 15 full-time officers would need to be dedicated to disclosure as a result of the requirements being written down in a formal process.

Gordon Meldrum: As Chief Constable House said, we disclose based on professional judgment. Although we examine every document, we do not necessarily assess them for disclosure purposes, put that assessment in writing, have a

conversation with the procurator fiscal, come to a determination on whether the document is disclosable and then schedule everything as either disclosable or non-disclosable. On one level, an administrative process will need to be built around the disclosure of the document over and above the professional judgment that is currently taken.

Nigel Don: Undoubtedly, this is a point of detail, but it has been said that police officers will be needed to deal with disclosure. I have nothing against police officers—they would be well trained for such a task—but is there a need for disclosure to be dealt with by a police officer, or could the job be done by someone who knows that particular part of the trade?

Gordon Meldrum: From my perspective, from having sent quite a number of my people down south, my answer as director general of the agency would be that the job need not be done by a police officer, but the individuals involved would need specific skills. I have actually scoped the requirements in our written submission. Our 15 officers would cost just short of £1 million; our 15 police staff would cost just over £0.5 million.

Nigel Don: I recall that. Are you happy that appropriately trained staff could do the job without needing to be warranted police officers?

Gordon Meldrum: In my view, yes.

The Convener: Will Mr House comment on that aspect from his experience down south? Are such matters dealt with down south by full-time professional police officers or by ancillary staff?

Chief Constable House: In the main, on the more serious murder investigations, the job is done by police officers. I think that there is no real need for that, as the job could well be done by properly trained full-time non-sworn police staff. However, I do not think that that is the point; in a large number of other cases the arresting officer and the investigating officer will still be required to do their own paperwork, because we do not have that sort of administrative backup for people. At the top end—homicide investigations—specialists take over and do the paperwork for a lesser cost as opposed to no cost. However, if uniformed police officers who are patrolling the streets arrest somebody for an offence, they still have to do the paperwork themselves; they do not get admin backup, so it still means cops being off the street.

The Convener: We turn to the subject of sexual offences.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Good morning, gentlemen. Section 33 includes provision to extend the law on indecent images of children and section 34 makes it an offence for a person to be in possession of extreme pornographic images. Can you give examples of how the existing law will be strengthened by those proposals?

Gordon Meldrum: The SCDEA's written submission comments on what constitutes an extreme image. Regarding the current definition in the bill, it says:

> "The definition of an 'extreme image' presents practical difficulties. The use of the terminology 'depicts, in an explicit and realistic way' would seem to include all images where such acts are depicted but are subsequently shown to have been staged or acted out. For example a realistic depiction of a rape or sexual murder, which is undoubtedly pornographic but where the 'victim' is shown to have suffered no harm and to have been a willing participant in actions depicted, would appear to be included in the definition."

That may not be a helpful response, because I am pointing out that we have said that work needs to be done on that definition.

Cathie Craigie: Do you have a suggestion for how it could be improved?

Gordon Meldrum: Not in front of me, but if you will bear with me, I would be happy to get back to you with thoughts and suggestions, if that would be helpful.

The Convener: That would indeed be helpful.

Cathie Craigie: The committee would welcome that.

Chief Constable House: I do not differ in any way from what Mr Meldrum said about the definition. We would also be happy to get involved in the work on that.

The Convener: Perhaps ACPOS will also give us something in writing under that heading.

Cathie Craigie: That would be useful.

On section 34, ACPOS commented that there would be challenges in monitoring the changes to the legislation and whether capacity issues would impact on Scottish police forces' ability to be proactive in the area. The general public want the police to be proactive. What are the pressures in that area and how could the bill be improved to deal with them? Are there financial or resource pressures on the ability to do the job?

Chief Constable House: There are always financial and resource pressures, because we use public money that is being spent somewhere. With the current financial outlook, I do not see more funding becoming available for an area such as this, but if it does, that would be great.

If we get a tight definition of extreme images, that would probably help us to deal with the situation. The problem is the huge flood of material that is available on the internet; in most cases, that is outside UK law enforcement and it is therefore beyond our ability to shut down the websites.

Those are the major issues that confront us, especially because different countries have different tolerance levels and the material might not be illegal in the country in which it was put on the website.

The issues are the volume of work involved, the subjectivity about what is pornography, the simple requirement to have people watching and dealing with such material to make an assessment and the need to take into account—I mean this seriously—their health, safety and welfare, given that the material is highly corrosive. I am sure that members have watched such material professionally, as I have done. The thought of having somebody watch it hour after hour for an investigation is quite troubling. Such people also need to be highly specialised and experienced. Therefore, we are talking about pretty expensive, top-end resources to deal with those things. This sounds sad, but those people deal with one case at a time, and we know that there is a flood of material out there because there seems, tragically, to be demand for it.

Cathie Craigie: The SCDEA submission says that it deals specifically with that matter. That is obviously a concern for Mr Meldrum as the man who is responsible for staffing the department. Do you want to add anything to what Chief Constable House has said?

Gordon Meldrum: I do not think so. I simply reinforce the point that we have people who are, unfortunately, involved in that work pretty much 24/7, because we have the national e-crime unit. As our written submission says, we have specific measures in place to monitor the overall health, welfare and wellbeing of those people.

I think that there will be an upward trend in e-crime in general, whether such crimes involve extreme pornographic images, fraud or other crimes that are committed with an e-crime attachment. We see that trend already. As Mr House has said, how to police the worldwide web from within the confines of Scotland is a particularly problematic issue for us. In general, we require the right people with high-end skills who can forensically interrogate the internet. However, there are not too many of those people around.

I know that none of what I have just said helps with the bill. I am sorry about that; I have simply made observations.

Chief Constable House: We are interested in another definition—the definition of the word "possession". I have personal knowledge of the difficulties that there have been with the meaning of that word in cases involving images. Does a person possess an image if someone sends it to their website, they view it once and then delete it? Does a person possess an image if someone sends it to their website, they view it once and then leave it there? Does that constitute possession? Does the person have to get the image himself or herself? It is important to try to nail down those issues in prosecutions. Cases have been lost in which it was able to be proven that a person did not establish a link to a website and that the link was established by somebody else for them, although the person did not break that link and it stayed open. There have been debates about physically getting images and images being pushed on to the computers of people who did not go and get them. That is arrangeable through a phone call. Such issues are involved. The information technology issues become highly technical and are beyond my knowledge, but they come into play in successful prosecutions as well.

Cathie Craigie: I am sure that the committee would be pleased if you made suggestions on those areas that we could consider as we take the bill through its parliamentary stages. That would be useful.

Chief Constable House: I am sure that we and the SCDEA could work jointly on that.

Cathie Craigie: We are all aware of the difficulties that computer-generated images, cartoons and drawings that graphically depict children in a sexually abusive way can cause. How should the law deal with that issue? From what has been said today, you should be able to come back to us on that. Should any proposals to deal with that type of child pornography be extended to deal with extreme adult pornography?

Chief Constable House: In my view, the answer to that is yes, but that is a personal view. I suppose that we should follow up the issue in writing. We will do that.

The Convener: Right. You could do so, because the issue has not been considered by the wider body that you represent.

Chief Constable House: Yes.

The Convener: That is fine.

Chief Constable House: I will move on to the issue of drawings and other things, which you hinted at. We are particularly concerned about the virtual world websites, such as Second Life and others, within which depictions of violent child and adult pornography are starting to emerge. As I understand it, the images on those sites are not photographic, and therefore the law as it stands struggles to deal with them.

I am sure that that involves only a very small number of images at the moment, but that will undoubtedly increase, given the number of people who are involved in the virtual worlds way of life.

We will have to consider that issue, because those things seem to be developing into a bit of a trend. Adult and child pornographic violence is taking place in alternative realities; I know that that sounds hugely bizarre and is a bit of a stretch to consider as we sit here, but it is happening nonetheless and causing severe distress.

11:30

Cathie Craigie: I want to draw together the issues for my understanding. Sections 33 and 34 are necessary, as the law in those areas needs to be improved, but perhaps they could be improved because circumstances move quickly in that field and will have changed even since the consultation was carried out. I would welcome more information on that.

It is helpful for us to take on board the comment about resources in relation to staff, and the ability of police and agencies to deal with that issue, with regard to our budget considerations later this year.

Nigel Don: Am I right in thinking that in the situation that we are discussing, you would support the inclusion of very wide-ranging words in the bill? In other words, would you prefer to let the court restrict what is obscene and pornographic, rather than let us do so in the legislation?

Chief Constable House: I return to what I said earlier: we simply want to work in a world of certainty. I do not mind whether a judge tells us what is what, or whether the law does that—the difficulty arises if we develop a case and bring it to court, and it falls apart because the definition is not right. I am not particularly worried about whether you use the bill to give us the right guidance or reserve that guidance for a court to give.

Nigel Don: The phrase "explicit and realistic" in section 34 seems to set boundaries, but one does not have to be terribly clever to get round those boundaries.

Chief Constable House: No.

Nigel Don: I do not possess those skills myself, but it is rather obvious how one might do it. Those are presumably the kind of phrases that need to be taken away, otherwise we will just open up another world in which people can act outside the law.

In such a situation, in order to avoid setting a boundary over which people can promptly go, we surely need a law that is effectively infinite so that only the courts can drag it back.

Chief Constable House: Yes—I do not disagree with that. One can see ways to get round the "explicit and realistic" provision in five seconds flat.

Nigel Don: As Cathie Craigie said, we would appreciate any suggestions on how those words should be put together conceptually.

Chief Constable House: It would have to centre around the distress and alarm that the images cause, but one then comes up against people who will say, "I wasn't alarmed or distressed by it—it is a part of life." It is not easy.

The Convener: Perhaps Mr House has a high tolerance level for distress.

Chief Constable House: Perhaps sitting in front of the committee is adding to that.

The Convener: Stewart Maxwell would like to come in.

Stewart Maxwell: My question is on a separate area.

The Convener: I was just about to ask some closing questions.

Stewart Maxwell: It is a general question about section 17, which deals with the presumption against short custodial sentences. What is the view of ACPOS on the effectiveness or otherwise of such sentences?

Chief Constable Strang: I am happy to respond to that on behalf on ACPOS. The ACPOS evidence to the Scottish Prisons Commission—which did not come from me—acknowledged that short sentences did not in general address the underlying factors that lead to offending behaviour. A longer custodial sentence is appropriate for serious offences, but the types of offences for which people are sent to prison for a short time tend to be at the more minor end of the scale.

ACPOS supports the community payback order because it allows the sentencing court scope to include conditions that address the underlying cause, whether that is alcohol, drugs or mental health issues. It is also of more benefit to the community that has been the victim of the crime, in that requiring the offender to pay back in some way is a more satisfactory outcome than their going to prison for a short time. The academic evidence is clear that the likelihood of reoffending is less with a community sentence than with a repeat short prison sentence. ACPOS welcomes that proposal in the bill.

Stewart Maxwell: Much of the debate has been about short sentences for acts that are deemed to be serious. I know that that sounds slightly odd, but much attention has been paid to knife carrying. Will you express your views on that?

It is generally accepted that the public views non-custodial sentences as a soft option. How do we get round that?

Chief Constable Strang: For the public and sentencers to have confidence in a community sentence, it clearly needs to be not the soft option. That is why it needs to be immediate and visible, and people need to have confidence that it will be completed, that it is not simply an appointment in four weeks' time and that something will happen if the offender does not turn up. Progress courts will be important, as will follow-up of community sentences and consequences for people who do not comply. Those all need to be put in place before short sentences are removed. Offenders are sentenced to short-term imprisonment because people do not have confidence in community sentences, so I agree that a lot of work needs to be done to increase their effectiveness and public confidence in them.

Chief Constable House: Convener, may I comment on knife crime? I know that time is short.

The Convener: You have already expressed a view on that. Do you have anything to add to what you said earlier?

Chief Constable House: Our submission talks about most occasions; there are occasions when a custodial sentence may be correct. There is a public appetite for locking someone away for six months on their first conviction for carrying a knife, but the court needs to understand why the person is carrying a knife. If it is because they are going to do violence, a prison sentence may well be right. However, if it is because of peer pressure, I suggest that another approach is right—explaining and doing some meaningful, visible work on the consequences of knife carrying and violence. Sentences for second and third convictions for knife carrying should not be less than six months anyway, so they would fall outwith the provisions.

Bill Butler: In ACPOS's view, is there a place for short custodial sentences?

Chief Constable Strang: Each case must be taken on its merits. There will be occasions when the court considers that a short custodial sentence is necessary and appropriate. We want a shift in the general approach to one that recognises that putting people in prison for a short time and then allowing them out unsupervised simply does not address the crime problems that Scotland faces. In principle, there should be a presumption against short sentences. Also, if people go to prison, their sentences should contain a custodial element and a community supervision element so that they are not simply released unconditionally. However, there will be occasions when a court thinks that a short custodial sentence might be appropriate.

Bill Butler: Are you saying that there is a place for short custodial sentences?

Chief Constable Strang: I am saying that I do not think that we can entirely remove that possibility; I am not suggesting a percentage or saying in what circumstances such sentences should be given. It would be unacceptable to say to sheriffs, justices or judges that they cannot in any circumstances sentence someone to imprisonment for less than six months.

Bill Butler: That is clear. Thank you.

The Convener: We are really behind the 8-ball. Cathie Craigie will ask a final question.

Cathie Craigie: Chief Constable Strang's answer to Bill Butler cleared up the point about which I was going to ask. I was looking for clarification of what ACPOS said in its written evidence.

The Convener: I thank the witnesses for their attendance. You are aware of the matters that remain outstanding and will be dealt with in correspondence. We look forward to hearing from you in due course.

11:40

Meeting suspended.

11:44

On resuming—

The Convener: Panel 2 is made up of witnesses from Victim Support Scotland: David McKenna is chief executive, Susan Gallagher is director of development, and Jim Andrews is director of operations. Thank you for the submission that you were kind enough to send us, which we read with considerable interest. We move straight to questions.

Bill Butler: What are Victim Support Scotland's views on the proposal to establish a Scottish sentencing council?

David McKenna (Victim Support Scotland): We warmly support the proposal to bring into being a Scottish sentencing council. In the 21st century Scotland needs not just a Parliament but a sentencing council.

That is not a reflection on the judiciary; we have great judges and sheriffs, who are professional and experienced—our judiciary is probably one of the best in the world. It is about the need to build public confidence in our sentencing processes, so that there is demonstrably a greater understanding of consistency in sentencing. That is required in the 21st century. The sentencing guidelines will be an important tool for judges and other sentencers. The proposal is a win-win for communities, victims and the criminal justice system.

Bill Butler: You mentioned the need to build public confidence in sentencing and an understanding of consistency. The committee has

heard different views on whether there are inconsistencies in sentencing. In your experience of working with victims of crime, have you come across examples of inconsistent sentencing or a commonly-held perception that sentencing is inconsistent? I think that your view is informed by such experience. What impact does inconsistent sentencing—or a perception of inconsistency—have on victims?

David McKenna: The area is complex. Many victims and families will never be satisfied by the sentence; for many people, no sentence is the right one. We understand that. However, all too often victims and their families say to us, "Not only did I not agree with the sentence but I have no clue how any system could have arrived at that sentence."

It is not easy to demonstrate to people who are involved with the criminal justice system and to communities the parameters within which sentencing takes place. We say to people, "Okay, you might not be happy with the sentence, but at least you should have the right to understand how it was arrived at." Apart from the lack of information and support for victims and witnesses in the criminal justice system, the impact of sentencing is the issue that victims raise most often with Victim Support Scotland.

There is little evidence of inconsistency, but there is even less evidence of consistency. The purpose of the new approach will be to demonstrate to the public that there is consistency and to build communities' confidence, so that people can have confidence when they participate in the criminal justice system, not just as victims but as witnesses who want to contribute to the process.

Bill Butler: Are you saying that clarification of the parameters of sentencing will help to build confidence in the system, and that although someone might not be satisfied with a sentence, at least the rationale behind the sentence will be explained to them?

David McKenna: People have the right to understand why a particular sentence was given in a particular case. That is what sentencing guidelines can do for us.

The Convener: Can they? The perception of inconsistency in sentencing does not appear to be borne out by the evidence. Is there a reason to think that if we set up a sentencing council that clearly lays down parameters, the public will become aware of and be satisfied with those parameters? There are difficulties in that regard, are there not?

David McKenna: Absolutely. The issues will not be addressed simply through the provision of a sentencing council, which is why we welcome the proposal that, as part of its legal responsibilities, the sentencing council would build confidence by providing information on sentencing in Scotland. As I say, it is a matter not of the sentencing council simply existing, but of the processes that the council will go through to demonstrate publicly the guidelines and parameters that judges will use as a tool in sentencing. I am not saying that the sentencer or the judge will not have discretion, but we need to be able to say to victims that, given the circumstances of their particular case, the guidance indicates that the judges will work within parameters X to Y. We do not have that at the moment.

Robert Brown: You support the issuing of guidelines and the establishment of a sentencing council. Given some of the difficulties that judges, in particular, have expressed, would you be satisfied if the body turned out to be a sentencing advisory council, with the judiciary having the last word on the guidelines?

David McKenna: I am not sure whether that arrangement would be as effective in demonstrating sentencing consistency to the public as the approach that is set out in the bill. An advisory group might just disappear into the background and never be heard from again. It might do good work, but it might not make the public and communities feel secure or confident about the sentencing process. The bill's current approach is the right way forward.

Robert Brown: I follow your argument about the status of the proposed body, but nevertheless we are talking about what would be, effectively, a quango that would be appointed by the Government and would give instructions to the judicial system and judges. Given such provisions, would you be satisfied for the final say on the matter to lie with the judiciary?

David McKenna: I have read some of the judiciary's views on the relationship between it and the proposed council and on what you might call the separation of powers. I am not an expert on constitutional law, but I know that we have a very good judiciary who do a great job, and I do not think that a sentencing council's statutory arrangements would affect the judiciary's performance or the role that it carries out in our courts. I cannot see judges being told, "You will do this or that," and thinking, "That's not right, but I'll do what they say anyway." The bill contains the necessary checks and balances. The issue is about enhancing sentencing consistency by working in partnership and bringing into the process not just judges but people from communities and different areas of society. I do not see that as a challenge for the judiciary, although I understand its views on the matter.

The Convener: We move to the use of custodial and community sentences.

Paul Martin: What is the panel's view of evidence from sheriffs that short custodial sentences can be effective and that their current use is generally appropriate?

Jim Andrews (Victim Support Scotland): In general, we support the use of community payback orders but recognise that, as ACPOS made clear earlier, custodial sentences might be appropriate in certain circumstances. However, we believe that a wider use of community payback disposals presents a real opportunity for 21st century Scotland to address some reoffending issues. It is important that victims have a clear understanding of, are involved in and contribute to the process and that the outcomes are visible to communities. It is also to be hoped that the community payback process will benefit offenders to ensure that it is as much of a win for them as it is for communities and offenders.

Paul Martin: Section 17 is on "Presumption against short periods of imprisonment or detention". Do you think that such a presumption and the views that you have just expressed reflect the views of most victims? Do most victims really feel that they do not want an individual who might, for example, be involved in serious antisocial behaviour to face the possibility of incarceration?

Jim Andrews: To start with, I think that most victims would wish that they had never become a victim in the first place. Then they would wish to know why they had become a victim and whether they had been a random victim or had been targeted or whatever. Finally, they would hope that what happened to them never happened again. In that context, if community payback is seen to be effective, I think that victims would support it.

Paul Martin: But do you accept the sheriffs' view that short sentences are the only way for communities and, indeed, victims to get respite from the prolific offenders who turn up at court on many and several occasions? Does the short-sentence approach not represent victims?

Jim Andrews: As others have pointed out, on certain occasions individuals will require a custodial sentence not only to give their community some respite but to ensure the security of the victim and the community in which they live. As a result, on some occasions custodial sentences will always be appropriate. However, the presumption in favour of community disposals applies not to those individuals but to other offenders who might be better dealt with under that approach.

Paul Martin: What examples can you cite from your experience of supporting victims to back up that view? What consultation has taken place with victims on section 17?

Jim Andrews: Each year, Victim Support Scotland supports about 100,000 victims of crime, about 30,000 of whom are victims of violent crime such as serious assault or assault against the person. In communicating the feedback that we receive from service users, we try at all times to ensure that we represent all victims' views. Of course, not every victim reacts to a crime in the same way or will necessarily have the same opinion about what happened to them but, in general, victims look for justice and want a clear and transparent system that has clear outcomes that benefit them, the community and the offenders.

Paul Martin: With respect, I am looking for specific examples. In your submission, you say, significantly:

> "Victim Support Scotland supports this section when suitable alternative disposals are … available."

You must have based that view on evidence that such a disposal is of benefit to victims. On the basis of work that you have carried out, do you feel that that is the view of most victims? Where is the evidence that such disposals are of benefit in the majority of cases?

Jim Andrews: From the information that we receive through our operational services, which are in every local authority area in Scotland and provide day-to-day support for victims of crime, we believe that victims of crime would support these measures.

Paul Martin: So there is evidence that you could provide to the committee after this meeting.

Jim Andrews: We could provide background information.

Robert Brown: One imagines that people's attitudes to such matters might well change when they become a victim. Has any consistent view emerged from victims on the circumstances in which only a custodial sentence or only a community sentence might be appropriate, or are those views simply too diverse because of the different attitudes held by and the personalities of the victims themselves?

Susan Gallagher (Victim Support Scotland): In our experience, victims of serious crime always want the offender to be given a custodial sentence, as a result of not only their personal experience, but their experience in their community and their worries about their safety. Victim Support Scotland feels strongly that custodial sentences are appropriate in such cases.

12:00

Robert Brown: I do not think that anybody would argue with that for serious offences.

Susan Gallagher: Serious offences, violent offences and assaults.

We know from our experience on the youth justice side that many victims feel strongly that young offenders should not necessarily be incarcerated, but should be helped and supported. Some victims feel that an offender should be helped rather than just put in prison.

Robert Brown: From what was said earlier, I took it that the primary wish of victims is for justice to be done but that they also want to prevent the offender from repeating the offence with another victim. Is that a reasonable interpretation?

Susan Gallagher: Absolutely.

Robert Brown: Against that background, how do victims feel about the effectiveness of short-term custodial sentences?

Susan Gallagher: People think that when somebody goes into prison they will be helped and supported from the moment they arrive until the moment they are let out—that they can go on anger management courses and other courses of that nature. However, with short-term sentences, such courses will not necessarily be available, so victims often feel a bit let down.

We also know that some victims feel angry when offenders go to prison and then receive, in the victims' eyes, the benefits of participating in alcohol programmes, drug programmes or substance-abuse programmes, when the victims themselves are not eligible for such services within their community and can get them only if they pay for it. That is a disparity.

Victims often feel that, instead of being given short-term sentences, offenders could be put to better use in their community, where they could do work of value for the community as a whole and, possibly, for the victim. Putting people in prison for short-term sentences will not necessarily help the victims.

Robert Brown: In your submission, you make two very interesting suggestions. First, you suggest that the court should set an alternative sentence alongside the community payback order. Secondly, the order should be given only if the treatment or activity is immediately available. Both those suggestions would involve substantial changes to the current arrangements.

I can see the merit in your suggestion on alternative sentences, but breaches of orders can be very varied. Some people are defiant from the beginning, but others breach orders in a more modest way, or simply fail to turn up at some point. As a result, your suggestion might not be terribly helpful in making community sentences work better.

David McKenna: We have to build confidence within communities. At present, things can be long and drawn out, and the outcome may be nothing like what it might have been had a community disposal not been given in court. We have a real opportunity to transform how we deal with low-level offending, to make things better for offenders, for victims and for the community. If the community and the judiciary are not confident in the proposals, the proposals will not work.

We are keen that communities should be given information on policies and procedures in relation to community payback orders. Communities should be involved in consultations and in the delivery of services. In the sentencing process, it should, from the beginning, be made clear to the victim and to the community what the alternative would have been. Mr Brown is right to suggest that people's situations can change, but that can happen in every aspect of life. We are talking about situations in which, had the community payback order not been available, a prison sentence would have been given there and then.

We need to give victims information about that process and about the terms of any order. Indeed, victims' views ought to be taken into account when the terms of an order are set, to ensure that their safety and security, and that of the community, are protected. Regardless of the nature of the offence, we need to ensure that people on community payback orders do not go back into the community and reoffend. One way to do that is to involve the community in understanding what the individual has been asked to do.

Robert Brown: Are you suggesting that, in practical terms, there would be a presumption that a suspended sentence would be the alternative, but that there would be some wriggle room in suitable instances?

David McKenna: Yes.

Robert Brown: You say that a community sentence should be handed out only if the chosen treatment is available at the time of sentencing. There are several ways of achieving that—it can be done administratively or when orders are handed out. Do you think that the best way to tackle the obvious problems of getting disposals to start on time and making them suitable is through the judge, who may or may not have knowledge of the administrative background that is available to the social work department or whoever?

Susan Gallagher: That is an option, but we want services to be available in communities—and we want communities to see that services are available and that resources are put in to ensure

that they are available—so that when a judge hands out a sentence, they know that the person concerned will be able to get the necessary support in the community. From our understanding of how community service orders work, people can sometimes wait for weeks or months for that to happen, which does not help to instil confidence in the general public. We think that making resources and services available quickly will help with confidence and transparency.

Robert Brown: The core points are the provision of information to victims, the perceived effectiveness of community sentences and the actuality: whether they are what they were supposed to be and whether people on them can get cracking from an early stage.

Susan Gallagher: Absolutely; and information should be available to people on what the sanctions will be if an order is breached.

The Convener: I have a couple of questions. There is a general perception among the public that community sentences are the soft option. I know that you have partly dealt with this, but with regard to the bill specifically, how do you think that that image could be improved—assuming that you do not think that community sentences are a soft option?

David McKenna: All three of us will have great ideas about that, but the first thing to say is that, at present, community sentences are misunderstood by communities. Communities do not see them and do not know that they are happening. In some ways, community sentences are unwanted, because of people's experience of crime and because they do not get information about what is happening. That is why the existing orders fail us.

We need to move to a position in which we understand the outcome that we want to achieve for offenders, which is that they reduce or stop their offending and we thereby reduce crime. The desired outcome for prisons is clear—we want to spend less money putting people in prison. We do not do enough talking about the outcomes for our communities that we will deliver through community payback orders. That discussion needs to start now.

We need to tell communities—I am making these outcomes up—that 1 million new trees will be planted in Scotland, that there will be a reduction of 1MW in the amount of power that is used, or that 500 miles of countryside will be opened up and made more accessible to people. We need to say to communities what CPOs will mean for them. Instead of just saying that they will be good for communities, we need to say, for example, that they will result in the development of 100 play parks or the installation of 10,000 recreational benches or seats in leisure areas across Scotland. We need to set out an agenda that shows what CPOs will mean for communities and which drives delivery of such outcomes. That is the missing part.

Jim Andrews: Community payback could be a huge success if it were linked to community planning and community safety and if community planning partnerships identified work that needed to be done in communities in their area. Through the community payback programme, such work would start to get done, which, as well as being visible, would be beneficial to the offender.

The Convener: You have dealt with the issue of speed. There seems to be general agreement that, regardless of the form that it takes, community service should have an immediacy that it does not appear to have in some jurisdictions at the moment.

Turning to visibility, there is a view that, whatever happens, offenders should be punished to an extent. How do you identify that a community service project is being carried out by those who have been sentenced by a court to do so? Do you take what some might call the extreme measure of having people wear Guantanamo bay suits? Do you have them wearing something that is recognisable? Do you advertise on the site by means of a billboard that it is a community service project? Are you prepared to do such things even if it causes some embarrassment to the offender?

David McKenna: I certainly believe that community service has to be visible; it does not have to be about wearing bright orange or fluorescent jackets with large signs on them. I hear the discussion from both sides about how community service should not be too brightly visible. We should talk to offenders about their views. I suspect that many offenders who participate in community service—if it is a constructive sentence for them—will want to take some pride in the fact that they are giving something back to the community. We can have visible community service and design that visibility into the programmes so that it does not embarrass people or take away their dignity, but helps to build their pride and dignity. We will have to wait and see what happens in that respect.

The Convener: I come back to something that you said earlier. I was interested in the statistics that Mr Andrews provided that showed that in the course of a year you deal with some 30,000 people who are the victims of violence. In some cases, the violence is minimal, but in others it is considerable. Those of us around this table speak frequently to victims of crime—perhaps the people to whom you have spoken are of a more forgiving nature—but if I were walking along the street at night and an 18-year-old with a history of previous convictions head-butted me and broke my glasses

and teeth, apart from the pain and woe caused to me and the considerable expenditure that I would incur, I would expect that guy to be locked up. Would I be wrong to expect that?

David McKenna: Many people share that view, but many victims do not share it. We stand back and see that what is happening is that we are sending people to jail for two, three or four months. That is costing us a lot of money and the people are getting no help or support to change how they live when they come out of prison. Indeed, when they come out of prison they have often lost their home, family and job. So prison is expensive and it does not improve the position of the offender or the victim. Community sentencing costs a lot less, and if it could be even 1 or 2 per cent more effective, we could reduce the level of victimisation that the community might experience in the future, even though it is a challenge to get things right in the immediate period.

In the case of low-level crimes, most people do not want people to go to jail. That is the general experience about which we hear, not from the 30,000 people who suffer violent crime, but from the other 70,000 who suffer low-level property crime. People say to us, "I don't want them to go to jail; I just want to know that it won't happen again." The most common words that come out of victims' mouths are, "I don't want it to happen again." The present system practically ensures that it will happen again and that is the sad part about it.

Cathie Craigie: A majority of MSPs believe entirely in Victim Support Scotland's position on immediacy and that the punishment should fit the crime and should be swift, and that there should be some payback to the community to make amends for the crime that has been committed. However, to achieve those goals—particularly immediacy—there is a cost. We have had oral and written evidence that getting the resources required for the bill's proposals will be difficult. If the bill is passed without additional resources being allocated to it, will it be effective?

12:15

Susan Gallagher: That is the challenge for everybody. The system does not have many resources in place, so it does not necessarily advocate for the needs of communities, victims of crime or even offenders. You are right—if resources are not provided effectively, the bill might not do the best that it could do.

Resources must be available for a variety of measures. Notwithstanding that, some opportunities that are still out there might not cost as much to put in place. Our organisation works in most communities and in the 32 local authority areas. If we are given small amounts of resources, we can work with providers to assist them with victim awareness training, for example. Ways are available now in which we can assist the process in communities. However, our organisation feels strongly that resources need to be in place to enable effective implementation.

David McKenna: I will make two quick observations. The figure depends on how it is counted, but Scotland spends £2 billion on criminal justice. We are not talking about £500 million to get the provisions off the ground. Within the existing spend, there must be ways of doing things differently that will release resources to allow measures to happen.

We need a new dynamic in how we think about the issue. For example, judges and sheriffs can make compensation orders to victims. That does not happen often, sometimes because no victim is discernible. When that is the case, why cannot a compensation order be made in court for use in community payback by the community that the crime has affected? The Procurator Fiscal Service can make compensation awards to victims—in effect, they are fines that go to victims. However, victims often do not want such awards, or no victim is discernible. Why cannot that money be channelled back into the communities that suffered the crimes, to improve their safety and improve life there?

We must start to consider new ways of operating in the future and not just rely on the old ways. Plenty of resources are in the system.

Cathie Craigie: Given that resources will be tight in the next financial year, when we will want to implement the bill, if victims were given the choice between spending £1 million on a quango—the sentencing council—or on front-line services, what would be their priority?

David McKenna: How tempting—let me think. It is clear that investment must be made in front-line services. At the same time, investment must be made in the future.

Cathie Craigie: You cannot have both. What is the priority?

David McKenna: Perhaps we cannot have the Rolls-Royce option in both cases, but the challenge for us is to find something in the middle that invests in today and in the future.

Members will have seen the international statistics and those from Scotland and the UK that show the public's decreasing confidence in their criminal justice systems and their decreasing likelihood of coming forward as witnesses, of reporting crime and of co-operating with the authorities. Dealing with those issues presents challenges for society. To build confidence, we

must invest in initiatives such as the sentencing council. Otherwise, what we are talking about today will not matter in 20 years' time, because nobody will co-operate with the criminal justice system or come forward as a witness and communities will look to deal with crime differently.

We must find a way to invest in the future and in front-line services, although perhaps we will not have the Rolls-Royce in both cases. I am thankful that working that out is not my job.

The Convener: That is an honest response.

You make an interesting point about money going into communities as reparation. It would be competent for a court to impose a compensation order if an agency could handle that.

David McKenna: Absolutely.

The Convener: The problem is that most offenders do not pay.

David McKenna: Of course that is correct. However, evidence from the United States and other countries shows that if compensation orders or victim fund orders are used rather than fines, they are far more likely to be paid. Offenders pay more when compensation orders rather than fines are used.

The Convener: All things are relative.

David McKenna: Yes.

The Convener: No great success has been experienced in collecting fines or compensation orders here, but that is for another day.

Nigel Don will close on disclosure.

Nigel Don: It is incumbent on me to disclose that you did not give us evidence on disclosure, so if you want to say nothing, you are entitled to do so.

Rape Crisis Scotland expressed concern that the medical records of victims of sexual offences figure more and more in court proceedings. That was in its evidence and not yours, but as you are here, what are your thoughts on that? Will the bill's proposals on disclosure help?

David McKenna: The bill is a comprehensive one and we focused on the key issues from our perspective. However, we do have something to contribute to the debate on the important matter that you mention. Susan Gallagher will pick that up.

Susan Gallagher: We have given evidence on sexual offences legislation in the past, and we concur with Rape Crisis Scotland's views on medical evidence. If it would be helpful, we are more than happy to send you a written submission on that.

Nigel Don: Given that it is a procedural matter, the more detailed the evidence we receive from those who understand these things, the better.

Susan Gallagher: Okay. That is no problem.

Nigel Don: That would be appreciated. Thank you.

The Convener: As the committee has no further questions, I thank Ms Gallagher, Mr McKenna and Mr Andrews for their attendance this morning and for their exceptionally helpful evidence.

12:21

Meeting suspended.

12:23

On resuming—

The Convener: We resume in order to take evidence from our third panel. I welcome Maire McCormack, head of policy, and Nico Juetten, parliamentary officer, both from the office of Scotland's Commissioner for Children and Young People; Tom Roberts, head of public affairs at Children 1st; and Dr Jonathan Sher, director of research, policy and programmes at Children in Scotland. Thank you for your attendance. We move straight to questions, which will be opened by Angela Constance.

Angela Constance: Good afternoon. Under the provisions in the bill, it will still be possible to deal with children aged between eight and 12 on offence grounds under the children's hearings system. What are your views on that? What further changes, if any, do you seek?

Maire McCormack (Scotland's Commissioner for Children and Young People): Thank you for inviting us. As you would expect, we approach the bill from a children's rights perspective. The function of Scotland's Commissioner for Children and Young People is to promote and safeguard children's rights and to have regard to the United Nations Convention on the Rights of the Child. That guided our approach to our submission.

The bill deems children under eight to lack capacity, as is the case under section 41 of the Criminal Procedure (Scotland) Act 1995, which is left intact, but those aged between eight and 11 are not decriminalised. The bill simply states that they cannot be prosecuted. If a child accepts an offence ground or that is established, there are serious implications under section 3 of the Rehabilitation of Offenders Act 1974. Our office has evidence that there are implications later in life for children who accept such grounds, because the information is still carried when they are looking for employment or want to go to college.

The fact that they accepted a ground as a young child can come back to haunt them.

Tom Roberts (Children 1st): As we state in our submission, the prosecution of children of eight on offence grounds does not fit with the model to which we think Scotland aspires in dealing with young people who offend. We also argue that it does not fit with our international obligations and is not in the best interests of those children, which is the starting point from our perspective.

Dr Jonathan Sher (Children in Scotland): Children in Scotland commends the Government for recommending an increase in the age, but we believe the proposal in the bill falls far short of what could and should occur. Perhaps there was a misunderstanding, because the policy document that explains the intent clearly notes the intention to increase the age of criminal responsibility to 12, but the bill does not do that. It confounds two different things: the age of criminal responsibility and the age of criminal prosecution. We believe that both should be increased. We see no point in, and do not support, splitting the two ages and maintaining a system that regards children in primary 4 as adults if they behave badly. They are not adults, but children.

We recommend that the age be increased to 16, not 12. There is no scientific basis for picking a particular age, whereas there is a scientific basis for understanding that a child's developmental age and their chronological age can be extraordinarily different. All 12-year-olds, 10-year-olds or 14-year-olds are not at the same developmental level and they do not have the same capacity or responsibility. The law ought to reflect a more sensible view.

The age of 12 is arbitrary, as any other age would be arbitrary. It was chosen simply because the UN said that it was the absolute minimum that would not be internationally appalling. I do not think that those were the UN's exact words, but that was certainly the sentiment. However, it is not good enough for Scotland to be internationally compliant. Through the children's hearings system, Scotland deservedly has a reputation for having far more than a minimalist approach to children's rights and wellbeing.

We argue that 16, not 12, should be both the age of criminal responsibility and the age of criminal prosecution. That would dovetail with other things that already exist. The children's hearings system, by and large, operates until the age of 16. Polmont young offenders institution starts to take offenders at the age of 16. Looked-after and accommodated children continue to be so until they age out at 16. Even if 16 is somewhat arbitrary, it is at least consistent with other laws relating to age and the perception of responsibility.

Angela Constance: Dr Sher anticipated my second question, but I would be interested to hear what the other three witnesses think about the age of criminal responsibility and the age of prosecution.

Maire McCormack: The bill is good in that it states that children under 12 cannot be prosecuted. Few children under 12 are prosecuted at present. I think that there have been four such prosecutions in the past four years. We are extremely pleased that the Lord Advocate's discretion in deciding whether to prosecute children under 12 is to be removed, so that no child under 12 will now be prosecuted. That is a welcome proposal.

12:30

Angela Constance: Has the bar been set too high or too low at 12?

Maire McCormack: The difficulty is that the bill has been presented as raising the age of criminal responsibility; in fact, the age of criminal responsibility will remain at eight. As Jonathan Sher pointed out, the UN Committee on the Rights of the Child refers to

"a very low level of age 7"

and to

"the commendable high level of age 14 or 16".

The committee states that setting the age lower than 12

"is considered … not to be internationally acceptable".

Two issues have been conflated. Prosecution is one thing, but capacity, which is not touched on, is also relevant to the age of criminal responsibility. The small group of children between eight and 11 will be immune from prosecution, but there has been no engagement with the issue of capacity. We need to consider whether a child is able to understand the nature and consequences of the crime that has been committed. Our submission focuses on the consequences. The UN Committee on the Rights of the Child's guidance on the subject says that we should engage with the issue of capacity, not set the bar too low, and take into account the child's emotional, mental and intellectual capacity.

Angela Constance: Are you suggesting that splitting the age of prosecution from the age of criminal responsibility is unhelpful?

Maire McCormack: It is very unhelpful, as it conflates two issues. We are dealing with a hugely complex legal construct. Last week, we met to discuss it with a number of experts; we have all found it a difficult issue to tackle. The policy memorandum says that the age of criminal responsibility is being raised, but it is not—it will

stay at eight, which is deplorably low. That will have consequences when children go through the children's hearings system on an offence ground. It is good that the age of prosecution is being raised, but the two issues are distinct. We need to ask ourselves whether the bill complies with the spirit of the United Nations Convention on the Rights of the Child. We have made some suggestions that may be helpful. We would like both the age of criminal responsibility and the minimum age of prosecution to be raised.

Nico Juetten (Scotland's Commissioner for Children and Young People): Scotland is a bit awkward on the issue, as there are a number of different concepts around the age of criminal responsibility. At present, we are employing at least two of those. We have a capacity cut-off at eight that the bill does not propose to change in any way. We have what one legal academic has called an age gateway of 16—that is the cut-off after which young people are dealt with through the adult criminal justice system as a matter of standard procedure. We also have a bit of a cut-off on the prosecution of children under 12. It is not as clear cut as the others, but it is clarified in the bill. I understand that, at the moment, children under 12 can be prosecuted only with the express consent of the Lord Advocate. Although that is good to an extent, it is much better to draw an absolute line in primary legislation. Three concepts are in use here at the moment. The bill clarifies the place of one of them, but it does not do much more than that.

Angela Constance: What would you like to see?

Nico Juetten: Essentially, we would like to see the decriminalisation of children under the age of criminal responsibility. That could be achieved in different ways. We could raise the age of criminal responsibility, which would mean that no child would be dealt with in the children's hearings system on an offence ground, with the potential criminal consequences that that entails, such as a criminal record. Alternatively, the Parliament could reconsider section 3 of the Rehabilitation of Offenders Act 1974 and remove the criminal consequences of offence ground referral—I understand that it has the power to do so.

I do not think that we have concluded what is preferable, but we want children who commit offences to be dealt with by the children's hearings system and the underlying reasons for the offences—their needs and so on—to be addressed in the interests of the offender, the wider community and the victim. We do not want children to leave the children's hearings system or any other forum with a criminal record or to be unaware that they might have one.

Tom Roberts: I support much of what has been said. We would certainly prefer the age of criminal responsibility and the minimum age for prosecution to be set at 16. That would fit with international obligations and with a number of other areas of our society, as Jonathan Sher said. Setting 16 as the minimum age would also pick up on how we view the activities of young people under 16 as a shared responsibility between us as a society, the young people themselves and their parents. The fact that children have to stay in full-time education until they are 16 suggests that we as a society regard them as still growing and developing as individuals up to that age, so applying the full extent of the law to those who are below 16 feels incongruous.

Dr Sher: Another point about the congruity around the age of 16 is that section 42(1) of the Criminal Procedure (Scotland) Act 1995 states:

> "No child under the age of 16 years shall be prosecuted for any offence except on the instructions of the Lord Advocate".

The proposal regarding the age of 16 that is before the committee today is therefore not a radical new idea: it is, in fact, normal practice. We think that the law should rise to meet that standard. Fundamentally, we believe that it is not appropriate to label any child as a criminal. Criminal status should be reserved for those whom we consider to be adults.

I will give three quick reasons for that. First, there is not a shred of evidence from Scotland or from any other developed nation that indicates that labelling, punishing and conferring criminal status and a criminal record on children does the slightest bit of good for them as human beings, for society or for making communities safer. Such an approach has no positive consequences for anyone involved; in fact, it makes things worse, because conferring criminal status and labelling a child as a criminal gives that child an identity, and children have a habit of living up to or down to the labels that we assign to them. If we call them criminals, we can pretty much count on their adopting that identity and living down to it. Calling them criminals therefore does not make practical sense in relation to community safety or personal development.

Secondly, people come out again. We are talking about people who can expect to live for more than half a century after whatever happens in response to their behaviour happens. What is likely to produce the best outcome for that next half century of their being among us? There is no evidence that criminalising them will make that a better half century for them, us or our communities.

Finally, it seems to me that, amazingly enough, we can learn something from the States. As my accent betrays, that is where I come from. The American criminal justice system is absolutely not

one that Scotland should emulate or want to emulate. However, even in America, where the level of incarceration is appallingly high, someone is not automatically considered for the criminal justice system until they are 18—even 16-year-olds are not automatically considered to be adults. We have to think carefully before creating a society in which a child can behave badly enough to earn adult status but in which there is no corresponding positive behaviour that will result in adult status. Criminality is an adult construction; it is not for children.

Robert Brown: I understand the labelling point and the criminal conviction aspect. However, I would like to ask a technical question about the children's hearings system. What are the implications of the age of prosecution and/or age of criminal responsibility being set at 12, 16 or some other age in between for the children's hearings system in terms of its grounds of referral and any additional powers that it might need? Obviously, children under the ages of 12, 13 and 14 can commit what we would describe objectively as crimes. Does there need to be a kind of offence-type ground, whether we make it a non-offence ground or whatever, that will allow the children's hearing to have adequate competence in these areas? Does the children's hearing require additional powers if the prosecution arrangements are done away with for children under a certain age?

The Convener: If you answer that, Ms McCormack, that will give you an opportunity to respond to the previous question as well.

Maire McCormack: In our submission we suggest that section 41 of the 1995 act should be repealed and that a new non-offence ground should be introduced to allow for children who are under 12 to be referred to the children's hearing—

Robert Brown: That involves situations in which the children have been, in effect, offending, as it were.

Maire McCormack: It would be a behavioural ground that would have no prospect of criminal consequences. We believe that it would be an abdication of our responsibility towards children who exhibit offending behaviour if their needs and behaviours were not addressed. We suggest that work should be done on rehabilitation and that people should focus on putting forward a new ground of referral. I think that that was raised during the discussions on the children's services bill, so it is not a new proposal.

The proposal would also encompass children who were under eight who did something that would be an offence ground at the hearing but who could not go to the hearing because of their age, which would be useful because those children are vulnerable and have deep-seated needs.

Robert Brown: Is there a need for the panel to have any additional powers?

Maire McCormack: Not that I am aware of.

Dr Sher: The submission from the Scottish Children's Reporters Administration offered the same idea, which Children in Scotland supports. We believe that a new, non-offence ground should be added. I want to be clear that Children in Scotland is absolutely not recommending that children who behave badly should be given a free pass or that we should look the other way when that happens.

We care about all children, and the truth is that most of the victims of child-perpetrated bad behaviour are other children. A 12-year-old child is far more likely to give a right kicking to someone who is 10 than someone who is 27. Because we care about what happens to all children, we believe that children's bad behaviour should be handled seriously by the children's hearings system. Children should not be given a free pass. They cannot behave in any way that they like, and there need to be immediate and real consequences if they behave badly. However, the point of those consequences, even if they include being sent to secure accommodation, is not simply to punish them but to find ways of unlocking the door so that those children can have better futures and become law-abiding and productive good citizens. We need to do everything in our power to ensure that that happens. The children's hearings system has a better chance than the criminal justice system does of producing that outcome.

12:45

Stewart Maxwell: I accept what you are saying about there being no free pass and children not being allowed to create mayhem and go free. The children's hearings system has a great role to play, and I am a strong supporter of it. However, surely the fact that we would be retaining section 42 of the 1995 act, which ensures that those between 12 and 15 would be prosecuted only on the direct instruction of the Lord Advocate, strikes a better balance than removing entirely the power to prosecute those under 16 does.

Tom Roberts: I think that that is a question of how we want to set out our approach to young people who become involved in what we would call offending behaviour. Part of what is important is the nature of young people's involvement in offending. The University of Edinburgh's study of youth transitions shows that a lot of young people become involved in what we would call criminal activity in adults but do not carry on that activity when they become adults. That should teach us

some lessons about how we respond to young people in those situations. We have already mentioned that, if you mark someone as being criminal, they start behaving like a criminal. A number of studies have shown that we are too quick to criminalise, and that it is more effective to minimise the response and focus on diversion as much as possible.

We are not convinced by the argument that there are some crimes that are serious enough to require referral to a higher court and cannot be dealt with in the children's hearings system, with all its welfare-based provisions.

Stewart Maxwell: I do not want to get into a debate about that, but there have been some exceptionally horrible cases in which children under the age of 16 have committed heinous crimes. I am not sure that the general public would support the line of argument that you just expressed.

Tom Roberts: It is important to design our system based on our approach to the majority of young people, rather than the one or two extreme cases.

Stewart Maxwell: Sorry to interrupt, but is that not exactly what is being proposed? The norm would be for cases to be dealt with through the children's panel system but, on the instruction of the Lord Advocate, certain rare cases involving children between the age of 12 and 15 could be prosecuted. As I asked earlier, is that not the right balance?

Tom Roberts: I do not think that European countries and other countries around the world that do not have that provision are suffering from a major outbreak of youth crime. As Jonathan Sher said, we are not arguing that there should be no response; we are talking about what the starting point for that response should be. I think that the starting point for almost all young people who are involved in criminal activity must recognise that there are significant welfare needs in their background. The better we can respond to those needs, the more likely we are to prevent further reoffending and divert those children from a lifetime of crime.

Stewart Maxwell: At the start, Maire McCormack said that four cases involving children under the age of 12 had been prosecuted last year.

Maire McCormack: In the past four years.

Stewart Maxwell: That is an extremely small number. Does the fact that those cases have arisen—and have been able to be prosecuted because of decisions of the Lord Advocate—suggest that there is a case to be made for keeping the age of criminal responsibility at eight but changing the age of prosecution to 12? If the age of criminal responsibility were changed to 12 as well as the age of prosecution, the possibility of prosecuting cases involving people under 12 would in effect be removed.

I have another quick question. In those countries that have higher ages of responsibility and prosecution—Dr Sher mentioned that it is 18 in the USA—is it not the case that, when a crime has been committed by two people, one over the age of responsibility and the other under it, there can often be an attempt to manipulate the system so that the responsibility is shifted to the younger individual because the punishment element is so much less for them?

Maire McCormack: I will answer your first question first. If you are putting a high-risk offender or a higher-tariff young offender into the community, the community has to feel confident that that is appropriate. When community-based facilities are being promoted, decision-makers have to be reassured that they are appropriate and effective for those offenders. I know that the Scottish Government is doing a lot of work on that. The hearings system also has to be informed about the disposals that are available. It is a real challenge for some excellent organisations, such as Includem, to find resources to invest in such services and in service development, given the current financial climate. The hearings system should be made aware of the disposals that are out there, which can be effective and appropriate. The disposals that are available to the hearings system include secure accommodation for a very small number of young people. I know that the securing our future initiative report looks at improving the secure estate to deal with that very small number. Work is being done, but perhaps the hearings system has to be beefed up to ensure that certain disposals are facilitated.

Dr Sher: I am not persuaded by the argument that just because something has been done means that it was the right thing to do and that we should keep doing it. There have been prosecutions of children under the age of 12, albeit only a handful, but that does not mean that prosecuting them was the right decision. I have no evidence that the outcomes in those situations would encourage a repetition of that process.

Instead of stopping the thinking process at the point at which you say, "Okay, now they're a criminal," we have to take the next step and say, "Now that we've labelled them a criminal, what is the predictable consequence of that and what will happen to them?" Until we can answer that, we will not have the solution. There is no evidence from anywhere that suggests that labelling and treating children as criminals turns their lives round or makes their communities safer. It does

not prevent them from reoffending; in fact, it seems to encourage them strongly to adopt that criminal identity. The fact that children under 12 have been prosecuted is not a reason to keep doing it. The evidence of what ends up happening in those cases seems to make a persuasive case for raising the age to 16.

I am now regretting mentioning the US. I did so in the context of the expression in the States that goes, "If I cannot be a good example for you, please allow me to be a horrible warning." The system there is not good and not one that we should emulate, given the effect that it has had on children and young people. My point was simply that, even in the context of a system that is far more deeply flawed than Scotland's system, 16-year-olds are not automatically considered as adults for the purpose of criminal proceedings. That is because there was an agreement between political parties in the US not to make that an issue. The underlying issue in such debates in Congress and state legislatures was that nobody wanted to be the one to raise the age for fear of being labelled soft on crime at the next election. Behind the scenes, a quiet deal was done that that would be taken off the table as an election issue and that something would be done that made sense in the light of the evidence. Although the system in the States is badly flawed, a few parts of it are worth learning from and considering in a Scottish context.

Stewart Maxwell: My point was that there have been unintended consequences when someone changes from being a juvenile to being an adult.

The Convener: Mr Maxwell was also making the point that when there are two accused, of whom one is over and one is under the age of criminal responsibility, lawyers are tempted to ensure that the one who is underage takes the rap—to use the American phrase—thereby allowing the one who is likely to receive a custodial sentence to escape. Is that the case?

Dr Sher: It is certainly the case that the system is routinely and badly manipulated in the States. There is no question about that. If we can avoid such problems in Scotland, that will be fine.

I am smiling, because I am recalling the last time that I had the honour of appearing before the committee, which was to give evidence on the Sexual Offences (Scotland) Bill. We talked about how, when someone crosses an age threshold on their birthday, they suddenly have a very different status, and we considered who would be prosecuted in the case of two people who are on different sides of the age boundary in the sexual offence arena. I will not rehash my testimony, but I remind the committee that the issue of barriers is inherently difficult.

The Convener: You will adopt your previous arguments. We move on to consider the provisions on fingerprint and DNA data, which are causing concern. The issue is fairly straightforward, so we are looking for reasonably short answers.

Bill Butler: Under section 59, the retention of fingerprint and DNA data obtained from children who are dealt with through the children's hearings system will be allowed. The witnesses think that the approach is inappropriate; will you outline your concerns?

Nico Juetten: We think that automatic retention is inappropriate and that retention through the children's hearings system is inappropriate. Those are two separate points, which I will address in turn.

Our overarching principle, which we derive from the UN Convention on the Rights of the Child, is that children who offend should be treated differently from adult offenders, because the same assumptions cannot be made for both groups. For example, is behaviour at one point when someone is growing up necessarily predictive of behaviour at another point? The age and developmental stage of the child matters and predicting future behaviour is not straightforward. That is a background point.

In some cases, it will be necessary to retain a child's DNA profile on the database—

Bill Butler: You are talking about your recommendation in paragraph 6.4 of your submission, which is that the bill be amended to ensure that there is no automaticity.

Nico Juetten: That is correct. We would not want automatic retention, for the reasons that I intimated. However, we accept that for the protection of others—in most cases, other children and young people—it might be necessary in exceptional cases to retain a DNA profile of a young person on the database. We have opinions on how that should be done—

Bill Butler: In your written submission, you suggest that the intervention of a sheriff should be required before a young person's DNA profile can be retained—never mind the extension of powers to retain DNA, which is what the bill talks about.

Nico Juetten: We need safeguards for children. There is no doubt that retention of a DNA profile is significant interference with a person's right to a private and family life, but retention can be justified in exceptional cases.

My second point is about where decisions about retention should take place. The children's hearings system is not the appropriate forum for that. We do not want the system's character to shift significantly towards being more adversarial,

with more legal representation. There must be significant legal safeguards if such a level of interference in a child's right to a personal life is to be granted.

Tom Roberts: As the committee heard from witnesses earlier, the debate about the role of DNA in society and how, when and where it should be retained is continuing. I am not sure that it is appropriate to pitch children into the debate at this stage. I am concerned that we are taking action because we can, rather than because we have thought through the gain to society, particularly from a child's perspective.

I am also concerned that the bill does not make it clear what offences would allow for retention of DNA—

13:00

Bill Butler: Perhaps I can help you there, Mr Roberts. I understand that the bill provides for the retention of DNA in cases involving violent or sexual offences. It is very specific about that. We are not talking about blanket DNA retention, which is the route down which our previous panellists seemed to be going. We are bringing practice into line with the ECHR because a particular case in England showed that there was nearly blanket retention in some areas. The retention of DNA must be more specified and targeted in respect of the Scottish disposal. Does that help?

Tom Roberts: It does a little. We have had a lot of debates with people beyond Children 1st about the issue, as it is a difficult one. If there are circumstances in which retention might protect other people—

Bill Butler: Including other children.

Tom Roberts: Absolutely. We would be open to that discussion. However, we do not feel that the bill as drafted or the debate as it is at the moment has brought us to that point. There is the significant issue of a consequence of someone going to the children's hearings system being the retention of their DNA.

Bill Butler: I put it to you that you would have a point were it not for the fact that the bill is very specific about retention being for those children who are dealt with by the children's hearings system for specified violent or sexual offences. Does that help you?

Tom Roberts: There is discussion to be had about the offences that are dealt with by the children's hearings system at the moment. On reading what was in front of us at the time, we did not feel convinced that the argument had been made for the retention of DNA—

Bill Butler: At all?

Tom Roberts: No.

Bill Butler: Okay. That is very clear. What about Dr Sher?

Dr Sher: This is an area in which I can claim not the slightest expertise, so my comments will be short. At stage 1, we think that the principle that makes sense is that there should not be automatic retention of DNA from all children who behave badly at any time. We think that there is more substantive ground for retention on a more targeted, case-by-case basis. We do not have a problem with that.

Bill Butler: That is exactly what you say in your written submission. You state:

"The policy intent … of specified time limits for the retention and destruction of samples taken from children"

is

"heading in the right direction."

Maire McCormack: I agree with my colleague and with Tom Roberts. The bill talks about "sexual and violent offences", but that is a broad spectrum and it does not define what those offences are. I know that a working group will be set up to look into that, but we need to consider the definitions. Different agencies have different thresholds and a different understanding of what a sexual or violent offence is. We should be thinking about managing the risk and assessment of the planning, but—

Bill Butler: But you agree with your colleague that there may be certain circumstances in which DNA retention would be an appropriate way forward.

Maire McCormack: As we state in our written submission, sections 16 and 17 of the Children (Scotland) Act 1995 both state that the children's interests are paramount. The UN Convention on the Rights of the Child also talks about the child's best interests. Nevertheless, in certain cases, those must be balanced against other rights. In tightly controlled circumstances, when it is explicit, proportionate and separate from the children's hearings system—which is a welfare-based function and should not be looking at whether a child is a criminal; that is not what it is about—we are very clear that—

Bill Butler: Sure. That is very clear. I would like to move on if I may. Mr Juetten can come back in when I move on.

You have said that you have concerns about something as radical as this proposal. It is quite right for you to have those concerns. Could any of the concerns that you have about the proposal be addressed by specific changes to the provisions in the bill? The office of the Commissioner for Children and Young People has suggested certain

amendments in paragraph 6.4 of its written submission.

Nico Juetten: Well, yes. We are asking for the process to be tweaked, if retention goes ahead, because the children's hearings system is not the appropriate place for such a decision to be made if, as we advocate, retention is not to be automatic. There are a few things to be said about the tentative proposal in our written submission. As with any proposal on the matter—which is a wee bit of a minefield, to be honest—there are upsides and downsides. We are aware that the fact that it would involve an additional court process after the children's hearing established an offence ground or that offence ground was accepted is an issue—it would be another big burden and another process to go through. However, at this stage, we accept the need for that process for want of a better proposal for a system that does not put a burden of double jeopardy—if we can call it that; I know that it is not quite precise—on young people. I am trying to say that we need a proper process with proper safeguards for such great decisions.

Bill Butler: Are you saying that one of those safeguards is the interposition of a sheriff in terms of establishing the ground, rather than what the bill suggests, which is simply that the extension should go to the sheriff?

Nico Juetten: I am sorry, can you repeat that, please?

Bill Butler: Well, in your submission, you suggest that the bill be amended so that DNA is retained if

"(1) the child has been referred on an offence ground; (2) the offence is one of a list of 'trigger offences' … ; these should be serious violent and sexual offences"

and they should be specified, as Ms McCormack said, perhaps by regulation; and

"(3) the child and their relevant adult have accepted the ground, or it has been established by a Sheriff".

It seems to me that you suggest an additional safeguard there.

Nico Juetten: The reporter will refer the child to the children's hearing on an offence ground, if there is a reason for that. If the child does not accept that ground, it can be referred for proof to a sheriff. That is the process in the children's hearings system as is. After the ground is established, the children's hearing can make a supervision requirement. In essence, the thinking behind our proposal was that, if it is deemed absolutely necessary in the exceptional case of serious violent and sexual offences that the child's DNA should be retained on the database, the police should make a separate application to the sheriff.

Bill Butler: So there should be an additional layer to be gone through and the sheriff should be part of that.

Nico Juetten: Yes.

Bill Butler: Okay, I understand that.

What are the witnesses' views on the retention of fingerprint and DNA data taken from children who are prosecuted in the criminal courts? It is a small number.

Nico Juetten: That already happens for children who go through the criminal courts system. Over the past three years, if I remember rightly, about 500 children under 16 went through criminal prosecution. That is a bit of an aside, but it is relevant. According to the most recent figures, we already have DNA profiles for about 2,500 under-16s on the database. In the same timeframe, we had just below 500 prosecutions, so there is some explaining to be done about how those profiles got on to the database in the first place.

Bill Butler: What is your view, though?

Nico Juetten: The same principles apply as I mentioned in relation to retention as an outcome of a hearing. The process argument would fall by the wayside because it would simply not be the case and there would be legal safeguards. However, we would generally advocate caution in those cases, simply because it is not necessarily appropriate to retain the DNA profiles of children in the same way as we do for adults for the reasons that I have given.

Maire McCormack: Obviously, I agree with my colleague. There is an issue. One of the key principles of the UNCRC is non-discrimination and, currently, a child of 16 who goes through the courts has their profile retained but one who goes through the hearings system does not. As Nico Juetten said, there is an issue with what is currently retained and how it is monitored, whether for minor or more serious offences. I understand that the Coroners and Justice Bill that is being considered down south will introduce a power for the Information Commissioner's office to audit without invitation, so we hope that that will deal with the issue. However, as we say in our submission, a lot of DNA is being retained for a substantial amount of time, but we do not know how long for and why.

Bill Butler: I take that point.

Tom Roberts: As stated in our final comment on the issue in our submission, we advise a strong presumption against the retention of the DNA of children. I would stick by that. Both in the children's hearings system and in the adult courts system, we recognise that a discussion is to be had about where retention of DNA might help other children or other members of the community.

However, I do not feel that we have yet had that discussion in full as a society, so that caution should remain.

Bill Butler: That is very clear, thank you.

Dr Sher: As we believe that no child under 16 should be prosecuted, there is a sense in which this should be a non-issue and we would reassert that principle in this context. As a secondary principle—on this I want to confirm the viewpoint of my colleagues—there should be no automatic retention of DNA. There should be a legislative presumption against the retention of DNA, but a legislative presumption is not a ban. We accept that there will be grounds and times and circumstances in which retention is appropriate and reasonable.

Bill Butler: That seems a wholly reasonable answer, for which I am obliged.

The Convener: Finally, we have a couple of questions on the sexual offences provisions.

Cathie Craigie: Convener, I know that we are pushed for time, so I will put both my questions at once. First, section 33 includes provisions to extend the law on indecent images of children. Are members of the panel happy with those provisions? Secondly, section 34 will apply to computer-generated images. How should the law deal with that issue?

Tom Roberts: We made a number of comments on those provisions. As a general point, we think that legislation needs to catch up with what is happening out there and with how such material is used to promote and justify the abuse of children. That is a significant issue. My only concern—although I am not a lawmaker—about the provisions in the bill is about the need to distinguish between the different purposes behind the creation of images. For example, we highlight the fact that images can be used in medical textbooks. The need to ensure that the law on the distribution of such material can be adequately enforced is an important principle.

We also need to ensure that the law keeps pace with technology. Given that computer-generated images can be used to groom children by suggesting to them that something that happens on their computer must be acceptable, the distribution of such images can cause harm or distress to children and can be just as bad as the other type of material that circulates on the internet. We need to ensure that our laws can deal with that appropriately.

The Convener: Does anyone else have a contribution under this heading?

Maire McCormack: We support the view that has been put forward by Children 1st, but I think that there is an issue with the definition of possession. What that means needs to be clarified.

Cathie Craigie: As those who were present for the earlier discussion will know, we have asked for further information on that issue from the Association of Chief Police Officers in Scotland and the Scottish Crime and Drug Enforcement Agency, which also had some concerns about the matter.

The Convener: As there are no further questions for the panel, I thank Ms McCormack and the gentlemen for their attendance, which has been very useful and is greatly appreciated.

13:13

Meeting suspended.

13:15

On resuming—

Subordinate Legislation

Act of Sederunt (Fees of Members of the Association of Commercial Attorneys in the Sheriff Court) 2009 (SSI 2009/162)

The Convener: Item 3 is consideration of a negative instrument of subordinate legislation. No points on the instrument were raised by the Subordinate Legislation Committee. As there are no questions, are members content to note the instrument?

Members *indicated agreement*.

13:15

Meeting continued in private until 13:32.

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