JUSTICE COMMITTEE

Tuesday 9 June 2009

Session 3

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JUSTICE COMMITTEE
19th 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:

Elish Angiolini (Lord Advocate)
Mike Callaghan (Convention of Scottish Local Authorities)
Mike Ewart (Scottish Prison Service)
John Logue (Crown Office and Procurator Fiscal Service)
Kenny MacAskill (Cabinet Secretary for Justice)
Councillor Harry McGuigan (Convention of Scottish Local Authorities)
Frank Mulholland (Solicitor General for Scotland)
Rachel Rayner (Scottish Government Legal Directorate)
Rona Sweeney (Scottish Prison Service)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 4

Scottish Parliament

Justice Committee

Tuesday 9 June 2009

[THE CONVENER *opened the meeting at 10:13*]

Criminal Justice and Licensing (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning, ladies and gentlemen. Let us get under way. I ask everyone to ensure that mobile phones are switched off. There is a full turnout of the committee and therefore no apologies.

Under item 1, we will take evidence on the Criminal Justice and Licensing (Scotland) Bill. Today's evidence will build on evidence already taken on parts 1 to 7 of the bill. I welcome our first panel who are Mike Ewart, chief executive, and Rona Sweeney, director of prisons, from the Scottish Prison Service. I apologise to Ms Sweeney in particular that this evidence-taking session had to be adjourned a couple of weeks ago because of time. Thank you very much for your forbearance. We also thank Mr Ewart for the submission that he sent in, which enables us to go straight to questions, led by Bill Butler.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, colleagues. As you know, the bill seeks to discourage the use of short custodial sentences in cases in which other appropriate sentencing options are available. What can prisons do with offenders who are sentenced to short periods of custody, and is six months a suitable dividing line between short sentences and other sentences?

Mike Ewart (Scottish Prison Service): It is fair to say that any period has an element of the arbitrary and cannot take account of the particular circumstances of every individual.

There is a strong consensus that six months is an appropriate dividing line—that has been a consistent feature of both academic literature and work in other jurisdictions. On the basis of the evidence that we can adduce from international practice and from the studies that have been done, six months appears to be appropriate.

10:15

Rona Sweeney (Scottish Prison Service): In relation to delivery in prison, there is little that can be done—it varies depending on the individual and the difficulties that they have when they come into prison, and the sentence will reflect any period spent on remand. For people who are with us for a very short time, the focus is around health care—particularly if they have an addiction, in which case we try to give them some support to deal with that. In general we try to build up their health. As I say, what can be done depends on the individual. We follow a process in trying to link people up with the community, but in many ways we are trying to undo the harm that imprisonment has caused.

Bill Butler: So anything other than health care, such as coherent rehabilitation work, is not really possible in sentences of less than six months.

Rona Sweeney: Not generally, no. During those very short sentences we focus on undoing the harm that imprisonment has caused, because we know that many of the protective factors that support someone in not reoffending are damaged by imprisonment. We try to help the individual build bridges back into the community to reduce that harm, but we are not doing anything more elaborate than that by way of offending programmes or something that is focused specifically on reducing the risk of reoffending.

Bill Butler: Does Mr Ewart agree with that?

Mike Ewart: It may be helpful to add that the six-month period that might be the overall length of a sentence is not necessarily the period that the Prison Service has to work with somebody. Often people have served a period on remand, and there may be factors that lead to their being discharged long before the six-month point is reached. Most short sentences are significantly shorter than six months.

Bill Butler: That is very clear.

The committee has received evidence from sheriffs in which they argue that short custodial sentences can be effective and that the current use of such sentences is generally appropriate. Do you have a view on that?

Mike Ewart: It is obviously delicate territory for me to comment on, because I might be taken as questioning a judicial decision, and I do not want to do that.

Bill Butler: It is just a general view that sheriffs have expressed in their evidence. Do you have a general view on their general view?

Mike Ewart: I have had many discussions with sheriffs. I have taken the opportunity to go to sheriffs' training days and discuss issues around imprisonment with them. I am sure that, in the individual decisions that they make, that generality is entirely right. They are, at the point of decision, making what they feel to be the correct decision.

I have heard sheriffs make two collective comments that I would question. The first is that a short period of imprisonment may give relief to the community from which the offender comes.

Although that is, in its own terms, obviously true, it must be balanced against the question whether a short-term sentence does more harm than good, as Rona Sweeney eloquently expressed, and might therefore contribute to further reoffending. Overall community safety might be compromised more by a short sentence, so there is a balance of arguments to be had there.

The second contention that I have heard from sheriffs is that after someone has appeared before them a number of times and has been dealt with by community disposal, which has not worked in the sense that the individual has breached or has failed to complete an element of the requirements of the disposal or has reoffended, they have no choice but to invoke imprisonment. In certain circumstances, that might happen because it is what the law requires.

One question is whether, if a community disposal was appropriate four or five times for a particular offender in particular circumstances, that disposal might still be appropriate if the only factor that has changed is the irritation of the criminal justice system with that character's reappearance.

Bill Butler: Right—that is clear.

Rona Sweeney: I agree with the chief executive. Our focus is to keep in secure custody and to care for all who the courts send us. It is not our public duty to doubt or judge that in any way. However, I am glad that we are having this discussion, because it is our public duty to alert the committee to the limitations of what we can do with very short sentences.

Robert Brown (Glasgow) (LD): I want to develop Mike Ewart's point about whether short sentences do more harm than good. Is it your view that short-term sentences across the board make people worse rather than better?

Mike Ewart: There is a strong consensus in academic and other literature that that is likely to be the case. I think that the McLeish commission used the famous phrase, which came from a Home Office report in the early 1990s, that in such circumstances, prison could be an expensive way of making bad people worse.

One can adduce a number of factors that have been teased out in many pieces of work. The first is that people lose the benefit of what Rona Sweeney called the protective factors: home, employment and family, or relationships more generally. That is a simple fact of what happens when people are sent to prison. As I think I have said previously on public platforms, that impact is rather well captured by the Dutch prison service, whose principal statutory requirement is to undo the harm that is done by imprisoning people in the first instance.

The second factor is the one that is colloquially called the university of crime. People are brought into an environment in which they may be more likely to reoffend when they are released because of the nature of the impact of the imprisonment on the protective factors, and they are exposed to people with more experience, who might coerce them into further activity or simply lead them into association with others who might do that.

Obviously, those factors cannot be traced in every individual case, but I believe that there is a strong consensus that those are the major factors and that that is the outcome.

Robert Brown: I want to challenge that a bit. A number of people who go to prison—whether on short-term sentences or longer sentences—are unemployed, have fractured family links, hang about with a difficult group of people and have a strong sense of alienation because of what has gone on before. Does prison make things worse in that respect? Can the short-shock aspect—the nastiness of going to prison—have an effect on individuals? Can things apply across the board, or do you have to distinguish between individual cases?

Mike Ewart: We very much have to distinguish between individual cases. I might put one case, but there is an alternative case that might apply. If I gave the impression that everyone has a happy domestic environment and a full-time job before they go to prison, you are right to point out that that would be entirely inaccurate. The reality is that, whatever the person's circumstances, they are made more difficult by imprisonment. Perhaps it would be better for me to leave it with that qualification.

The argument has been adduced on the issue of the short, sharp shock, which has been the subject of a practical experiment. A few decades back, that approach was formal policy in England and Wales for quite some time. However, one hears bravado from people in prison, such as: "Now I've experienced prison and I can cope with it. What more can you do to me?"

Robert Brown: In your written submission, you say:

> "Research suggests that early intervention and a care based model is more effective with young people than a justice based approach".

What do you mean by "young people"? Are such approaches also effective with older people? What is the age range of those who go to prison on short-term sentences?

Mike Ewart: That substantive point was also followed through in the Government's consultation paper and has been summarised more sharply in other places. I think that Andrew McLellan, for example, has said on several occasions that

prison, which comes at the very end of the process, is the wrong instrument for correcting social ills, which should be dealt with at the beginning of life. That is the nub of the argument.

Young people represent a very significant proportion not only of the prison population but of those who have their first contact with prison. Indeed, the fastest growing group in the rising prison population is young male offenders between 16 and 21 years old.

Robert Brown: I suppose that the nub of my question is whether the mechanisms that you have advocated in your submission work as well with prisoners in their late 20s and other older prisoners as they do with young people. Having worked in the education system, you will know that the children's panel system is based on different principles. Can such principles be applied to the adult justice system and to prisoners who have, rightly or wrongly, reached that point without any early intervention?

Mike Ewart: There are different kinds of intervention. Many of the structured interventions that can be made in the prison setting are based on cognitive behavioural approaches, which could be used equally well with older people outwith the prison system. In other words, there is no specific element of the prison context that makes such interventions effective or not.

Robert Brown: I suppose that my key point is that problems such as overcrowding plague the short-term sentence approach. I appreciate that there are limits on all of this, but if you had more resource, could you be more effective with short-term prisoners—assuming of course that you had them for more than a few days? Moreover, are you able to do anything useful with those on remand, given the number of people who tend to be released after being on remand without serving any additional sentence?

Mike Ewart: I will ask Rona Sweeney to answer your points about remand and the question of people being invited to, but not required to, take part in activities.

With regard to resource, which I take to mean the staff and buildings necessary to give us capacity, I have to say that, given the current restrictions on the building envelope, I would not argue that we could do any more if we had more staff. I would like to have time to consider in an entirely theoretical way the possibility of doing different things with staff and resource. I have seen a number of different approaches that have been taken elsewhere, for example in Norway, where the prison system runs what amount to hostels to allow people to continue their education and work. Such models, which we do not have at the moment, might provide a possible way forward, but I stress that that is purely a germ of an idea in my mind, not a major policy proposal.

Overall, I would be extremely reluctant to argue for an increase in the scale of the prison estate. I want to improve the quality of the existing prison estate and to make some marginal increases to capacity, and we have plans to do that. However, my long-term contention has always been that we already lock up too many people, making ourselves, as a community, less safe as a result. If we build more capacity, that will not provide us with elastic in the system because the extra places will be filled up. That would not result in an improvement in our performance.

10:30

Rona Sweeney: I will deal with the point about remand prisoners. Some of our services are no different, whether a prisoner is on remand or has been convicted, so our remand prisoners are able to access health care services, as you would expect, social work services and addiction services. There is a difference in that, under prison rules, convicted prisoners are required to work. Our definition of work is quite broad and includes other purposeful activities, such as education or attendance at programmes. That requirement does not exist for remand prisoners. Some sites offer those services to remand prisoners when they can, and some remand prisoners accept them, but not all of them. Not every prison can offer remand prisoners such activities because of overcrowding and the fact that spaces are limited.

The Convener: Before we proceed, it might be useful if you could provide the committee with a note—at a date that is convenient to you—of the number of remand prisoners that you have, and of how many of them have been remanded in custody because of a deferred sentence and how many of them are awaiting trial on a summary matter. That would be a useful piece of information to have, if that were possible.

Paul Martin (Glasgow Springburn) (Lab): I invite Mr Ewart to elaborate on the issue of resources, particularly as it relates to prisoners who serve short sentences. How do the resources that are required for prisoners who serve short sentences compare with those that are required for prisoners who serve long-term sentences?

Mike Ewart: In principle, there is no difference between the overall resource requirements for prisoners in the two categories. It might be possible to attribute some marginal additional costs to prisoners on longer sentences who access more in the way of programmes and education, but I do not think that I could put my hand on my heart and say that we could give you a clear breakdown of the figures that you have

asked for on the basis of how we allocate our budgets, because they are allocated to institutions and activities, not to categories of prisoner. If it would be helpful to the committee, we could take that question away and see what clarity we could provide.

Paul Martin: In your mind, there is no financial benefit attached to the scrapping of sentences of six months or less. Is the Government wrong to say that that will result in the saving of quite significant resources?

Mike Ewart: That is not what I am saying. I am suggesting to you that if I were to divide the operational costs of a prison or of the Prison Service collectively by the number of customers that we had on any one day, that would not distinguish effectively between prisoners in different categories of sentence.

Paul Martin: Would you like to comment, Ms Sweeney?

Rona Sweeney: I am not sure that I understand your question exactly. Our understanding of the modelling, which I know that the committee will have explored, is that if we were to reduce the number of sentences of six months or less by 50 per cent, that would have an impact on our population of between 250 and 300 people, which would mean that we would still be above the design capacity and would still have overcrowding. We would have to take a significant volume of prisoners out of the system, to the extent that we could start to close prisons, before we could release resources and hand those back to the community. I am not sure whether that was what you were asking about.

Paul Martin: In summary, there are two types of sentence: short and long term. Is one more expensive than the other? Mr Ewart has said that as far as he is aware, without going into the matter in any further detail, he does not think that there is any difference. Is that correct?

Mike Ewart: Calculated on a daily basis, prisoner costs are more or less the same, regardless of length of sentence.

Paul Martin: So if the Government were to move in this direction, the only reason for doing so would be to reduce prisoner numbers. Can you confirm that there is no financial benefit?

Mike Ewart: The purpose of the bill is to try to make better use of the resource that we have. We have advanced the argument that using short-term prison sentences puts the community at greater risk, in aggregate.

Nigel Don (North East Scotland) (SNP): If I understand you correctly, you are reflecting what I have always believed—that almost any business has few costs other than fixed costs and that, regardless of what else it does, it must still pay the bills. If a significantly smaller number of short-term prisoners came through the door, would you spend significantly less time letting them through the door and out again? Is it fair to say that, although that might not change your total fixed costs, because you would have to have the same number of personnel, it would free up a significant amount of time to allow those people to do something else?

Mike Ewart: That is a fair comment. The debate tends to be focused largely on either the average daily population or the peak daily population. At the moment, the figure is about 8,500. You are right to say that that conceals the churn of about 40,000 admissions in the course of a year.

Nigel Don: Are you able to quantify that—not in money, but in man and woman hours? Can you calculate how the reduced churn converts into man hours that are available for doing other, more productive things in prison?

Mike Ewart: I will defer to greater experience.

Rona Sweeney: We could do such a calculation. I understand that each year we have more than 8,000 receptions of prisoners with sentences of six months or less. The process varies a great deal, because we try to be as person focused as we can. It is a vulnerable time for individuals. Prison staff are alert to the fact that people are vulnerable, especially to self-harm. Care must be taken with those who are addicted to substances, until our health care teams are able to understand the complexities of their situation. The vulnerability of prisoners is such that many sites have a first-night-in-custody centre, where we can focus our attention much more acutely on those who have just come through our doors, as we may not know much about them or understand their complex needs.

We could do more modelling. The reception process varies a great deal, because it is focused on individuals. It tends to take between 20 and 50 minutes per individual, depending on their needs and how well we know them. I can explore the issue further, if the committee would like.

The Convener: That would be helpful.

Nigel Don: It would be hugely helpful.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): The bill establishes a presumption against sentences of less than six months and shifts the emphasis from criminal justice services to local authorities and community partnerships. In its written evidence, the Convention of Scottish Local Authorities states that it

"is very clear that for the provisions of the Bill to be implemented effectively in relation to the criminal justice

elements of the Bill there is a need for a radical shift of resources."

I take from that that COSLA envisages resources being transferred from organisations such as the Scottish Prison Service to local authorities, which will be responsible for implementing community payback orders. However, this morning you have suggested to the committee that, although there may be a reduction in the number of people coming through the door, work will continue to have to be done and there will be no scope for shifting resources. Is that a fair interpretation of your position?

Mike Ewart: That is a bald summary, but it is the nub of the issue. I discussed the issue in precisely those terms with the conveners and chief officers of the community justice authorities at a meeting earlier in the year. We all share an ambition to shift resource from strong dependence on a wholly penal solution to a much stronger system of community disposals. In addition, an even bolder statement is that we want to shift resource from the end of the process to earlier in individuals' lives.

However, the real challenge is not in persuading people that community disposals are a good idea—there is an obvious groundswell of support for that proposition—but in managing the transition to them. During the period in which effective community disposals and interventions are built up and crucial confidence in them is developed, so that we collectively feel that that is the appropriate route, we will still have to maintain the required resource for keeping more or less the current population running through the prison system. There will not be a major shift of population until that confidence is established. The transitional arrangements will be the real challenge. Henry McLeish and his colleagues on the Scottish Prisons Commission made their view clear. Certainly, Mr McLeish made it clear in his public statements that the proposition that he advanced would have a transitional cost.

The Convener: We now turn to the potential impact of the Custodial Sentences and Weapons (Scotland) Act 2007: Angela Constance will lead.

Angela Constance (Livingston) (SNP): The bill seeks to amend the custody provisions in the Custodial Sentences and Weapons (Scotland) Act 2007 prior to those provisions being brought into force in order to help create an effective regime for managing offenders. What are Mr Ewart's and Miss Sweeney's views on that?

Mike Ewart: Our principal concern about implementation of the original propositions in the custodial sentences part of the 2007 act was the inevitable impact that it would have on an already overcrowded prison system, particularly because it would introduce people who would—unlike the group whom we have just been discussing—serve substantially longer sentences and so would be in the system longer, which would keep the numbers high. We discussed that prior to the enactment of the 2007 act, and we continue to follow it through. Rona Sweeney might want to add to that more general observation.

Rona Sweeney: The challenge for us will be the risk assessments, because we are not yet clear what they will look like. Until we understand the sentence lengths, it is difficult for us to say much.

Angela Constance: Do you envisage that the amended provisions will, once they are brought into force, impact on resources—for example, those for risk assessments?

Rona Sweeney: Until we understand where the line will be drawn and what the risk assessment will look like, we do not know.

Angela Constance: Mr Ewart—do you have anything to add?

Mike Ewart: No. In this case, we are in territory that we must explore as the work is done.

The Convener: We proceed to community justice authorities.

Stewart Maxwell (West of Scotland) (SNP): The committee has heard evidence that some community justice authorities have been proactive in engaging with the Scottish Prison Service and with other relevant authorities and agencies in order to provide continuity of treatment and support to offenders once they are released. We heard about that from one particular CJA. In your experience, does that level of engagement apply throughout the country in all prisons?

10:45

Mike Ewart: From my point of view—I think it will be the same for my colleagues—contact and interaction with the community justice authorities have happened across the board and have been positive. When the community justice authorities came into being, we established a system of liaison officers to facilitate the relationship between the CJAs and the Scottish Prison Service. We have had a useful series of bilateral exchanges with individual CJAs on, for example, the development of the specification for the new prison for the north-east. More generally, in a meeting with members of the SPS board and CJA conveners and chief officers, we had an extremely helpful and open discussion about the strategic issues that we face together.

There is contact not just with the liaison officers or at board level, but between establishments and their CJAs. We hope to see that continue as we

develop, through discussing with the CJA partners the community-facing prison model. I was properly upbraided for using such jargon previously. We are trying to see whether we can develop a prison that will deal with more of the community's total imprisoned population closer to home.

Rona Sweeney: The level of contact between individual sites and their CJAs reflects the extent to which a prison's population is also the CJA's population. In some sites, where the large majority of prisoners are local—such as in Greenock prison before, and even since, it took women prisoners—there is very close liaison with the CJA. I know that the governor at Greenock has a number of priorities in her planning documents that have been generated through her dialogue with the CJA.

In prison sites such as Shotts, where prisoners come from all over the country, there is less active involvement with the CJA. There is still contact, but there is less of an overlap of interests.

Stewart Maxwell: The relationship between prisons and CJAs seems to be working positively and reasonably well across the country. It is working particularly well in prisons that deal with a local population, but there are difficulties. Perhaps more work has to be done in prisons that deal with people from throughout the country.

Rona Sweeney: Yes.

Stewart Maxwell: How can things be improved?

Rona Sweeney: One of the important things that we have for prisoners is the link to individual social work departments and social workers. There is a process of integrated case management for prisoners, which is a bit like the annual appraisal process in which one might be involved in the workplace. There is an annual case conference, attended by the prisoner's supervising social worker from their home area, either in person or by videolink. We have links other than direct links through the CJA that can help to bridge the gap for individuals when they go back into the community. As the chief executive said, we are committed to developing community-facing prisons wherever we can, so that prisoners are closer to their home areas and to services there.

Stewart Maxwell: Does the system work better with longer-term prisoners than it does with shorter-term prisoners? Is there a particular difficulty with the relationship between the prison and the CJA, the support network and the treatment that offenders receive when they leave prisons where prisoners are on short sentences?

Rona Sweeney: Yes. The model that I have just described is for long-term prisoners. There is an on-going commitment to them, because they leave on a supervised basis and will have support from someone in the community.

For short-term prisoners, we do something less elaborate; we have what is called a community-integration plan. Basically, service providers are asked to make links. The housing people in the prison will therefore make links to housing people in the community. The process is less formal and less structured.

Mike Ewart: There is, in respect of people who serve short sentences, a relevant issue that is not specifically for us to address. I know from our partners in housing and social services—to which Rona Sweeney referred—that one of their challenges is that they might start the process of creating an integrated plan for a prisoner to whom they have been introduced, but not have time to provide many back-up services before that individual enters the community.

Stewart Maxwell: I want to move on to another issue. In the weeks in which we have considered the bill, we have discussed the make-up of the sentencing council. What are your views on comments that have been made about the SPS being represented on the proposed sentencing council because of its obvious experience of, and involvement with, the impact of sentences?

Mike Ewart: I will give a purely personal response—there is no policy response to give the committee on behalf of the Government. My strong preference is that the Prison Service be one of many sources of potential advice to the sentencing council on questions that it might wish to address to the Prison Service. However, there are two reasons why it would not necessarily be appropriate for the Prison Service to be formally represented on the sentencing council. First, we are required to discharge the lawful warrant that is the outcome of a sentence. Secondly, unlike some other organisations that take part in such discussions, we are part of Government and could be seen to be directed by ministers. I do not think that such a position would be helpful for us or for the sentencing council.

Stewart Maxwell: In your view, it would be helpful if the Prison Service acted through a formal method or some other method as an advisory and information service to the sentencing council.

Mike Ewart: I hope that we would be asked to provide advice.

Stewart Maxwell: Ms Sweeney, do you have a contrary view?

Rona Sweeney: No—I agree with Mike Ewart.

The Convener: I thank Mr Ewart and Ms Sweeney very much for their attendance. Their evidence has been extremely helpful.

10:52

Meeting suspended.

10:53

On resuming—

The Convener: I welcome our second panel of witnesses, which consists of Councillor Harry McGuigan, who is the Convention of Scottish Local Authorities' community wellbeing and safety spokesperson, and Mike Callaghan, who is a policy manager for COSLA. We have received COSLA's written submission, which is extremely helpful. It enables us to proceed immediately to questions, which will be led by Nigel Don.

Nigel Don: Good morning, gentlemen. Thank you for coming to the meeting.

I know that some of my colleagues want to talk to you about community payback orders and their content. I will therefore avoid that matter for the moment.

In your written submission, you suggest that it will be important for the proposed sentencing council to work alongside community justice authorities to ensure that community sentences gain credibility with both the courts and the general public. Will you please elaborate on how that relationship should develop?

Councillor Harry McGuigan (Convention of Scottish Local Authorities): I do not want to elaborate on that too much, because it is an issue of considerable contention for the judiciary and so on. However, we think that at least consistency of understanding between the sentencing council and the local authorities will be needed. Dialogue is important. We must be careful about the territory that we are moving into, however, so I would be cautious about exploring the matter in great detail this morning.

Nigel Don: I understand your caution, but I do not really want you to be cautious. I would really like to get your opinions on what the issues are. You might want to be cautious about exactly what side of the line you put your feet on, but it would be helpful if you could tell us where you think the lines are and where the areas of contention will be.

Councillor McGuigan: I will be cautious and careful because I do not think that I have the in-depth knowledge and understanding that would enable me to be more informative. However, that is not to suggest for a minute that we are badly informed about the issues around the proposal and what the impacts of a sentencing council would be on the wider judicial process.

We have an opportunity sensibly to improve what is happening in the wider judicial set-up, although I say that without going into the detail of how that could be done. There needs to be more in-depth analysis of what we may or may not be able to do and what might or might not be perceived by the judiciary as being a challenge to its independence.

Nigel Don: Others will want to explore the content of community payback orders, but I am interested in how they might operate. Section 14 talks about a "responsible officer", which you mention in your submission. I am not quite sure that I have yet heard anyone say how they think that system is going to work. Should the responsible officer who is identified by the court be the man or woman who is engaged in face-to-face supervision of the person who has been sentenced, or should it be, for example, the director of social work in the local council, who would delegate the face-to-face supervision? The position is not prescribed in the bill, so I am interested to know how you think it should work.

Councillor McGuigan: You are right to say that the issue has to be considered in greater detail. The responsible officer, as far as we are concerned, should be a qualified social worker. I do not think that you would expect to see a situation in which the court would identify personally whom the responsible officer would be. Rather, the social work department should identify who would be best equipped to undertake the role, in the context of its overall resources at that time. The responsible officer must be a qualified social worker.

Nigel Don: The bill says that the local authority must nominate the responsible officer—the court will not specify who the person should be. Should the responsible officer be the person who works face to face with the person who has been sentenced, or should it be the person who is in overall charge of the process, such as the director of social work, who would delegate the face-to-face work to others?

Councillor McGuigan: We live in the real world. We could nominate an individual to be the responsible officer, but that person might fall ill or be unavailable for another reason, which would mean that someone else would have to be identified. There are sensible mechanisms that can ensure that the responsible officer will be identified in a way that is manageable within the context of the real-world circumstances that we face.

Robert Brown: The community payback order replaces a number of existing orders. Do you think that any of those disposals should have been retained, or does the new order adequately encompass the various elements that should be available to the court?

11:00

Councillor McGuigan: Different people will give different answers about which disposals should or should not be retained, but I approach the issue with an open mind. First, we need to ensure that the new community payback order will make a real difference in rendering our communities safer and more secure and more comfortable with the processes of justice. We need to be careful not to make the mistaken assumption that was made previously—and perhaps even is being made now—that a community payback order will necessarily always work. In community sentencing, we have some pretty poor examples out there as well as some excellent examples that are working. Exemplars of good practice and proven impact should be retained, but those that are less credible and less effective should be examined to see whether they can be improved and be made more robust and more effective. Those that cannot be improved need to be replaced by those that are more effective.

The question is a good one, in that it highlights that the community payback arrangements will fall down if they are weak and if they are simply rhetoric that sounds fine without really making a difference out there. Some people have suggested that the proposals are a move away from tough justice, but I believe in effective justice. The community payback order will be a move towards effective justice if the arrangements are made properly, carefully and thoughtfully as part of a collective analysis and understanding of what we are trying to achieve.

Robert Brown: I believe in effective justice as well, but let me just pursue that point so that we are clear that we are talking about the same thing when we talk about effective justice. How do you define what is effective in this context? What is your understanding of that?

Councillor McGuigan: First of all, I define effective justice as justice that renders our communities safer, happier and better places to live in. Effective justice is about ensuring that the victims of crime are looked after. The victims need to be comfortable that the processes of justice have been effected properly and in a way that they would associate with being fair and with giving the desired reparation both to the community and to themselves.

Of course, we can use terms such as punishment, retribution and restitution, but there must also be rehabilitation. Offending behaviour happens in our communities, and offenders will go back into those communities. It is imperative that the community is also prepared to work collectively to ensure that the support arrangements are in place to enable rehabilitation and reconnection of the offender with the community. That is the broader aspiration that I have for what might be called effective justice.

Robert Brown: Let us strip that down a little. The community payback order comprises a payback element—the work that is done, which needs to be effective and meaningful—and a rehabilitative element. As the representative of local authorities throughout Scotland, what is your view on the current availability of programmes to meet those needs through the existing community disposals, never mind any that might follow?

Councillor McGuigan: That is a big issue that needs to be faced. I doubt very much whether there are sufficient programmes available for community sentences, especially if we move towards an increased demand or call on services that are to be delivered locally. The quality of such programmes is another matter, too. We need to question whether current resources are sufficient to enable quality, effectiveness and credibility in community sentences.

I firmly believe, and it is COSLA's position, that as long as community sentencing is properly resourced, proper training is given and the support services that are needed more widely are built in, it will not simply be about people doing community work and our communicating that to the public, although that is important, but will make a real difference to the individual and to the community against which that individual has offended and to which they will return.

Robert Brown: You made an interesting comment about the quality of some of the programmes and remedies that are available, which is slightly to one side of the resource issue. Questions about quality imply that some programmes could be stopped, and the resources redistributed to something a bit more effective. Have you any thoughts about the mechanisms through which that might most effectively be done? It is a key issue.

Councillor McGuigan: I do not know that it is as key an issue as you make out, but it is important. We have to ask what the deficiencies are in the programmes that are perhaps not the best type of programme. If they are not working or making a difference, we need to ask why and perhaps build in the missing features to enable them to work better.

In some situations, of course, a particular programme will just not work and will not be convincing in any way. It then has to be removed from the programme catalogue; the resource for it then becomes available, but that will not be a great amount. Resources will also be focused on trying to improve the quality and extent of the current community payback programmes and of the new ones that are introduced.

Robert Brown: Accepting that resource is limited—on which subject we will no doubt hear more later—it is important that the programmes that are in place work, are effective and achieve the best results with the money that is put in. Does COSLA have an angle on how effective those programmes are throughout the country? What improvements could be made in how they are assessed and judged and in who decides on it all?

Councillor McGuigan: COSLA works closely with the community justice authorities, which have a major role to play in assessing and commenting on the quality of the provision, and it makes interventions where it considers that it is necessary to do so. Local authorities have a responsibility to ensure that they face up to their commitments under the concordat and the single outcome agreements. Those agreements are part of the concordat and are credible; they are not a pretence. We are focusing on those main aspects.

Robert Brown: Does Mike Callaghan have any thoughts on that?

Mike Callaghan (Convention of Scottish Local Authorities): I reiterate the points that Councillor McGuigan has made. Community payback orders are essentially a spend-to-save option. Such an option involves the redistribution of current resources to the new system. You are asking about where the resources will come from. There could be opportunities for existing programmes and initiatives such as drug and alcohol strategies and modern apprenticeship initiatives, which are currently working in isolation, to converge and join up their activity and resources to implement community payback orders.

The programme as a whole is a challenge, especially given the economic downturn and the financial context of diminishing resources in the public sector. However, we have to consider where opportunities exist, and examine other areas in which a shift in resources towards the wider local government family can be implemented.

Robert Brown: My final point is on the "robust" and "visible" aspects of the Scottish Government's intentions in this regard. You have dealt with that issue to a degree, but what do you think is required to make the community orders robust and visible? I suppose that that relates, to some extent, to the victim end of the issue.

Councillor McGuigan: One of the most important aspects is resources. You asked Mike Ewart and Rona Sweeney about that earlier. The big issue is the transitional funding that will be required as we move more people out into the community. We need to be mature about how we do that, because it will not work if resources are limited.

We have made representations on the basis that we associate fully with the principles of the bill but, unless the resources are available and there is a willingness to redistribute resources between the set of agencies—not just the Scottish Prison Service, but local authorities and the national health service—it will be extremely difficult to make the significant improvements that we believe are necessary.

Robert Brown: The Government has stated that community sentences will be "robust, immediate and visible". The use of the word "immediate" is fairly obvious and has a number of implications, but what do you understand by the words "robust" and "visible" in the context? What are the implications for local authorities?

Councillor McGuigan: A robust community sentence is one that requires the offender to undertake open and committed service to the community. That can take many different forms. I could list four or five that exist in North Lanarkshire—four that are highly commendable and one that is not worth as much as the other four.

Communication is an important aspect. The community and the victims must know and understand that community sentences exist and that they enrich their community, not just in the short term through the projects that are undertaken but in the long term through the lasting, sustainable impact that they have on the community. That sustainability is crucial. We need sensible communication about what is happening so that people realise the value of the community payback programme. If the programme is managed properly—sensitively, supportively and robustly—the individual is likely to become reconnected to and reassociated with their community, and the community will benefit from that.

I am a great believer in communities playing a bigger role in the justice system. I have often said that the justice system almost captures justice issues and takes them away from the communities where the offences occur and where the victims live. There needs to be a better way of reconnecting communities to the whole system.

Paul Martin: Good morning, gentlemen. Councillor McGuigan mentioned the chaotic lifestyles of many of the offenders who will participate in the community payback programme. How realistic is it to assume that those individuals will complete their community paybacks? We know that community service involves many challenges. Why should the community payback programme be different?

Councillor McGuigan: It will be different only if it is of better quality and has a better combination of input from the various agencies. I have seen community sentencing arrangements that have input from only one agency. If we consider, for example, social work departments and the supervision that takes place there, criminal justice social work is a tiny corner of what social work does. That must change. All the community agencies must recognise that they have a role to play and they must be part and parcel of the thinking processes to identify meaningful, sensible, useful and—I use the word again—effective community sentences. In the past, we have perhaps not done that. We now have an opportunity to examine the bigger picture and involve the other agencies.

Paul Martin: We talk about the community justice authorities and the other agencies working together. We talk a good game about delivery and integration, and we can legislate for that in respect of community payback orders, but how can we be assured that individuals who have chaotic lifestyles will complete the programme? No matter which agencies supervise them, they might decide that they do not want to complete the programme. What is different about the proposed approach? In the 10 years that I have been in Parliament, I have not yet met a witness who has not said, "We need to work together as part of the programme." What is different about the new programme?

11:15

Councillor McGuigan: I have also encountered that situation and I sometimes rebuke the very people who say, "Well, we've been doing it for 10 years and it never worked so if we do it again it won't work". You have to question whether the new programme will work differently.

I disagree with you that the multi-agency approach has been as obvious as you have found it to be—I have not found it to be so obvious as that in the community sentencing and community activity arrangements that are in place. It will be a challenge. One of the key agencies will be the community justice authority, which is responsible for looking at how well and how effectively the various agencies and community planning partners are delivering on their single outcome agreements in the area. If they do not deliver on the outcome agreements, they should be held to account. You and I have a responsibility to ensure that they are held to account if they are failing.

Paul Martin: Can I take you back to consider the individual offender? You are talking about support for the offender that you hope to see in place and I am sure that we will come on to resources, but the offender has not changed; they are still the same offender who has completed community service previously and who has now been asked to complete community payback. If that offender is leading a chaotic lifestyle today, will it make any difference if we pass legislation in the Scottish Parliament? Will they become a new type of offender? What evidence is there that they will change their chaotic lifestyle?

Councillor McGuigan: I think that there will be a change. We are not talking about the offender simply going through the same old process that they went through before; there is a change in terms of the specific, person-centred support that the individual will get. I take your point that that is a necessary part of the programme. If we were simply to follow the old way where everyone went through exactly the same curriculum—for want of a better word—and the particular features of their requirements did not matter, it would fail. However, if we are ensuring that the process is offender centred as far as the rehabilitation aspect is concerned, it has to be victim centred as well because communities are the victims.

The programme will work if all the agencies are working to a plan, including local authority housing, education, employment skills and confidence building, citizenship and trying to reconnect, as you say, an alienated group of people who have been round the course a few times and do not have a great deal of confidence in the system. We have a new opportunity to make sure that those additional services are built in and we do not simply come up with a list that says, "Here's what we do and it's the same for Joe, Jimmy and Annie as it is for everyone else." The approach has to be more person centred.

Paul Martin: You have said that you want to put in place support mechanisms for chaotic individuals that you hope will have a more positive outcome. We know that the current arrangements for community service mean that a high number of people do not complete it. I cannot remember what the statistic is, but I think that Mr McLeish referred to it in his evidence. Are you willing to state on the record today that we will see a significant reduction in the number of those who do not complete payback orders? Surely if you are so confident—yours has been a confident performance today—we can get something on the record today to the effect that we will see a massive reduction in the numbers of those—

Councillor McGuigan: Of course you cannot say that and you would not expect me to. I am confident that the arrangements that will be put in place under the bill will improve on the current ones. I am also confident that community planning partnerships and the Scottish Government will have big responsibilities in the area and they have to make sure that they meet them fully. You will have a responsibility to ask questions if they are

failing. However, if you want me to put my hand up and say, "Look, everything's going to be wonderful," you have the wrong man sitting in this chair.

The Convener: That was a very wise response, Councillor McGuigan.

Cathie Craigie will ask some questions on resource issues.

Cathie Craigie: As the convener has instructed, I will move on to resources. According to the financial memorandum, the majority of additional costs incurred under section 14, which relates to community payback orders, under section 17, which relates to the presumption against short periods of imprisonment, and under section 20, which relates to reports about supervised persons, will be funded under section 27A of the Social Work (Scotland) Act 1968. Given that that funding, which is provided to local authorities, is in turn channelled through the community justice authorities, COSLA is clearly right to point out in its submission that if these provisions are to work, they have to be resourced.

In your submission, you say that there has to be a "radical shift of resources". The same comment has been made in other evidence that we have received. However, as you might have heard, the Scottish Prison Service has just told us that there might not be that kind of "radical shift of resources" from the areas that I had thought might be targeted. What are the resource implications of these provisions for local authorities?

Councillor McGuigan: If you are asking me to tell you where you can find the money to deliver this—

Cathie Craigie: I do not have to find the money.

Councillor McGuigan: Okay. If you are asking me to tell you where we, collectively, can find the money, I think that the matter must be addressed in an entirely separate review. Otherwise we will be putting legislation in place and expecting the resources for it to be somehow conjured up.

I simply do not think that the bill will work if the necessary resources are not in place. Local authority budgets are not as abundant as you might believe, and we are making considerable efficiency savings—cuts, if you like—in many services. As you point out, the provisions for community payback orders, which involve reviews, putting in place responsible officers and meeting other responsibilities, will cost the local authority a fair amount, which I cannot quantify at the moment. I know that the Scottish Prison Service and others have argued that if fewer people require certain services, it might free up resources. However, as has been pointed out, prison staff, for example, will still be required, so such moves might not free up the massive amount of resources that you might think. On the other hand, some pressure might be taken off the NHS.

As a result, we need an overall review of the existing sources where resources might be found and transferred, distributed or whatever. However, if the money cannot be found from those quarters, we have to put our money where our mouth is and find the resources to ensure that the bill works in making our communities safer and reducing reoffending. It simply will not work otherwise, and I give my full backing to such moves.

Having discussed the issue with him, I know that the Cabinet Secretary for Justice is well aware of my view that the bill must be backed up with resources. Indeed, he, too, would like to see those resources being made available. The committee has to say for itself what the priorities should be; if one happens to be the safety and wellbeing of communities, the bill should be on the receiving end of resources.

Cathie Craigie: COSLA also states in its written submission:

"interim transitional financial arrangements should be established".

Have there been reasonable returns from the cabinet secretary on that? Is it too early to discuss it?

Councillor McGuigan: It is too early, although there is continuing discussion among us about the bill's financial implications. I repeat that, if the bill's intentions are not accompanied by a big resource—I will not quantify how big—the bill will be much weaker than it should and could be.

Cathie Craigie: Do you agree that it is important that the committee ensures that financial resources follow the bill?

Councillor McGuigan: That is critical.

Cathie Craigie: Okay. I think that that is it on the resources aspect, convener. However, does the COSLA representative want to highlight anything in the bill that has not been discussed in this session?

Councillor McGuigan: No, nothing jumps to mind. I have covered most of the business.

The Convener: Yes, that is fair. Do members have any other questions?

Stewart Maxwell: Can I take the witnesses back to the proposed Scottish sentencing council? I did not ask a supplementary question on that earlier because I wanted to double-check what the COSLA written submission said on it. Nigel Don asked earlier whether you could elaborate on how the relationship between CJAs and the sentencing

council would work in practice. COSLA's written evidence says:

"COSLA welcomes the establishment of the Scottish Sentencing Council. However, it is important that this new Scottish Sentencing Council works alongside Community Justice Authorities as part of the wider Local Government Family to ensure that community sentences operate in a manner that enhances their credibility with the Courts and with the general public."

I want to ask the same question that Nigel Don asked. How do you envisage that relationship working in practice, given what your written evidence says?

Councillor McGuigan: It would work through the CJAs working very closely to their plans, which were submitted to, and approved by, the cabinet secretary. Those plans must interface with, or be woven into, the local authorities' and the community planning partnerships' single outcome agreements. If that does not happen and a CJA operates in isolation from the collective aspiration of key agencies in our communities, something is amiss. The CJAs will have to sit at the table with other agencies. I cannot be positive about this, but I think that most CJAs are, indeed, regarded as key partners in community planning partnerships. The CJAs' way of working and their plans, policies and proposals should therefore be mirrored in single outcome agreements.

Stewart Maxwell: I accept what you say about CJAs, single outcome agreements, local government and community planning partnerships, but the question was really about how CJAs and the Scottish sentencing council would work together on a day-to-day basis. How would that relationship operate in practice, given that your written submission states that it is an important feature?

Councillor McGuigan: Right. I am sorry that I went into other territory. It makes sense that the sentencing council and CJAs understand what each other is about and what is available—what the strengths and weaknesses are of, for example, community payback. If a CJA does not have programmes that are tailored to the needs of particular individuals, it needs to talk to the sentencing council about what variations or alternatives are possible. That would seem to me to be a sensible, on-going dialogue. We must be careful that CJAs do not influence, or overinfluence, what the sentencing council will do—that is similar to Mike Ewart's earlier point. I, too, do not think that CJAs should sit on the sentencing council, just as I do not think that the SPS should sit on it. It is about on-going dialogue, sharing of information and analysis of what is and is not working and how it can be reviewed to ensure that it has the intended impact.

Stewart Maxwell: That is helpful.

The Convener: We must move on. I thank Councillor McGuigan and Mr Callaghan for their evidence, which is greatly appreciated.

11:30

Meeting suspended.

11:32

On resuming—

The Convener: We will now hear from the third panel of the morning. I welcome the Lord Advocate, the Rt Hon Elish Angiolini QC; the Solicitor General for Scotland, Frank Mulholland QC; and John Logue, head of policy division at the Crown Office and Procurator Fiscal Service. Thank you for coming. We will move straight to questioning.

I open on the possibly vexed issue of the Scottish sentencing council. As you will have seen from the evidence that we have taken until now, the proposal to set up a sentencing council has attracted criticism from the judiciary, which thinks that its independence would be undermined. Do you have a view on the matter?

Elish Angiolini (Lord Advocate): Traditionally, the Lord Advocate does not play a significant role in sentencing, but she does have a role. One witness suggested that I have no locus in sentencing, but that is not the position in law. The Lord Advocate has the right to appeal what is perceived to be an unduly lenient sentence, but that is interpreted restrictively. Because the Lord Advocate and her prosecutors are the gatekeepers of what comes into the system and of the forum in which it is prosecuted, they have a significant influence on the sentencing process. We also provide information to the court, which influences sentencing. We have a significant interest and role.

In my view, a sentencing council can only be a good thing. I do not think that it would interfere with judicial independence. The Sentencing Guidelines Council in England and Wales has been a significant contributor to developing jurisprudence, on the basis that it is a resource for judges. One difficulty that our judges have faced in the past is the lack of availability of a systematic resource to which they can refer and from which they can seek advice or guidance. The sentencing council will be a huge addition to the justice system. As well as helping to achieve consistency and provide transparency and understanding of the sentencing process, it will allow judges to obtain information that will assist them in the sentencing process. At the moment, they have difficulty in pinpointing such a resource. Altogether, the sentencing council will be a real

benefit to the judiciary, and I hope that that is how they will see it in years to come.

The structure that is proposed in the bill will not result in interference with judges' independence. It is quite clear that it will not be the council's role to provide prescriptive mandatory guidelines or to interfere with judges' independence in particular cases. The council will provide guidelines that the courts must "have regard to", which means that they must give them consideration. If it is considered that the application of the guidelines is not acceptable in a specific case, reasons will be given why that is the case—that is a rational approach. Equally, if the appeal court considers that the judge's determination was correct, it can refer the matter back to the sentencing council. Altogether, the bill presents a package that I think will only improve the sentencing process and assist our judiciary.

The Convener: As you say, the guidelines that the sentencing council issues will not be compulsory. It might be said that they will give a nudge in what is considered to be the appropriate direction. What would you say to the argument that, in effect, there is a sentencing council in force at the moment, which is called the appeal court?

The Lord Advocate: The appeal court has the ability to produce guideline opinions, and I am extremely enthusiastic about its doing so. It has not done that particularly frequently, although it has been asked to do so in relation to a pending case in which I have appealed sentences. When the appeal court produces guideline opinions, that is a highly effective way of looking at sentencing across the board and providing a consistency—as opposed to a uniformity—of approach.

The benefit of having a sentencing council will be that the court will be able to look at other information on aspects of sentencing that do not relate solely to the judiciary. As a public prosecutor, I prosecute in the public interest. Constitutionally, I must do so independently, but that does not mean that I exist in a hermetically sealed vacuum when I determine what the public interest is. I take account of information from a number of sources. That is extremely important. The independence of judges in community courts in the United States is not constrained by their going out and speaking to their local communities; in fact, that enhances their understanding of what the problems are and how the public view matters.

At the moment, it is difficult for judges to know, other than through the tabloid media or the editors of the tabloid media, whether their sentencing reflects public interest, and I am not sure that that is the best way to approach sentencing. The council will create an opportunity for a much more systematic approach to be adopted and will give judges a resource that will allow them to understand and research whether their sentencing approach is relevant, appropriate and effective.

The Convener: No one doubts that sentencing is sometimes a complex and difficult issue. We have received some contradictory evidence about alleged inconsistencies in sentencing. I know that you might have reservations about commenting in any great depth but, in your experience, is there a serious problem with inconsistency?

The Lord Advocate: When judges sentence, they are not sentencing widgets. Sentencing is not a process that is subject to some form of regular procedure that will result in uniformity for all sentences, and nor should it be. Every case is different. Judges must approach cases on a fact-specific basis. If they were not to do so, it would result in arbitrary outcomes. They must consider not only the nature of the crime, but the circumstances of the accused and the victim, the issue of whether there was any provocation and the context in which the crime took place.

There is no such thing as a uniform crime. The crime of murder, for example, covers a vast range of activity and the nature of the conduct can become more aggravated depending on the circumstances of the case. Therefore, it can be difficult to assess whether there is inconsistency in the sentencing process, because of the absence of data and, indeed, of a system that is open to examination. I have been a practitioner in the courts over the years and I can tell you that there is anecdotal evidence across the board that some sentences surprise practitioners and that in certain circumstances it is difficult to predict what the sentence will be. As a prosecutor, that concerns me, because if a victim of a crime in certain circumstances was to ask me what sentence they could expect the accused to receive, I would be challenged in answering, unless I had an idea of who the judge was, which might give me an indication of the range of the sentence. The situation would be similar for defence counsel. The individual judge might have a significant impact on the sentence.

Lord Macfadyen put it well in his report when he said that even if there is no information that shows beyond a doubt that there is inconsistency across the board, there is certainly a perception of that. That perception might be driven to an extent by the tabloid media, but I can say from my experience as a prosecutor that there are instances of sentences that are outwith the general realm of sentences that are imposed.

On days when a particular judge is known to be on duty, there might be a queue of enthusiastic guilty pleas, but on other days, the court can be a veritable desert as far as guilty pleas are concerned. We will always have some judges who are more lenient and others who are more

draconian in the sentences that they impose. We do not produce a uniform, homogenous product in the judiciary; judges' independence, knowledge of life and experience are important in each case. However, it is important that there is a greater understanding of that; that there is consistency in the approach to sentences; and that we are not left in circumstances where there is sometimes considerable uncertainty as to the basis of the sentence, because a similar case might have resulted in a very different outcome.

The Convener: So the problem of sheriff shopping that I mentioned last week—tongue in cheek—is an issue even in the High Court.

The Lord Advocate: I am not sure that it is an issue. The structures of the courts are such that they remove the opportunity to select a judge. Someone might want to do that if they know that a particular judge is an extremely hefty sentencer—they might be inclined to try to avoid that court. That will not be ironed out by the existence of a sentencing council, because, as I said, there will always be judges who are more draconian and those who are more lenient. The important thing is that guidance will be available, which the council will have looked at. The judge will have regard to that guidance and he will explain his departure from it in the context of the sentence, which, in turn, will allow the prosecutor to determine whether the sentence is within reason and within the range established by HM Advocate v Bell.

The Convener: Have you seen any significant increases in section 76 applications dependent upon the particular judge?

The Lord Advocate: You might be relieved to hear that we do not research the sentencing of judges on that basis. There has certainly been a rise in section 76 pleas since the introduction of the Bonomy reforms and the Du Plooy judgment, which is much to be welcomed. However, we as the prosecution do not put a searchlight on where they occur.

The Solicitor General has just pointed out that you would not know who the judge would be for a section 76 plea, which would perhaps avoid the vagaries of someone attempting to ensure that a particular judge was on duty on a particular occasion.

Cathie Craigie: The convener raised the issue of the Lord Advocate's recourse to the appeal court. Can you advise the committee today—or perhaps later in writing—how many times, on average, the Crown would appeal a sentence?

The Lord Advocate: There was a recent parliamentary question on that. I think that there have been 68 appeals against unduly lenient sentences since the provision on that was introduced. The approach that I have taken—and which my predecessors have taken—is that we will not take appeals unless there is a significant issue regarding the case. We do not wish to use the mechanism constantly as a way of directing the judiciary in its sentencing procedure. It is used selectively in circumstances that have been considered judicially in the case of HM Advocate v Bell.

The Convener: We move on to the issue of voluntary intoxication. Stewart Maxwell, who has no interests to declare, will lead the questioning.

Stewart Maxwell: Thank you for clarifying that, convener.

Section 24 provides that the voluntary consumption of alcohol leading to intoxication cannot be taken into account as a mitigating factor in sentencing. Given current sentencing practice, I wondered whether you believe that that provision is required.

11:45

The Lord Advocate: Most judges would suggest that voluntary intoxication does not form the basis of mitigation and, in some circumstances, some judges would treat it as an aggravating factor. However, that does not prevent a culture in Scotland in which, if you were intoxicated, you will put that matter before the court by way of mitigation. Day in, day out, notwithstanding the understanding that it does not mitigate, solicitors continue to put it before the courts in mitigation that their client would not have carried out the crime if sober. That is particularly prevalent as an excuse or as a form of mitigation in domestic abuse cases.

Although our judges would not take into account intoxication, law is not just for judges, solicitors and those who use the courts; it is for the public. An important message would be sent out if we codified what is already known in our common law, which is that alcoholic intoxication is not a mitigating factor and that defendants who have imbibed alcohol will not have their sentences reduced because of that. It is important, in the current context in Scotland, to enshrine that message in our law.

Stewart Maxwell: I agree, particularly in relation to domestic abuse. I, too, have heard such examples. Should the provision be extended beyond alcohol to other intoxicating substances?

The Lord Advocate: Voluntary intoxication, be it through alcohol or other drugs, can result in certain offences being committed, but alcohol is still the primary feature in the cases that cross the threshold of the prosecutors, particularly in relation to aggressive and violent conduct. Certain drugs can inhibit aggressive behaviour, although they

are not a neutral aspect, but drugs are often significant in so far as a person's addiction—their withdrawal symptoms and their need to secure a fix—is the reason for a crime being perpetrated in the first place.

Stewart Maxwell: Some of the evidence received by the committee has been about the issue of a drunk person who committed an offence or a breach of the peace, but who became drunk as a result of a personal tragedy, such as a family bereavement. It is suggested that such circumstances might be mitigating. What is your view?

Also, you touched on alcoholism. Many people—I hope most people nowadays—see alcoholism as an illness. What is your view of someone who commits an offence when they are trying to get over that illness but they fall off the wagon?

The Lord Advocate: Those are two separate and distinct issues. There is the issue of the underlying cause of the intoxication. In the first example that you gave, in which someone who is suffering from profound grief drinks and then commits an offence, it is the grief that is the underlying cause or mitigating circumstance to which you would attach any significance—if that were relevant to the sentence.

Likewise, if someone is an alcoholic, they have an illness—a condition—that is one of the causes of their taking alcohol; it is therefore alcoholism rather than intoxication that is the mitigating circumstance. There is a distinction here. If someone has become a chronic alcoholic, there is often organic damage to their brain. A situation in which someone has gone out and had five Bacardi Breezers, three After Shocks and ten pints of Carlsberg is different from one in which someone has developed a personality disorder or organic brain damage as a result of years and years of alcohol abuse.

The Convener: We turn to serious organised crime—a matter that I know is of particular interest to the Solicitor General. Paul Martin will lead the questioning.

Paul Martin: Lord Advocate, can you clarify the current legal position? Can people already be prosecuted for conspiring to commit a crime or inciting others to commit a crime?

The Lord Advocate: Yes.

Paul Martin: Why should that be confirmed in legislation? Why has the Government introduced the sections in the bill that refer to serious organised crime?

The Lord Advocate: The provisions add to the armoury of the police, the prosecution and the criminal justice system more generally. As we know from information that was recently published by the serious organised crime task force, and as communities already know, serious organised crime is a huge problem throughout the world. Such crime does not understand or observe borders. It attracts investors from abroad. It is important to ensure that a signal goes out to those who might have the propensity to invest in organised crime in this country that they will not be comfortable here, and that a modern, contemporary law gives that strong message. Where people will invest in illegal activities is a consideration.

On whether the bill simply duplicates what already exists, it is, to some extent, not essential to have the provisions. With creativity, we could find ways under the common law of prosecuting most of the offences that are covered. However, section 25 in particular goes further than what is currently seen as conspiracy. Currently, there is a conspiracy if two or more persons agree to commit a crime. However, section 25 goes further back than that. It states:

> "A person who agrees with at least one other person to become involved in serious organised crime commits an offence."

Things are taken a stage back. We are talking about the stage of preparation and the stage of perpetration. In many cases, we have evidence that does not quite show that the person was at the actual conspiracy stage; rather, it relates to their becoming involved in a conspiracy. The person will have set up himself or herself and their business to become involved in that, but we could not get sufficient evidence to show the commission of a specific crime, albeit that generic evidence was available that showed involvement with people connected with money laundering, drug supplying or human trafficking, for instance. The offence in question will be useful as another aspect of our prosecution armoury.

There is also a useful message about aggravation, which is a separate and distinct offence. Let us consider an 18-year-old or a 19-year-old with a conviction on indictment for assault to severe injury in their schedule of previous convictions. If such a conviction is aggravated by their involvement in serious organised crime, an entirely different message and signal will be given in later years and to those who may employ them in the future about what that assault was about and what they might have been involved in. There is therefore a question of labelling, which we have considered with racist crime and more recently with hate crime. Such an approach is useful in showing the nature of the activity as well as whether the crime was innovative or new.

Prosecutors currently have the choice of prosecuting malicious mischief or vandalism. It is

not a question of legislating for the sake of legislating; rather, it is about giving clear messages to the public about what the law is and how we treat and deal with aggravated offences by reference to membership of a conspiracy. I hope that, in addition to dealing with the crime itself, the courts will clearly show and reflect the seriousness with which engagement in serious organised crime, intimidation, the exploitation of human beings for human trafficking or sexual purposes, or engagement in drug trafficking are treated in Scotland by reference to the aggravation and by having the particular offences available. I think that the provisions will be very useful.

The Solicitor General may have more to say about the matter. His discussions with the Attorney General of British Columbia brought the existence of such offences in Canada to our attention.

The Convener: It would be useful to hear from the Solicitor General at this stage.

Frank Mulholland (Solicitor General for Scotland): I visited British Columbia a couple of years ago, where I discussed serious and organised crime. British Columbia is blighted by that problem too. There was a raft of common-law or codified offences in Canada to deal with the matter, but for the reasons that the Lord Advocate articulated, the view was taken that a message had to be sent out and additional tools had to be given to law enforcement agencies and prosecutors to deal with it. There was a particular problem with Montreal biker gangs, I think, as a direct result of drug-dealing activities involving murder and that type of thing. That is why that particular legislation was introduced. I spoke to the Attorney General of British Columbia at the time—I think that there had been five successful prosecutions.

They take a slightly different approach to sentencing in this regard. If someone is convicted of a substantive offence and the aggravation, then by law the sentences must be consecutive. I do not understand that that is proposed in relation to the bill, but they thought that that was of particular use.

Paul Martin: I think that the Lord Advocate said at the outset that some elements of duplication are involved and that current legal remedies can be taken forward. Surely they can already be used as a way of sending out a public message? From a prosecutor's point of view, how helpful is it for politicians—myself included—to keep on sending out the message that we want to send out a message. There are many ways of doing that other than by duplicating legislation. The law is there to be enforced. If a legal remedy is available to us, why do we not enforce it? Why do we not use that route to send out the message? Are we not reinventing the wheel? I appreciate that there are additional elements to some parts of the bill, but there is clear duplication in other parts. How helpful is that to you as a prosecutor?

The Solicitor General for Scotland: There is duplication across the common law, for example between the common law and statute on vandalism and malicious mischief. Indeed, there is duplication across serious and organised crime—there is a raft of offences that we can deploy when indicting criminals. However, we seek to say that a person has committed a crime as part of a serious and organised crime group for the purpose of obtaining money, perhaps through drug dealing, intimidation and violence, people trafficking or labour—that type of thing. Legislation gives a framework for prosecutors and investigators in considering serious and organised crime. In my view, that is very useful, and that is the view of the Canadian authorities, too.

Paul Martin: I turn to the definition of serious and organised crime. Some have suggested that we are not focusing on what is serious and organised crime. If you have read the *Official Report* of last week's meeting, you will know that the Association of Chief Police Officers in Scotland could not confirm what its view of serious and organised crime is. Surely we have fallen away from the focus of the bill.

The Lord Advocate: I saw a suggestion that two people coming together to steal a pork pie or some other type of meat pie could amount to a serious and organised crime under the definition. Of course, if two people conspire to steal a meat pie, I can—theoretically—indict them for that. Currently, that is under the common law. However, I would not do so, because if I did, I would receive criticism—and not delicate criticism—from the judiciary and others. I would be seen as having lost all common sense. Our common law allows us to indict a whole range of crimes from breach of the peace and assault and prosecute people under summary complaint. The definition in the bill is "indictable offence". Clearly, the definition straddles a number of different types of offence.

One thing that we have learned about serious and organised crime is its capacity for innovation and change. The people who commit these crimes are innovative creatures. Fifteen or even 10 years ago, we as prosecutors could not possibly have envisaged the serious and organised crime that we see at the moment. We could not have envisaged the nature of the conduct in which these criminals are engaged. I would like to see flexibility, in so far as it is possible, so that we are not caught with a gap in the law that means that we cannot deal with something as a result of having narrowed it down to a schedule in such a way as to prescribe the nature of the offence. That would be the difficulty. For instance, let us

consider those who engage in the trade of child pornography. Fifteen or 20 years ago, it would have been very difficult to envisage that type of trade taking place, but it is certainly taking place at the moment. We want to be able to take into account such new types of crime and prosecute people without being prescribed by what we currently know and recognise as organised crime.

Paul Martin: Is that specific example an area where you cannot intervene at the moment? Do you not have a legal intervention that allows you to prosecute those engaged in child pornography?

12:00

The Lord Advocate: Of course we do. As with most things, we can intervene. One of the beauties of the common law is that it allows a degree of flexibility, but with the jurisprudence of the European convention on human rights, particularly article 7, there is a drive towards greater certainty about what constitutes an offence. The exercise of our courts' power to declare what is a crime is likely to fall into desuetude.

The benefit of having a wider definition is that it gives us the capacity to indict immediately, without having to wait for legislation, when an innovative new business is created that should clearly be struck at in the context of serious organised crime, as opposed to the simple commission of fraud. Even emergency legislation can miss that opportunity. For example, we know that terrorists use credit card fraud as an effective way in which to raise money to perpetrate their activities. I could indict that activity as a fraud, but I would not do so. I would use the terrorism legislation, which duplicates the crime to some extent, but gives a clear message on purpose and intention and provides a framework.

On the point about duplication, there is a distinction to be made. The legislation gives the activity a flavour and a label, so it sends a clear message on the nature of the activity not just to the sentencer at the time but to sentencers in the future, to the public, to prospective employers, and to those who consider people for immigration. The provision would also be useful throughout Europe. If an individual who had committed an assault in the United Kingdom was thinking of settling down in Paris, it would be useful for the authorities there to know that they committed the assault for the purposes of serious organised crime.

The Solicitor General for Scotland: I have a good example of that, to supplement what the Lord Advocate said. There is evidence that some illegal dumping of toxic waste is related to serious organised crime. That is a statutory offence on its own, regardless of the context. However, if it is committed for the furtherance of serious organised crime, that will aggravate the offence, and the courts will be able to deal with the crime in the context in which it was committed.

Paul Martin: Concern has been expressed about the wide scope of the offence of failing to report serious organised crime. What are your views on that?

The Lord Advocate: The offence is modelled on the proceeds of crime legislation and the provisions on terrorist structures that are contained therein. I have no difficulty with that. There is a clear protection for legal privilege, but it should not be used as a cover by solicitors or other professionals who would facilitate crime. We would consider the facts of each case, but we need certainty about that.

In the current environment, if someone goes to a solicitor and, with no reference or background information, wants them to hire some barns in disparate and remote parts of Scotland, the solicitor will be aware of the problem that we have with cannabis cultivation and might have a basis for believing that the request is unusual. The solicitor might then acquire the information that the individual has no other business connections, and they might compile other evidence. We begin to see how professionals have a responsibility to help us to prevent the growth of organised crime.

The provision is important because a lot of organised crime can take place only with the acquiescence of certain professionals, be they estate agents, solicitors or others, who allow activity to take place through what are ostensibly legal and legitimate activities. We must ensure that we tackle that route. Organised criminals need professionals to launder their money, to transact, and to lease properties. I am not concerned that the provision is too widely drawn, but if that is seen to be the case, we can consider whether amendments might provide reassurance.

Nigel Don: I am grateful to the Lord Advocate for her comment that the European convention on human rights is and will increasingly be inconsistent with the Scottish courts' declaratory power to establish what they believe the law is now when it was not understood to be the law before. That probably explains—for the first time to me—why we increasingly come up with statute law that is wider than we might have wanted. It is because the courts cannot expand it for us.

In that context, I wonder whether the definitions of a serious offence in section 25(2)(b) are wide enough. It has been suggested to us that threats and intimidation are a part of the culture that we are trying to work against but that they might not be covered.

The Lord Advocate: They would be covered by the current definition. Threats and intimidation are indictable offences; the outcome depends on the situation in which they take place. I could indict a threat or extortion in the High Court—indeed, we have done so.

The Solicitor General for Scotland: Just issuing a threat is, in itself, an indictable crime under Scottish common law.

Nigel Don: So you are happy with the drafting of that section.

The Solicitor General for Scotland: Yes.

The Convener: The situation is fail-safe—nobody could fall through the crack in the pavement, either way.

The Lord Advocate: Who knows? If we had a crystal ball, we could look into it.

In this context, a significant feature is the ability to mutate from one type of organised crime to another. We need the flexibility in our law that will enable us to deal with that. If we prescribe things too tightly, we will end up trying to deal with the drugs barons of 10 to 15 years' time—who might have moved on to human trafficking or various activities that we as yet cannot conceive of—with an act from 2009 that, by that time, might appear all fuddy-duddy and passé.

Robert Brown: Lord Advocate, you say that you are comfortable with the provisions in section 28 that deal with people who have knowledge or suspicion of crimes. However, do you accept that that proposal moves on quite a distance from traditional concepts of law in this area? There is no question of the person's involvement in crime—if there was involvement, the person could be dealt with under one of the other sections. The offence that would be created by section 28 does not concern involvement but knowledge or suspicion, which does not even go as far as knowledge. What is the essence of that crime? What are you trying to get at that you cannot get at by using the provisions on involvement?

The Lord Advocate: You are right to say that knowledge is a step away from direct involvement in activity, but I point out that the provision is modelled on provisions in the Terrorism Act 2000 and the Proceeds of Crime Act 2002. As I said earlier, it is important that we can get to people who, through their proximity to certain activity that they know to be serious organised crime, have the ability—outwith the realms of professional privilege—to provide information that would be of use to the authorities. It is important that we have that provision. The courts would judge objectively what it was reasonable to infer from the activity and what information the individual had access to. I do not think that the provision would be applied by the courts arbitrarily or on a whim; they would have to believe that it was reasonable to have such a suspicion, based on the objective facts that were available to the individual.

Robert Brown: Is the issue not to do with the individual having some sort of involvement? In its supplementary letter to the committee, ACPOS talked about situations in which an individual received benefits, such as payments of money, which would imply involvement. I am quite comfortable with the provision dealing with people who have a degree of involvement, but I have concerns about someone being prosecuted for their knowledge and suspicions, without there being some other involvement beyond that. Most people who view these matters in a traditional fashion might take that view as well.

The Lord Advocate: If I am a solicitor in practice, I may not deal with a particular client's case but I know what is going on in the office. How would you consider that that matter should be approached?

Robert Brown: Would you elaborate on that?

The Lord Advocate: I think that, in such circumstances, the professional responsibility should be such that that knowledge is sufficient, in so far as it relates not to the privilege aspect but to the facilitation of crime. If I were a young lawyer in a firm of solicitors and I knew that in the firm something criminal was going on that involved serious and organised crime, the fact that I was not a partner or directly involved with that client should not absolve me of my professional responsibility, under the legislation, to report that.

That is why the obligations that we have placed on our financial institutions with regard to money laundering and terrorism are so important. We are dealing with a serious situation. Serious organised crime could be significantly undermining our economy and our employment laws—people involved in serious organised crime do not have to have regard to employment legislation, as they can simply intimidate or knock off those with whom they are not satisfied. They also do collateral damage to our communities in terms of the confidence of our young people and their aspirations about where they can go in their lives: if they see that those who are involved in serious organised crime are those with money and assets, that is a problem.

I understand your concern about knowledge being a step away from involvement, but I think on balance that, because of the public interest, the use of the provision is justified in the situations in which we see it being used.

Robert Brown: You seem to suggest that you would be picking off the minnows rather than going after the senior partners and others who

knew more about the activities and were actually involved.

The Lord Advocate: I assure you that we would not use the provision to the exclusion of the prosecution of others—we would not let the major players off. The issue is about whether the person with knowledge of the activity would be liable to prosecution. In some cases, such people are liable to prosecution because of their own activities, and, in those cases, we use them as witnesses for the Crown. The provision would not be used arbitrarily, and discretion would be applied in those circumstances.

Robert Brown: Do you think that there are adequate protections against people being dragged into the context of the activity, even though their involvement is extremely peripheral?

The Lord Advocate: The protection is the integrity of the individual, their professional ethics and their ability to resist accommodating the activity that I described in the firm or organisation that they work in.

The difficulty is that, at the moment, there is no obligation for professionals, but if they are trained in law school about the significance of the issue, it will bring it to light. The provision will also make those who might be inclined to engage in or facilitate such criminal activity think twice about doing so, as they will be aware that the younger solicitors in the organisation and others who might have knowledge of the activity are obliged by law to report that.

Robert Brown: Can you provide us with precise examples of situations in which there has been a problem of the sort that you are talking about? I appreciate that you cannot breach people's confidence with regard to particular cases, but can you illustrate your point more precisely? You do not need to do so today; you could do so in subsequent evidence.

The Convener: Clearly, any case the Lord Advocate referenced could not be a current case; it would have to be historical.

The Lord Advocate: Yes, I cannot talk about a case that involves on-going investigations.

Anyone who is involved in the investigation of serious organised crime—in Scotland, Europe and across the world—knows that it cannot take place without the involvement of the legitimate professionals and agents who facilitate the necessary processes. We have to get to the heart of that activity and disrupt it. If we show our willingness to do so, our professionals will ensure that their ethics and practices are such that, when individuals come to them with suitcases full of cash or demand to purchase large assets without any apparent sources of money, they ask questions proactively with a view to the circumstances that might result.

Robert Brown: Are there not already arrangements in place under money-laundering legislation and so on that deal with such situations in a much more focused way?

The Solicitor General for Scotland: An example of what we are talking about would be an estate agent who factors four or five flats on someone's behalf finding that they are paying monthly electricity bills of £5,000 per flat. That would tip off anyone with any semblance of common sense that something strange is happening in the flats, and, if they applied that common sense, they would probably conclude that the flats were being used as cannabis farms. Should that person be able to say, "I had suspicions, but I decided not to do anything about it because I was getting a big fat fee for factoring the five flats"?

That sort of situation is not covered by money-laundering legislation but would be covered by the provision in the bill. The proposal would give law enforcement a great tool and send out a message to those who are willing to engage in serious organised crime that we have the tools to deal with them.

The Convener: This is an important aspect of the bill but, as there are no further questions on it, we will move on to deal with witness statements.

Bill Butler: Section 62 creates a power for the court to allow a witness to refer to his or her statement during the giving of evidence in a trial. What are your views on that proposed change to current practice?

12:15

The Solicitor General for Scotland: I think that the proposed change is a good thing. Let me explain why.

Many trials are really a memory test for witnesses. For example, in a cold case, witnesses who gave evidence in 1991 might be called to give evidence in 2009 and be questioned on the detail of their statement. If they cannot remember precisely what they said or if they say something slightly different, they will be accused of being inconsistent. It seems unfair that the only person in a prosecution who cannot see the statement before the trial is the witness who gave the statement in the first place.

Another aspect is that police officers are allowed to refer to their notebook as an aide-mémoire. Their notebook will often contain their own statement. Therefore, the proposed change has a precedent in Scots law in relation to police witnesses.

I think that the change will also reduce the length of trials. In my experience of many trials over the past five to 10 years, witnesses can be asked, "Was it at 5, or was it at 4? Was it rainy that day, or was it windy? You said that it was rainy, but you now say that it was windy." Cutting that questioning out of trials and getting down to the actual substance of the case would be a good thing.

Another aspect is that the statements must be accurate. The committee has heard evidence from various persons involved in the criminal justice system who—from the *Official Reports* that I have seen—have complained about the accuracy of police statements. I will not pretend that there are no problems, but measures are in place to deal with that, such as training, guidance and co-training with the Crown Office and Procurator Fiscal Service on the new standard statement, which tries to focus police officers. Police officers also now have electronic notebooks. In addition, Lord Coulsfield has recommended that statements in solemn cases should be signed by the witness.

In my view, the proposed change will improve the accuracy of statements. If witnesses can see their statement in advance of giving evidence, they will be able to see whether it contains any inaccuracies that should be drawn to the attention of those involved in the case. The proposal is a further measure that will save time and improve criminal justice for witnesses. After all, we rely on witnesses to prove cases so we need to treat them with respect.

Bill Butler: Are there no potential drawbacks?

The Solicitor General for Scotland: I mentioned the accuracy of statements, which we hope the proposed change will help to improve. I see no problem with the proposals. For example, when I was over in The Hague last week to see the International Criminal Tribunal for the former Yugoslavia, the prosecutors involved in those war crimes trials told me that they go through what they call a pre-trial proof, in which witnesses can go over their statements with the prosecutor. That also happens in other jurisdictions, including England, so I do not see why it should not happen here.

Bill Butler: That is very clear, thank you.

The Convener: We now turn to disclosure, which has caused some excitement. The questioning will be led by Robert Brown.

Robert Brown: As the Solicitor General will know from our evidence last week from Lord Coulsfield and others, it has been suggested—the subject of disclosure takes up about 15 pages of the bill—that the whole principle behind disclosure has been lost. Questions were asked about the workability of the provisions. Do the law officers have any technical views on whether the provisions are workable and practical? Could many of them be junked from the bill and put into a code of practice or something of that sort? What are your views on that general approach and on the comments that were made last week?

The Lord Advocate: I have had an opportunity to consider the provisions. The Solicitor General deals with disclosure and also heads our reference group, so he will answer the question, but first let me say that Lord Coulsfield did a tremendous piece of work, which was instigated by my predecessor as Lord Advocate, Lord Boyd, and by me as Solicitor General because of the great uncertainty resulting from the extent of our obligations. What has become apparent since then, from development of the common law through the appeal court and the Privy Council, is the extent to which matters are still capable of development. Although the essential concept appears to be breathtakingly simple, its practical application is extremely complex. Therefore, it has been necessary to bolt down, in a sense, that which might in the future have a consequence for a prosecution.

Much more streamlined legislation would be more attractive, but to leave open some issues might imperil future convictions because a decision that the obligations were different from those that had been understood by prosecutors would, to some extent, have retrospective effect. That has been one of the guarding principles. I certainly agree with the desire to make things as straightforward and simple as possible—there is a possibility that the schedules of evidence could be taken out of the bill and put into subordinate legislation. Again, I understand that Parliament likes to have, as far as possible, certainty about the law in the primary legislation rather than in subordinate legislation. I will let the Solicitor General give his views.

The Solicitor General for Scotland: Superficially, disclosure does not appear to be, and should not be, a complex matter, but when one gets heavily involved in the subject, it can be seen to be quite complex. For example, the COPFS disclosure manual that we have published on the Crown Office website contains 178 pages, 33 chapters and 11 annexes. That gives you a flavour of the complexity of disclosure in daily operations.

To echo what the Lord Advocate said, prosecutors need certainty. You need to know with which rules you must comply in order to comply with disclosure obligations. The problem with the common law is that it develops. We know from experience that there is a legal fiction that a change or development in the common law is retrospective—therefore you look at old

convictions after a change in the law and it imperils old cases. The bill gives us a comprehensive set of rules so that the police and the prosecutor know that if they comply with those rules, they will comply with their disclosure obligations, which will ensure a fair trial in accordance with article 6 of the European convention on human rights.

As the Lord Advocate said, one or two matters could reasonably be taken out of the bill and put into subordinate legislation or a code of practice, such as schedules of evidence.

Robert Brown: We can look at the detail of that. One suggestion is that there should in the bill be a better statement of principle that provides a starting point, is ECHR-compliant and does what it can to allow an element of flexibility for development without losing the precision that you seek. Are you in favour of a clear statement of principle in the bill, as suggested by Lord Coulsfield?

The Solicitor General for Scotland: I agree that there should be a statement of principle in the bill, but there is one in section 89(3), which derives from the duties as set down in the most recent and up-to-date case from the Privy Council, which is McDonald, Blair and Dixon v HMA. It says that the subsection will apply where

"(a) the information would materially weaken … the prosecution case,

(b) the information would materially strengthen the accused's case, or

(c) the information is likely to form part of the prosecution case."

That is a statement of principle—it is our disclosure obligation. It takes into account the most up-to-date and authoritative jurisprudence on the matter from the Privy Council, and it is enshrined in the bill.

Robert Brown: To take that further, do you agree that the more complex the arrangements for the detailed rules are, the easier it will, along the line, prove to challenge some minor aspect of them and that therefore, the complexity is a bit of a challenge in itself?

The Solicitor General for Scotland: I am a great advocate of simplicity, but as I said, disclosure is a complex matter. When you look at the number of relevant provisions and sections in comparison with our disclosure manual from which we operate, they are not overly long or detailed and they give us a comprehensive set of rules or provisions. We know that if we comply with them, we will ensure a fair trial and comply with our disclosure obligations.

The Lord Advocate: On Mr Brown's point about whether a technical failure to comply with one aspect of the disclosure obligations might result in a conviction falling, as jurisprudence has developed on article 6 of the ECHR in Scotland, the appeal courts have acknowledged that failure to disclose would not in itself render a trial unfair and contrary to article 6. Rather than consider a technical breach that might not affect a conviction, the court would consider the fairness of the whole trial and would examine, in that context, the impact and material significance of a failure to comply with the regulations.

Robert Brown: Defence statements have been subjected to even greater criticism—on the principle, rather than their detail. Evidence has consistently suggested that such statements do not work but only make things more complex. New information from England suggests that the statements are used only in a vague way and that they make little difference at the end of the day. In short, they are complex, they waste time, and they do not help in getting at the heart of the issues. What is your view?

The Lord Advocate: That was the position when Lord Coulsfield considered defence statements in England and Wales. I subsequently met the Director of Public Prosecutions for England and Wales, and learned that statutory amendments and changes in practice mean that the experience is now quite different. From the prosecution perspective, the statements are now a different and more useful creature—

Robert Brown: When were the changes made?

The Lord Advocate: I think they were made 12 to 18 months ago. John Logue, who is the head of policy here, might be more au fait with implementation. The clear message from England and Wales is that the new version of the defence statement, as now implemented, is quite a different creature from that which existed at the time of Lord Coulsfield's work.

I am happy for the Solicitor General for Scotland to deal with these matters, but I know that there has been debate over whether the statements should be voluntary or mandatory. The prosecutor has to understand what is relevant and material to an accused, in terms of his defence, as well as what is relevant and material to the prosecution, and decisions have to be based on all the available information.

In many cases, especially High Court cases, there may be more than 3,000 statements, thousands of productions, and information that is very broad. To understand what might be relevant or of interest to the defence, it is of considerable help—in establishing the rights of the accused to a fair trial under article 6 of the ECHR—to be able to anticipate in what the defence might be interested. It is not just about assisting the prosecution; it is

also about assisting the accused. It is not about prosecution by ambush or surprise—we now disclose all our relevant information—but nor should it be about defence by ambush or surprise. Things have changed with disclosure: the environment in which we prepare cases is no longer the traditional arm's-length preparation, with defence precognition and separate Crown precognition.

If information that is relevant to the defence is esoteric or not patent, I would, as a prosecutor, want to know about that not after six weeks of trial, but before the trial commenced, because it may affect whether the prosecution should proceed at all. We should not waste the resources of the criminal justice system when a defence can clearly be made out. It is in the public interest for us to be aware of that at an early stage. Information that might assist the defence should be made known.

In Scotland, special defences are currently intimated. One is not bound by them—nor would one be by defence statements—but the special defences are restricted to particular circumstances. There are other defences for which it would, even with a crystal ball, be difficult to discern what will emerge during the trial. How can a prosecutor properly and comprehensively satisfy their obligations to the accused in the context of 3,500 statements if they have no idea what the defence will be or what might be relevant to the defence? The Solicitor General has a good example from a trial that he conducted.

The Solicitor General for Scotland: Before I give the example, I will draw on my experience at The Hague at the ICTY. I popped in to see the procedural hearing for the prosecution of Radovan Karadzic for war crimes in Serbia and Bosnia. He has been ordered by a procedural judge—Lord Bonomy: a Scottish judge who is highly regarded out there—to lodge a pre-trial brief within three weeks. As I understand it, the trial is not due to start until September or October. The pre-trial brief is a detailed case on Karadzic's behalf that answers and sets out his defence against the allegations in the pre-trial brief that the prosecutor has lodged. That is an example of how it works on the continent; there are other jurisdictions that require such measures.

12:30

To give my example, which the Lord Advocate mentioned, I prosecuted a murder trial in Glasgow a number of years ago, which concerned a young lad who was shot at close range with a sawn-off shotgun in Kenmure Street. A special defence of incrimination was lodged, but that did not give me any details.

There was a raft of disclosure in that case, but it only became clear to me towards the end of the defence case that the details of the incrimination involved the fact that the person who had committed that awful crime was wearing a balaclava. I asked, of my own volition, whether a search of the police statements could be made to see whether there was any mention of the recovery of a balaclava in any of the nearby gardens or buildings. Lo and behold, we found a statement from a police officer who said that he had recovered a balaclava. I disclosed that fact towards the end of the defence case, but I would not have known about it if I had not received that information. I am sure that the defence would have wanted to know that well in advance of the trial. With the best will in the world, I do not have a crystal ball, and I need to be advised as to the precise details of the defence that the accused is going to put forward.

Scots law has always been based on fair notice: the defence advises the Crown of the nature of its case, then the Crown advises the defence on what the prosecution's case is. The provision would supplement that and help to focus trials. Trials are paid for by the public purse, so we want them to focus on the issues, rather than on trying to second-guess the real issues with a crystal ball.

Robert Brown: It is an issue not about principle, but about the practicalities and how the process works. It strikes me from the way you described the balaclava example that that fact might well not have emerged from a defence statement anyway, certainly in the way that statements were used in England before the recent changes, which might have made a difference. Is not that a case for the lodging of defence statements to be optional rather than their being a more substantial requirement?

The Solicitor General: That goes back to the question of what is the nature of a trial. A trial is a test of the prosecution evidence and the defence case, if the defence wants to put forward a case. One would want to identify issues in advance of the trial because that, in my view, makes for a much better trial. It means that it will not be simply a case of taking a scattergun approach to the evidence: there will be focus to assist the court and the jury, and there will be no excessive delays or long trials. A defence statement is a good thing: it should be mandatory rather than discretionary in order to achieve the purposes that I have articulated.

Robert Brown: Can you give the committee further details of the changes in the English legislation, and how that legislation has improved the position there? The information that the committee has received suggests that there were significant issues with the English position before

the legislation was introduced. Again, it is a matter of practicalities: whether the legislation is working; whether it has been in place long enough to make a difference; and whether it can be translated into the Scottish system. You do not have to supply the detail now. Perhaps you can write to the committee.

The Lord Advocate: John Logue might wish to deal with that.

John Logue (Crown Office and Procurator Fiscal Service): I am happy to do so. The legislative change in England and Wales is quite recent, so it might be safer if we provide the details in writing—I do not have the information with me today.

An important point of principle is that it is difficult to conceive of a reason why the defence would, at the stage of being ready to go to trial, be unable to advise anyone of what its case is. After all, as a result of the recent changes, the defence now has fair notice of the entirety of the Crown case to the extent that is required under the law, and the accused is the only person in the process who is able to say at that stage what the defence case potentially is.

There is no reason in principle why provisions that require the defence to provide a statement cannot be made to work effectively. Much of that—as I think is the case in England and Wales, on which we will provide more detail—comes down to the way in which the court manages and oversees the process. Legislation can, therefore, advance the matter only to a limited extent. The final part of the answer essentially requires—to advance the point that the Lord Advocate and the Solicitor General have made—a mature approach from all those who are involved in the criminal justice process.

The Convener: It would be helpful if someone could produce a paper for us, because that issue came—as our American baseball friends would say—from left field and has caused us some consternation.

Nigel Don: Do you expect an increased workload under the disclosure regime? I get the impression that you feel that you are doing it already and that the bill merely tells you what you need to do.

The Lord Advocate: I hope that we will to some extent reduce the workload that relates to disclosure as a result of the developments that we are currently researching. We are running pilots of pen drives, encrypted websites and so on to remove the labour intensity of the process. Disclosure was a huge additional burden when it was introduced in 2005 and it was responded to very well, given that it happened overnight. So far as the police are concerned, there should be no difference from current obligations in respect of disclosure: there is no change to the law or to the extent of our obligations. There may be alterations to working practices but—again—given the practices that have been developing, it should not be a dramatic change. It should be neutral.

Nigel Don: I will turn to the non-notification order procedures. It has been suggested that that process might not be consistent with the ECHR. Can you give us a policy steer on whether it is an acceptable way forward?

The Lord Advocate: As Lord Advocate, I will look at whatever manifestation there is of that provision at the end of the bill process and I will refer the matter to the Privy Council if I consider it to be incompatible with the ECHR. However, the issue of special procedures and non-notification has been looked at by the House of Lords in R v H and C and it has been looked at again by the House of Lords in the appeal court this week, when there was an opinion regarding special advocates. I am satisfied that, so far as is possible, the bill sets a framework that will be compatible with the ECHR as we understand it in the United Kingdom, and that much will depend on the facts of individual cases. It will ultimately be for judges to determine whether the provisions, as they operate in practice, can allow fair trials in that respect. That judicial role will be important.

Stewart Maxwell: We have received written evidence about non-invasive post mortems from the Scottish Council of Jewish Communities. In principle, do you have any objection to the introduction of non-invasive post mortems—in other words through magnetic resonance imaging scans—into the Scottish system, with the obvious caveat that the procurator fiscal would have the final say. I raise the issue not only in the light of the written evidence from the Scottish Council of Jewish Communities, but because I think that Muslim communities and other communities would probably support the introduction of such post mortems and because the Coroners and Justice Bill, which is currently going through the UK Parliament, makes provision for such a change in England and Wales, following the pilot trials in Manchester. Do you have any objection in principle to something similar coming into effect in Scotland?

The Lord Advocate: No—but it would depend on the nature of the death. Stewart Maxwell referred to deaths generally, but in the context of suspicious deaths, when we are looking at potential homicide, we would require to ensure as far as possible that we present the best possible case to the court. Where possible, if there was a significant clinical history—for example, if a person had sustained injuries and it was a very long time before they died, and there were significant clinical

notes as well as computed tomography scans in life and so on—the need for a very invasive post mortem might be reduced, but might nonetheless be required thereafter to satisfy the evidential tests of corroboration, if the cause of death were to become more complex because of that very fact and causation was an issue.

I do not think that non-suspicious deaths would be within the scope of the bill, but the matter is already very much of interest to procurators fiscal. Indeed, John Logue and his staff have been looking at how we can reduce, to some extent, the terrible trauma of post-mortem examination for next of kin in any circumstance, but particularly where provision can be made for view and grant, as it is referred to. A number of pathologists in Scotland will be satisfied that by looking at the clinical notes and the X-ray material that may be available, as well as at the clinical history, by viewing the body externally and by taking samples for toxicology or for other purposes, they will be able to certify death on that basis. Where possible, that will be done. In other circumstances, such an approach might not be possible.

The specific issue of the use of CT scans by the Manchester coroner is something that we have considered. We visited the Manchester coroner with a view to establishing whether such an approach could be introduced in Scotland. That study is on-going and Mr Logue will be able to assist the committee on where that work is now.

John Logue: We are considering the matter closely because of representations that have been made to us. However, it is important to bear in mind a number of important differences.

In the context of the statutory scheme and the operation of the coroner's role, the legislation in England and Wales specifies when post mortems are required. We have a very different scheme in Scotland, so we need to consider whether MRI scan post mortems are useful, whether legislation is required for such post mortems to happen, and whether the broader role that the procurator fiscal has in relation to the investigation of deaths offers other opportunities.

There are other ways in which the procurator fiscal investigates deaths in Scotland, which mean that the use of such equipment—as it is envisaged in England and Wales—would not be necessary in Scotland. The answer, as the Lord Advocate has said, is that there is in principle no objection to its use, but the context may be very different. It may not be required as it is in England and Wales, and we are happy to consider other ways in which we can resolve the issue. At the end of the day, we must be guided by medical opinion as to when that is appropriate, in addition to our own views, to which the Lord Advocate alluded in relation to suspicious deaths. The early indication is that the use of such equipment may have limited scope, but that does not mean that we should not consider whether it would be useful.

Stewart Maxwell: I accept what the witnesses are saying—with the exception of the last point that Mr Logue made about how useful such scans would be. The evidence from the Manchester pilot is that replacing a surgical invasion with an MRI scan has reduced the number of post mortems by about 90 per cent or even more, which is more extensive than the limited application that Mr Logue is suggesting.

John Logue: The difference is between the context in which the procurator fiscal investigates deaths in Scotland and the more prescriptive and regulated scheme whereby the coroner in England and Wales investigates deaths. I understand that there are generally many more post mortems in England and Wales at the instigation of the coroner. I am trying to get across the fact that there may be more flexibility in the current system in Scotland, which means that MRI scans will not have the impact that they appear to be having in England and Wales. That is my understanding following an early visit to the coroner and the professionals who operate the scheme.

Stewart Maxwell: I have written to the Cabinet Secretary for Justice about the matter, which merits further discussion before stage 2.

The Convener: It is work in progress for the Crown Office. By that time, the situation will, we hope, be clarified.

Nigel Don has a final point to raise.

Nigel Don: Looking at the sections about extreme pornography, I am left with the impression that the offences are more widely drawn regarding images of children or images that may have come from children, than are those regarding images of adults. That may or may not be a correct perception. Given the influence of computer software and the developing nature of crime, which the Lord Advocate mentioned earlier, is section 34—which deals, essentially, with adult pornography—drawn widely enough?

The Lord Advocate: Yes. We already have the Civic Government (Scotland) Act 1982, which includes the wider definition of, or the fundamental platform of, obscenity. It provides a list, although, with the passage of time and for the reasons that I mentioned regarding serious organised crime, a list that tries to be exhaustive might always be seen to be in some sense deficient or might not cover innovation. The difficulty in respect of pornography is that we come up against the ECHR rights of freedom of expression and the article 8 rights to privacy in the context of sexual activity. It is important to derive some certainty in that area in order to show a balance—to show not

only that what is being done in engaging article 8 is proportionate, but that it has a degree of certainty in that area of criminality.

The Convener: I thank the Lord Advocate, the Solicitor General and Mr Logue for their attendance. If we could have the further information that has been requested as soon as possible, we would be even more appreciative.

12:44

Meeting suspended.

12:49

On resuming—

Subordinate Legislation

Licensing (Mandatory Conditions) (Scotland) Regulations 2009 (Draft)

The Convener: Agenda item 2 is subordinate legislation. I draw members' attention to the draft Licensing (Mandatory Conditions) (Scotland) Regulations 2009, which is an affirmative instrument, and to the cover note.

The Subordinate Legislation Committee drew the instrument to the committee's attention on the ground that there appears to be a doubt about whether it is intra vires. Specifically, there are concerns about whether regulation 2, which restricts the application of an existing mandatory licence condition set out in paragraph 13 of schedule 3 to the Licensing (Scotland) Act 2005, is within the scope of the enabling power cited or the implied power in paragraph 11 of schedule 1 to the interpretation order.

I welcome Kenny MacAskill MSP, the Cabinet Secretary for Justice; Gary Cox, head of the alcohol and knives licensing team; and Rachel Rayner, solicitor in the Scottish Government legal directorate. I invite the cabinet secretary to make a short opening statement. If I detect the committee's mood correctly, the issue is not what you are trying to do—on which there is general agreement—but how you are trying to do it. We look for you to persuade us that what you propose is an appropriate way forward.

The Cabinet Secretary for Justice (Kenny MacAskill): Good afternoon. The committee will recall that in 2007 it approved regulations that, from 1 September 2009, require alcohol to be displayed in dedicated parts of off-sales premises. At the time, the committee recognised that the regulations would stop cross-merchandising, such as cans of gin and tonic being displayed alongside lunch time sandwiches, and help to ensure that alcohol is not viewed as an ordinary commodity.

The issue of the effect of the regulations on distillery visitor centres during the transition period before the 2005 act comes fully into force has been raised with me. Members will know that such premises are not like any other type of licensed premises. They are not set up to pile alcohol high and sell it cheap; rather, they provide a top-quality visitor experience that is about explaining the production, quality, history and other attributes of premium drinks. I was concerned when distillers said that the practical effect of the regulations would be that, to comply with the new conditions, they would need to set themselves up more like supermarkets. The last thing that we want to do is

to diminish the visitor experience at these first-class attractions. For that reason, I have brought forward a regulation that would exempt from the display area requirements premises such as distillery visitor centres, brewery visitor centres and similar facilities such as the Scotch Whisky Experience. There is a world of difference between creating a first-class visitor attraction centred on the production of a quality Scottish product and other premises whose main business is to sell as much alcohol as possible.

As the convener indicated, the Subordinate Legislation Committee has reported that there appears to be doubt about whether the regulations are intra vires. Paragraph 11 of schedule 1 to the interpretation order provides that a power to make regulations implies a power to revoke or amend any such regulations made under section 27 of the 2005 act. As paragraph 13 to schedule 3 of the 2005 act was inserted by the 2007 regulations, we consider that the draft regulations have the effect of amending the 2007 regulations and are, therefore, within the scope of the power in section 27.

I was happy to respond positively to the whisky industry by bringing forward these regulations, especially as we are in the year of homecoming. The draft regulations have been developed in conjunction with the Scotch Whisky Association; I understand that it has made a representation to the committee supporting them. I invite the committee to recommend approval of a regulation that addresses an unintended consequence of the original regulations.

Robert Brown: This is quite a technical issue, and I may be getting it entirely wrong. I understand that you call in aid the interpretation order. The committee has been advised that that relates only to revocation of orders and not to changes to the principal legislation, as are proposed here. Do you accept that the regulations revoke not the previous regulations per se but a provision that is part of the 2005 act?

Kenny MacAskill: I defer to my learned legal adviser on this technical matter.

Rachel Rayner (Scottish Government Legal Directorate): I agree that the paragraph in the interpretation order allows us to amend or revoke regulations. The 2007 regulations, which added the condition relating to layout plans, were made under section 27 of the 2005 act. In effect, the regulations that the committee is considering today amend the 2007 regulations—although that is not indicated expressly—because they amend the paragraph that was inserted by those regulations.

Robert Brown: The trouble is that we are dealing with a relatively technical and important matter relating to the effect of particular legislation that is fairly narrow in scope. As the convener said, we are all sympathetic to what you are trying to do. However, in its report, the Subordinate Legislation Committee has in effect said that you cannot use the interpretation order to do what you are trying to do. Indeed, is that not reasonably clear?

Rachel Rayner: Although we acknowledge the Subordinate Legislation Committee's view, we also note that it is only a doubt. We think that there is a better argument for saying that the draft regulations are within vires, and it might help if I went through it.

Under section 27 of the Licensing (Scotland) Act 2005, conditions can be added to schedule 3. Paragraph 11 of schedule 1 to the interpretation order sets out a power to make regulations and to revoke or amend them "unless the contrary intention" is shown. We interpret that to mean that section 27 can be used to make regulations and add in, amend or revoke any conditions to schedule 3. We accept that section 27 cannot be used to amend the conditions set out in the 2005 act as passed by the Scottish Parliament, but we do not think that any of the wording of section 27 shows that we are not using the power in the way that it was intended to be used. If we follow the Subordinate Legislation Committee's argument, the only way in which regulations made under section 27 can be revoked or even relaxed is by a provision in an act of the Scottish Parliament, which we do not think was the original intention.

Robert Brown: I wonder whether you can develop the point about the power a bit further. Section 27 of the 2005 act says:

> "The Scottish Ministers may by regulations modify schedule 3 … to add … further conditions or … to extend the application of any condition specified in the schedule."

However, are you not restricting things instead of adding or extending conditions?

Rachel Rayner: No. When schedule 3 was passed by the Scottish Parliament as part of the 2005 act, it contained no condition about layout plans. The effect of the regulations is to revoke the existing condition about layout plans and to bring forward a different, additional condition that was not in the 2005 act when it was passed. Paragraph 13 is still an addition to the schedule that was in the 2005 act as passed.

Kenny MacAskill: We are trying to vary regulations that were added to the 2005 act without the need for primary or substantive legislation. After all, it was not primary or substantive legislation that was added.

The Convener: We are trying to be helpful. It seems to me that, if we are not going to take the proposed route, there are one or two ways in

which we could deal with the matter. First, the 2007 regulations could be partly revoked. Secondly, there could be a stage 2 amendment to the Criminal Justice and Licensing (Scotland) Bill, which the committee is considering.

Kenny MacAskill: I will ask Rachel Rayner to respond to your first suggestion. On your second, I suggest that such a move would cause significant delay and impede our ability to proceed with this matter. We would not be able to have the required transition, which would jeopardise the Scotch Whisky Experience in this year of homecoming.

Rachel Rayner: On the first suggestion, according to the Subordinate Legislation Committee, we have no power to revoke the 2007 regulations, because the power in section 27 of the 2005 act allows us only to add conditions. Revoking the 2007 regulations would require a bill to be introduced.

Kenny MacAskill: Regulations are supposed to be light touch. Although it has not been mentioned, I think that it is quite clear that this is all about interpretation. It is not a variation of primary legislation but of regulations that were brought in, and I submit that varying those regulations in order to improve them is clearly what Parliament intended.

Bill Butler: I do not know about you, convener, but my head is beginning to hurt. I will ask a fairly straightforward question. Cabinet secretary, are you saying that you are certain that this is a variation of regulation and not—albeit inadvertently—an amending of primary legislation?

13:00

Kenny MacAskill: Yes, in a nutshell.

Bill Butler: Is that what your learned adviser is advising you?

Kenny MacAskill: I ask her to answer that.

Rachel Rayner: Yes. The effect is that we are using regulations to amend something that is in schedule 3 to the 2005 act. Section 27 of that act specifically provided the power to do that through regulations.

Bill Butler: Right. You are saying that we are amending a regulation. We are changing the condition within a set of regulations; we are certainly not amending primary legislation, which would not be appropriate.

Rachel Rayner: No. The power in section 27 is to modify schedule 3. It is a power that expressly allows regulations to modify—

Bill Butler: So, this is a regulation to modify. We are not inadvertently falling into the trap of amending primary legislation.

Rachel Rayner: No. The power is to amend primary legislation. The effect is that paragraph 13 of schedule 3, which is primary legislation, which relates to layout plans, will be relaxed.

Bill Butler: Are you saying that the primary legislation within schedule 3 allows us to modify that piece of primary legislation?

Rachel Rayner: Yes, there is a power to modify.

Bill Butler: Will you read that out please?

Rachel Rayner: Section 27(1) of the 2005 act states:

"schedule 3 … every premises licence is subject to the conditions specified in that schedule."

Section 27(2) states:

"The Scottish Ministers may by regulations modify schedule 3 so as—

to add such further conditions as they consider necessary … or

to extend the application of any condition specified in the schedule."

Kenny MacAskill: The regulations that were approved in 2007 modified schedule 3, so we have already modified. To some extent, you could argue that this is a modification of the modification.

Bill Butler: It is a further subtlety that has been introduced by regulation.

Kenny MacAskill: Yes.

The Convener: We need this to be quite clear. Will you define quite clearly what you are doing here? Basically, you are amending something that has already been amended.

Rachel Rayner: We are amending something that was inserted into primary legislation by regulations.

Paul Martin: I support the direction of travel that the Government is trying to go in. Has precedent been set by a previous instrument? Is there precedent for this, or is this situation unique?

Rachel Rayner: Section 27 has been used to make two sets of regulations that have added conditions to schedule 3. This is the first time that we have sought to alter one of the conditions that those regulations inserted.

Paul Martin: The convener has talked about the Criminal Justice and Licensing (Scotland) Bill, which we are scrutinising. Procedurally, there are no other opportunities to take us through—

Kenny MacAskill: Your other opportunity would be to act through primary legislation, which would not be done in time to address the requirements of the whisky centres.

Paul Martin: I understand the impact on the whisky industry. Hindsight is a great thing, but was

there no interrogation of the legislation to consider the impact that it would have had? I suspect that the whisky industry might not be the only industry that is affected. I appreciate that you have had representations from the whisky industry, but others must be affected.

Kenny MacAskill: As Rachel Rayner made clear, we are modifying regulations that were approved by the committee unanimously. We all approved the regulations and we have all learned that there are unintended consequences. That is why the Scotch Whisky Association has lobbied us and you. We are seeking to modify the regulations as expeditiously as possible. We are modifying, if I can put it bluntly, the regulations that the committee approved, which insert provisions into the 2005 act.

Paul Martin: But you appreciate that other bodies may make similar representations.

Kenny MacAskill: Various bodies have made similar representations, usually because they wish to continue to sell alcohol in the manner to which they have become accustomed. We think that there is a particular reason why the draft regulations should apply not only to distillers but to, for example, the Scotch Whisky Heritage Centre and the Scottish Liqueur Centre in Perthshire, which we visited, and to small breweries that have visitor centres. We think that such places are distinct because they produce alcohol on-site or collate information about an alcoholic drink. That is vastly different from what is done in a shop on the Royal Mile or in any other place in Scotland that may say that it is a tourist attraction. We acknowledge that the centres to which I have referred have a specific nature, so we are prepared to change the legislation to accommodate that.

Paul Martin: I am trying to make a genuinely constructive point in my question. I appreciate that the whisky industry has made effective representations, that we want to try to resolve that situation and that we debated supermarkets and other places in 2007, but have other representatives of the tourism industry made representations that are similar to those of the whisky industry?

Kenny MacAskill: Not that I am aware of.

Paul Martin: That is all that I am asking.

Kenny MacAskill: They are not in the same industry.

Stewart Maxwell: I think that I understand the position now but, for clarity, are you saying that you cannot and would not touch with this method any of the conditions that were originally set out in schedule 3 to the 2005 act but that anything that was added subsequently via regulation is open to amendment or revocation by the route in the draft regulations?

Rachel Rayner: Yes.

Stewart Maxwell: We are therefore not touching the primary legislation that the Parliament passed; we are touching only additional matters that were dealt with by regulation, which is a normal process.

Rachel Rayner: Yes.

Cathie Craigie: That is completely different from the Subordinate Legislation Committee's advice to us and Rachel Rayner's statement a wee while ago, in response to Bill Butler, that the regulations will amend primary legislation. The Subordinate Legislation Committee's view is that they will amend primary legislation that Parliament passed but that there are no powers for them to do so.

Rachel Rayner: There is a distinct power in the conditions in the primary legislation as passed to use regulations to add conditions to the primary legislation. Our view is that we cannot amend the conditions in the act as passed. However, unlike the Subordinate Legislation Committee, we believe that we have the power to amend or revoke conditions that were added by regulations.

Cathie Craigie: Have there been discussions between the Government solicitors and the Parliament solicitors on the issue?

Rachel Rayner: Yes.

Cathie Craigie: I know that you can ask solicitors anything and get umpteen different answers, but it is a serious situation when the Government and Parliament have such differing legal opinion on the same issue. Where is the difference in your argument? I am not clear on it at all.

Kenny MacAskill: To an extent, the Subordinate Legislation Committee raised the point that we are discussing as a caveat; as far as I can see, it is not a blanket criticism. I do not know whether Rachel Rayner has any additional comments.

Rachel Rayner: I understand the Subordinate Legislation Committee's different view or interpretation, but I think that our argument is a better one. We think that there is the power to do what I described. Members will see that the Subordinate Legislation Committee's paper includes our response to the issue that it raised with us, so there have been discussions.

Bill Butler: I will have one last shy, if I may. My question is for Rachel Rayner. Are you saying that the draft regulations will amend primary legislation but that there is permission in that legislation to do that?

Rachel Rayner: Yes.

Bill Butler: Now I am clear—thank you.

Cathie Craigie: But where is the permission?

Bill Butler: Just for the record, where is the permission explicitly stated?

Rachel Rayner: We think that it is in section 27(2) of the 2005 act.

Bill Butler: That is enough for me. Thank you.

Robert Brown: I want to follow matters through in order. The regulations say:

"The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 27(2)"

and some other sections, which I understand are not relevant for the purpose. In other words, section 27(2) is the only basis on which the regulations have been put before the committee.

Rachel Rayner: Read with the interpretation order, which does not need to be cited.

Robert Brown: The exercise of section 27(2) is being used to amend the 2005 act, as amended by the Licensing (Mandatory Conditions No 2) (Scotland) Regulations 2007 (SSI 2007/456). A condition was added to the 2005 act by the 2007 regulations, which now counts as part of the legislation.

Rachel Rayner: Yes.

Robert Brown: Section 27(2) says that schedule 3—the schedule that we are dealing with—can be modified by adding further conditions or by extending

"the application of any condition specified in the schedule."

You are not doing either of those things; you are restricting the application of such a condition.

Rachel Rayner: But the interpretation order provides that when there is a power to make regulations, there is also a power to revoke or amend those regulations. Before the interpretation order, it used to be usual, when there were powers in legislation, to say specifically that there was a power to make regulations, a power to amend them and a power to revoke them. The current practice is not to do that but to rely on the interpretation order.

Robert Brown: I want to be clear that we are not relying on section 27(2) by itself, because it talks about the addition of further conditions or the extension of the application of an existing condition, which obviously does not apply.

Rachel Rayner: The interpretation order implies that section 27(2) includes a power to amend or revoke any instrument made under the original power, unless the contrary intention is shown.

Robert Brown: That is the nub of the issue.

Rachel Rayner: Yes.

Robert Brown: I will approach the issue in a slightly different way. Are there any other powers in the 2005 act or elsewhere that would allow you to get at the issue in any other way? In other words, is there some sort of catch-all expression that would allow you to amend and do various things to previous regulations?

Rachel Rayner: No, because the previous regulations were made using the power under section 27(2).

Robert Brown: So the regulations stand or fall on the interpretation order issue.

Rachel Rayner: Yes.

The Convener: As there are no further questions, we will move on to item 3, which is formal consideration of the motion to approve the regulations. I invite Mr MacAskill to move motion S3M-4198.

Motion moved,

That the Justice Committee recommends that the draft Licensing (Mandatory Conditions) (Scotland) Regulations 2009 be approved.—[*Kenny MacAskill*.]

The Convener: Do members have any further comments or questions?

Cathie Craigie: I am not satisfied that section 27(2) of the 2005 act gives the Government the power to make the regulations. Section 27(2)(b) says that ministers can modify schedule 3 in order

"to extend the application of any condition specified in the schedule."

I do not believe that the regulations do that; they change a condition in schedule 3. Although I support the principles of the regulations, it is important that we take seriously any amendments to law that has been agreed to by the Parliament, so I will not be able to support the regulations.

Stewart Maxwell: I hear what Cathie Craigie says about section 27(2), which is correct, but as the witnesses have said, and as members such as Bill Butler and I, and perhaps others, who have spent many years on the Subordinate Legislation Committee, know, there is a general power under the interpretation order, whereby it is accepted that where there is a power to make regulations, there is also a power to amend or revoke them. That does not have to be explicitly stated in the legislation. Given that that is generally accepted and that there is a clear distinction between amending or revoking the original act as opposed to amending or revoking the additional parts that were inserted through regulation, which is what the regulations that we are considering seek to do, I am satisfied with the regulations.

Bill Butler: It is so long since I served—I use that verb deliberately—on the Subordinate Legislation Committee that, when I was a member, the cabinet secretary was the committee's convener.

This has been a bit messy, but I am satisfied with the cabinet secretary's answer and Rachel Rayner's advice. When I asked Ms Rayner whether the draft regulations would amend primary legislation and whether there was permission to do that in the primary legislation, she replied, "Yes." On that basis, I am prepared to support the regulations, although I can well understand that some members have considerable doubts. This is not an easy matter.

13:15

Nigel Don: We must acknowledge that there is an element of doubt. However, the will of the Parliament seems to be clear and the policy consideration is clear to us. On that basis, we should recommend the approval of the draft regulations, to ensure that we send the right message about the policy. That is the best that we can do.

Paul Martin: I agree with what Bill Butler said about the intention behind the regulations, which I will support.

I appreciate the importance of the whisky industry to the Scottish economy and I commend the Government for taking its views on board. However, a precedent has been set for responding in such a way when an organisation or whoever approaches the Government to express concern. That leaves the door open for other industries to make similar representations, and we could find ourselves in a similar situation in future. Lessons must be learned from what has happened.

Robert Brown: If deficiencies of the type that we have been considering appear in legislation, it is appropriate that organisations make representations to the Parliament to ask that matters be sorted out, if that is necessary. If the regulations are not approved, there could be significant implications for an important Scottish industry. That must be the underlying point.

I remain doubtful about the way in which the matter has been dealt with, but the point is arguable so, against that background and given what the cabinet secretary and his officials said about delay, we should recommend the approval of the regulations. However, the cabinet secretary might want to consider whether the Criminal Justice and Licensing (Scotland) Bill could be used to bolt the door, to ensure that not a scintilla of doubt remains.

Unlike some members, I have no experience of the Subordinate Legislation Committee, thank goodness. However, in principle, regulations such as those that we have been discussing ought to be able to be amended and revoked as appropriate. If that is not the case, the Subordinate Legislation Committee or others might need to consider the more general issue.

The Convener: I am far from happy about the situation. Cathie Craigie's point had merit. We are on dangerous ground when we seek to amend legislation or regulation of the type that we are considering. The nub of the question is whether by doing so we are interfering with primary legislation. After a great amount of probing, we have the appropriate answer. The Scottish Government has admitted that by recommending the approval of the draft regulations we will not set a precedent in relation to amending primary legislation. I was anxious to receive that assurance.

I stress that I have no difficulty with what the Government is attempting to do, which we all support. However, I have misgivings about how the matter is being dealt with. On balance, I will support the draft regulations. Do you want to wind up the debate, Mr MacAskill?

Kenny MacAskill: No.

The Convener: The question is, that motion S3M-4198 be agreed to.

Motion agreed to,

That the Justice Committee recommends that the draft Licensing (Mandatory Conditions) (Scotland) Regulations 2009 be approved.

Police Pensions Amendment (Increased Pension Entitlement) (Scotland) Regulations 2009 (SSI 2009/185)

The Convener: These regulations, which are subject to the negative procedure, will not be as complex as the previous ones.

The Subordinate Legislation Committee reported the regulations on the ground that a mistake had been made in a reference to a related statutory instrument, but it acknowledged that the mistake is unlikely to have an effect on the operation of the regulations. The Scottish Government has given a commitment to bring forward an amendment to remedy matters within a year.

Nigel Don: According to the regulations, there have been 28 amendments to the original legislation. Someone somewhere knows what all that means and perhaps that is all that matters, but have we asked the cabinet secretary whether he will tidy up the legislation?

The Convener: There has been correspondence on the matter, which is being

tidied up. Your point is well made. Are members content to note the regulations?

Members *indicated agreement*.

13:21

Meeting continued in private until 13:23.

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