JUSTICE COMMITTEE

Tuesday 23 June 2009

Session 3

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JUSTICE COMMITTEE
21st 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:

Sharon Bell (Accountant in Bankruptcy)
George Burgess (Scottish Government Criminal Justice Directorate)
Wilma Dickson (Scottish Government Criminal Justice Directorate)
Fergus Ewing (Minister for Community Safety)
Yvonne Gallacher (Money Advice Scotland)
Vida Gow (Citizens Advice Scotland)
Kenny MacAskill (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 23 June 2009

[THE CONVENER *opened the meeting at 09:04*]

Criminal Justice and Licensing (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning. I remind everyone to switch off their mobile phones. We have an apology from Angela Constance, who is attending a funeral. She might join us later.

Item 1 on our agenda is continued consideration of the Criminal Justice and Licensing (Scotland) Bill. Today is the concluding evidential session on the criminal justice parts of the bill.

Given the breadth and complexity of the bill, the committee has agreed to postpone taking evidence from the Cabinet Secretary for Justice on the licensing parts of the bill until after the summer recess.

Panel 1 officials will support the cabinet secretary on sections 1 to 37, and panel 2 officials will provide support on sections 38 to 120.

I welcome Kenny MacAskill, the Cabinet Secretary for Justice, who is supported by George Burgess, from the criminal law and licensing division; Wilma Dickson, from the community justice services division; and Rachel Rayner, from the legal directorate. All of them are from the Scottish Government and none of them requires any introduction to the committee.

I invite the cabinet secretary to make a short opening statement.

The Cabinet Secretary for Justice (Kenny MacAskill): The Criminal Justice and Licensing (Scotland) Bill is a wide-ranging piece of legislation that takes forward many of the Scottish Government's priorities. In my opening statement, I will not cover everything that is contained in the bill, but I want to talk about a couple of very important elements.

The bill provides for a tough new sentence—the community payback order—as a replacement for a number of existing community penalties. The community payback order will allow offenders to repay communities for the damage that they have done by offending and will help to tackle reoffending rates with quick justice.

This year, we have already invested an additional £2 million in community service—£1 million to get orders under way and completed more quickly, and a further £1 million in recognition of underlying workload increases. That equates to a 15 per cent increase in funding for community service between 2008-09 and 2009-10, which will roll forward into next year.

Community sentences need to start on time and be enforced rigorously. However, as Robert Brown has emphasised, they also need to offer the support that offenders need. The recent audit of local authority performance revealed the distance that remains to be travelled towards the new targets that have been agreed with local authorities for the start and completion of community service orders, particularly with regard to the target for work to start within seven days of the sentence being passed.

I can announce today that we propose to make available an additional £5.5 million over the next two years to help us achieve our twin goals of having a higher number of more robust community sentences and providing better support to offenders.

Start-up funding of £1.5 million will go out this year, rising to an extra £4 million in the following year. That extra £4 million equates to an additional 15 per cent expenditure on the core community sentences—probation and community service—year on year.

Most of that money will go to local authorities, to help them clear their backlogs and achieve tighter turnaround times. We want to work with them to ensure that, if the Parliament supports the bill, they will be ready when the new community payback order comes into force. Once that transition period is complete, resources can be redirected to additional CPOs.

Subject to the views of the Parliament, we need to provide resources to deliver the new approach to sentence management that is introduced in the bill. Much of that funding will go to local authorities, but courts will also require investment to support progress hearings, and the new breach provisions will require extra electronic monitoring capacity. We need to give the courts tough options, short of prison, to deal with those who fail to comply with their orders.

The issue is not all about money. It involves the Government and local authorities working together to achieve shared goals for tighter delivery and find more efficient ways of working that will ensure that the judiciary gets the information that it needs in the most useful form, that social workers do not waste time on bureaucracy and that we make the best use of information technology to speed up case handling. However, we recognise the need to invest. Money is tight, and every penny has to be made to count. Sometimes, we have to focus

investment on top priorities, which is what we are doing in this case.

Alongside the community payback order will be the introduction of a statutory presumption against the courts imposing prison sentences of six months or less. We should be clear that the courts will still be able to impose sentences of six months or less—there will be no statutory bar. However, the courts will need to explain why they think that the use of such a short sentence is justified, as opposed to the use of an alternative disposal such as the community payback order.

This is not about saving money; it is about our making communities safer by facing up to the challenge of turning round the reoffending behaviour of low-level criminals and making them pay back the community for the damage that they have done. Short custodial sentences do not allow the offending behaviour to be addressed.

I realise that this is a complex and technical piece of legislation. I am aware that the committee has received a considerable number of written submissions on the bill and has heard oral evidence from numerous organisations and individuals. Even though we have the rest of the morning, I would be surprised if we were able to answer all the queries that have been raised in evidence to the committee. I will therefore be happy for my officials to work with the clerks on any queries that remain outstanding following today's meeting.

The Convener: That is helpful, Mr MacAskill. We are unlikely to conclude our consideration of the bill today, and other questions will arise. We will put them to you in writing for answer over the summer recess—when I am sure you would otherwise only be enjoying yourself anyway.

I will open with a question on the purposes and principles of sentencing. Why was it deemed necessary to set out in the bill the purposes and principles of sentencing? Will they apply to offenders who are under 18 at the time of the offence?

Kenny MacAskill: They will not apply to people who are under 18.

We think that sections 1 and 2 are clear and easy to understand. They set out the purposes and principles of sentencing, and we think it essential to do that. Sentencing does not have just a single purpose—that of punishment—and the lack of hierarchy in section 1 is quite deliberate. In trying to get the balance right, fairness is important, and setting out purposes and principles will contribute to achieving that.

We are happy to consider any specific suggestions that the committee may have, but we felt that we should state what is being done when courts exercise the majesty of the law.

The Convener: Some people have told us that they consider section 1 incomplete.

Kenny MacAskill: If people feel that it is incomplete, we will be more than happy to take on board any recommendations from the committee. Such things will always have to be flexible, because changes will occur in society and in people's perceptions. We have set down the parameters within which the people who are charged with the function of dispensing justice should operate.

The Convener: We have to consider public perceptions, and I fully accept that they may sometimes be slightly detached from reality.

You suggest that no inference is to be drawn from the order in which the purposes and principles of sentencing are listed, but are you still confident that the public will end up with a greater understanding of the purposes of sentencing, or of the purpose of a particular sentence in an individual case?

Kenny MacAskill: We have embarked on a journey, and the legislative framework will assist us. A start has been made with the way in which sentences are announced in court; they are now made clear to everybody. Such ideas came in with the Custodial Sentences and Weapons (Scotland) Act 2007; people now realise how long an offender will spend in prison and what issues will be dealt with in other ways.

This is a work in progress. We have to tackle public misunderstanding in a range of ways. That will involve educating people about civics—or whatever terminology we want to use. However, making the role of sentencers clear, and making clear the requirements that are on them, will help to kill off the myths and to ensure that people understand what is happening in the courts. That will be important.

The Convener: Our questions also impinge on aspects relating to the Scottish sentencing council. I invite Bill Butler to pursue that line.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, cabinet secretary. As you will know, the committee has heard conflicting evidence on whether sentencing is inconsistent. Do you believe that there is significant inconsistency in sentencing? If so, to what do you attribute that?

Kenny MacAskill: The Sentencing Commission for Scotland raised the issue of inconsistency in sentencing, and we are building on its comments. Equally, the Crown has mentioned difficulties in relation to judge shopping, for example. As the convener suggested, the public perceive—although their perceptions may not reflect the

reality—that sentencing is inconsistent. Justice has not only to be done, but to be seen to be done. Building on the comments of the Sentencing Commission will be the way to go.

Bill Butler: You are right to say that public perception is powerful and must be taken account of, but can you provide the committee with details of academic research that shows that there is inconsistency in sentencing?

09:15

Kenny MacAskill: The Sentencing Commission for Scotland concluded in 'The Scope to Improve Consistency in Sentencing':

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

The commission went on:

'the experience of members of the Commission'—

who were very senior—

'points to the occurrence of some inconsistency in sentencing in Scotland'.

The commission noted that there was a great deal of anecdotal evidence in that regard. It would be inappropriate of me to mention individual cases, but I stand four-square behind the commission. The commission was powerful and its membership was highly esteemed.

Bill Butler: I do not doubt that. However, when we questioned Mr McLeish, the chair of the Scottish Prisons Commission, he was unable to come up with much in the way of academic evidence that proved that there is inconsistency. You said that there is such evidence, 'limited though it is'; can you forward to us the academic evidence that persuaded the commission and then you that there is inconsistency in sentencing?

Kenny MacAskill: I cannot second-guess the McLeish commission; we have founded our approach on the conclusions of the Sentencing Commission for Scotland, which was an august body that contained senior figures, including senior members of the judiciary. We are building on their comments. As we have said, factors other than inconsistency are involved. However, we think that there is disquiet among the public about inconsistency in sentencing, which must be tackled, whether it is based on anecdotal evidence or reality. The Sentencing Commission for Scotland said publicly that there is an issue. We are predicating our position on that view.

Bill Butler: The provisions on the proposed Scottish sentencing council have attracted criticism. It has been argued that they could undermine the independence of the judiciary. It was suggested that the High Court will be stripped of powers, which will be passed to a non-elected, non-judicial body, thereby giving rise to concerns about compatibility with the European convention on human rights. How do you respond to those criticisms?

Kenny MacAskill: There is no substance to such fears. It is perfectly clear that the approach is compatible with the ECHR. Not long ago, the Parliament enshrined in statute the independence of the judiciary. The Government intends neither to go against the will of the Parliament nor to interfere with the independence of the judiciary. We made it clear that the sentencing council would only set guidelines and would not give directions. The understandable concerns that might exist among the judiciary can be allayed; it is clear that the sentencing council will not interfere with judicial independence and will not be incompatible with ECHR, given its limited powers.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): It was suggested in a written submission to the committee that the creation of the Scottish sentencing council would be objectionable on constitutional grounds. How do you respond to that?

Kenny MacAskill: Given that we do not have a written constitution in this country, I find it hard to understand where the person who expressed that view is coming from. The approach is not incompatible with ECHR and the council will not interfere with the independence of the judiciary. Such fears are unfounded. We have made it as clear as we can do that we will not interfere with the ultimate responsibility of each sheriff or judge to make the decision that they think is appropriate to the specific offence of the individual offender who appears before them.

However, we believe that inconsistency in sentencing is a difficulty that must be dealt with. Equally, we believe that not only those who are given the privilege of sitting on the bench but people who represent interest groups such as victims organisations should be able to have some say, even if the ultimate decision in an individual prosecution will be made by sheriff A or judge B. There is something manifestly wrong in our society if the views of a representative of a victims organisation cannot be heard. That is why we believe that there should be a sentencing council. It will not interfere with the independence of the judiciary and it is certainly not unconstitutional.

Cathie Craigie: The make-up of any sentencing council is not the point. It has been put to the committee that it would be unconstitutional to take responsibility away from Parliament, ministers and the appeals court—that is the point that I am trying to make. I am sure that the cabinet secretary will have read the *Official Report* of the committee meeting when members of the judiciary and

witnesses who came with them gave oral evidence. The constitutional issue is important, and I would like to hear a Scottish Government viewpoint on it.

Kenny MacAskill: I just cannot see the basis on which the sentencing council could be viewed as unconstitutional. It will not interfere with the independence of the judiciary and it is clearly intra vires. I do not understand the difficulties that people have with it or the question of its being unconstitutional. Ultimately, that is a matter for lawyers, whether our Government lawyers, the Lord Advocate or, indeed, the Parliament's lawyers—as we have seen in recent events. They will decide whether the bill is intra vires, but the fact that the bill was introduced with a clean certificate seems to me to indicate that nobody views it as anything other than perfectly constitutional. I therefore cannot understand where the problem arises.

Cathie Craigie: Convener, perhaps we can furnish the cabinet secretary with an extract from the *Official Report* of the evidence that we took on the issue, and ask for a response on it.

The Convener: By all means. I am sure that the cabinet secretary, having had sight of the extract, will respond appropriately.

Kenny MacAskill: By all means. All I can say is that it would be entirely inappropriate for me to seek to berate the legal advice and the sign-off that was given by the Presiding Officer, the Parliament and, indeed, other people charged under the Scotland Act 1998 with responsibility for ensuring that proposed legislation remains within the powers of the Scottish Parliament and is constitutional.

Bill Butler: As you said, one of the functions of the proposed sentencing council will be to prepare sentencing guidelines that a court must 'have regard to' when sentencing an offender. How should the phrase 'have regard to' be interpreted?

Kenny MacAskill: I will adopt the position that was taken by my learned friend the Lord Advocate when she appeared before the committee on 9 June. Requirements for the courts or other decision makers to have regard to certain matters are well precedented in statute, and the courts have been clear about what is required. The Lord Advocate explained on 9 June:

'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—'

or incorrect—

'it can refer the matter back to the sentencing council.'—[*Official Report*, *Justice Committee*, 9 June 2009; c 2057.]

Bill Butler: Do you agree that sufficient discretion will be left with the court, even given the sentencing guidelines?

Kenny MacAskill: We have always sought to make it clear that, if a sheriff or judge believes that the guidelines are inappropriate in a particular case for whatever reason—whether because of something pertaining to the individual offender or because the offence is regarded as so unusual—the sentence must be left to their discretion. It is a matter for the individual presiding whether that means that the sentence will be less or more liberal than the guidelines suggest. We fully support that position, which is how it must be. It comes back to the fact that, although there will be broad guidelines, each individual offence and offender is unique.

Nigel Don (North East Scotland) (SNP): That takes me back to the purposes of sentencing, or at least the purposes of the sentencing council. It has been suggested—and I agree with the suggestion—that it might be better if the bill said that the overarching principle was fairness, which is a concept that five-year-olds understand. If we have sentencing that is coherent and appropriate, that broadly fits with fairness.

Kenny MacAskill: Fairness is clearly an appropriate factor but it is not the only one that those who impose sentences should consider. It is, presumably, about balancing in the scales of justice the interests of the community and wider public against those of the individual. However, it is also appropriate to take into account a variety of other matters in sentencing, such as the message that a sentence can send to the wider community.

Fairness is clearly a critical factor, although it is not the only one. However, we will not stand on nomenclature and, if anybody can suggest better definitions and terminology, we would be more than happy to accept them. Our general view is that fairness is important, but sentencers have to take other factors into account when sitting on the bench and presiding over the sentencing of an individual.

Bill Butler: You will be aware of the evidence that the committee took from sentencers on the proposed membership of the Scottish sentencing council. What are the reasons for not having a judicial majority on the council?

Kenny MacAskill: We must be clear that the council will be judicially led. We accept that that is important. We are open to persuasion, but our view is that it is important that the council also has representatives of broader society. That is why the council is in the bill. The ultimate decision will be made by the judiciary, who will have the power to

act in their own way because of whatever reasons they consider make the treatment of a specific individual or offence different from what is suggested in the guidelines. They will be protected by that power, so it is important that we take into account others who have an interest, such as the police, the prosecution service or Victim Support Scotland. If the guidelines are not prescriptive but must be taken into account by sentencers, the fear that they will interfere with judicial discretion will be allayed. The judiciary should recognise that all our communities have a broader interest in sentencing and should be represented. The proposal gives us the best of both worlds: it will protect judicial independence, and it will ensure that the broader community has an opportunity to say how it regards offending.

Bill Butler: You say that you are open to persuasion on the council's composition. What is the purpose of a constable being a statutory member? Should the Convention of Scottish Local Authorities be represented?

Kenny MacAskill: The inclusion of a constable is simply shorthand for including the police. A decision will have to be made about whether that is a chief constable or somebody else.

I am happy to consider whether COSLA should be represented but we cannot have representation from every organisation that has legitimacy—such as the Association of Chief Police Officers in Scotland, the Scottish Police Federation, the Association of Scottish Police Superintendents and so on—because, as with any committee, there comes a time when we have to balance a broad base.

The only difficulty with including COSLA is that, the more non-judicial members we put on the council, the more judges or sheriffs we would have to put on to try to keep a reasonable balance and the less time they would have to sit on the bench and do their day jobs. Without being flippant, we need to ensure that we strike an appropriate balance between the non-judicial and judicial members of the council. However, we are open to suggestions and more than happy to consider including representation from COSLA.

Bill Butler: I am glad to hear that. In effect, you are saying that you would be open to that type of suggestion if it was manageable and was seen to retain the balance that you seek.

Kenny MacAskill: Absolutely. Such things are not static. As we have seen with other bodies, we must be flexible and pragmatic as society changes. We have not set the matter in tablets of stone. We have said that the council should be judicially led, although we do not think that a judicial majority is needed. Thereafter, the membership is about ensuring that the balance is not out of kilter so that we do not have five members from the judiciary and 25 Uncle Tom Cobbleighs and all. Equally, who those representatives should be is an important matter to discuss and we will be happy to take advice from anyone.

09:30

Robert Brown (Glasgow) (LD): I am surprised to some extent that the cabinet secretary cannot see that there is a problem with having a prosecutor and a constable on a sentencing council that will in effect give directions—albeit in general terms—to the judiciary. Might not a way round the problem be to give the judiciary the final say through the existing appeal court procedures? In effect, that would make the sentencing council an advisory council and thus keep both the independence of the different parts of the machinery of government—the separation of powers, if you like—and the input from victims and others, which we all feel is important.

Kenny MacAskill: I think that we have struck the correct balance. We have made it quite clear that, if a sheriff or judge believes that there is good reason to ignore the guidelines, they may do so—

Robert Brown: With great respect, my question is about how the sentencing council arrives at the guidelines in the first place. I appreciate that later bit.

Kenny MacAskill: I am coming on to that.

It would be ludicrous if a body dealing with the protection of our communities from offending did not include representation from the police and the prosecution. I do not believe that there will be a conflict of interest. Indeed, if the police and prosecution were not represented, good questions would be asked about how such an august body could operate without a clear input from those who are at the coalface. Clearly, as happens in a whole variety of other situations, those who are appointed will act as members of the sentencing council and will not necessarily wear the hat of their day job, but the experience that they will bring will be absolutely essential. I would think it remiss if we were to conclude that a sentencing council should not have a representative from the police or from the prosecution service. I do not see any conflict thereafter.

As I said, by laying down guidelines while allowing the sentencer to decide ultimately to say, 'The guidelines do not apply for the following reasons,' we are striking the appropriate balance. That protects the individual member of the judiciary; equally, it allows the appropriate input from our communities.

Robert Brown: With respect, no one suggests that the sentencing council should include no representatives of victims organisations. My question is whether the proper balance would be achieved if the council was an advisory council with the imprimatur, as it were, coming from the judiciary. After all, the judiciary need to interpret and make individual decisions on these matters at the end of the day.

Kenny MacAskill: I have made it quite clear that I think that the sentencing guidelines must be more than advisory. The judiciary will have the opportunity to say that the guidelines do not fit in the particular circumstances of an individual offender or individual offence. However, to give the sentencing council a status that will allow the views of the broader community to be included, the guidelines will need to be more than just a whim or fancy. Therefore, we need to ensure that the sentencing council can set broad guidelines that provide the parameters, but ultimately the judiciary will have the opportunity to state for the record that the guidelines should not apply in particular circumstances. However, in the main, the guidelines will apply.

Clearly, we have other ways in which the court provides assistance. What the High Court does in disseminating down is useful, and the sentencing council will be able to operate with that. However, as I said, we think that the current proposal strikes the appropriate balance. The bill will give our communities the right to have a say on sentencing to try to achieve better consistency of sentencing without interfering with the ultimate independence of the judiciary.

Robert Brown: I want to pursue two other aspects. First, I want to ask about the interrelation between the sentencing guidelines and the statutory purposes of sentencing that are set out in section 1. I am bothered by section 2(2), which says in effect that the sentencing guidelines need not comply with the principles and purposes of sentencing as set out in section 1, which is normally regarded as the principal section. Why is that the case? Why do the principles of sentencing not override everything, including this somewhat indeterminate body—the Scottish sentencing council—that sits in the middle?

Kenny MacAskill: To some extent, we are talking about a very general matter and then moving on to deal with more specific things. After describing the ambit of or the backdrop to what we are seeking to do—the broader background to which Nigel Don referred—the bill focuses on more specific matters. I do not think that the two provisions are inconsistent. The bill will simply allow the sentencing council, in dealing with specific matters, to be a bit tighter than it would be in dealing with a much more general philosophical position.

Robert Brown: With great respect, section 1 refers to 'the punishment of offenders', 'the reduction of crime', 'deterrence', 'reform', 'protection of the public' and 'reparation'. How can those things possibly not be taken account of in the sentencing guidelines?

Kenny MacAskill: We are talking about the backdrop and the general wide position that we are setting out. You then have to drill down and focus. That applies to a variety of other matters. I do not think that there is any inconsistency. If you have particular points to make, we will be more than happy to consider them. We are talking first about a general, philosophical view, then about rather more specific matters. It will be for those on the sentencing council to consider that.

Robert Brown: That perhaps raises the question of what purpose section 1 is intended to serve. Bearing in mind that any judge or sheriff worth his salt, any solicitor practising in the court and any prosecutor will be well aware of all the requirements of sections 1(1)(a) to 1(1)(e), what difference are you intending to make to the existing situation by stating those—dare I say it—fairly motherhood-and-apple-pie things in legislation?

Kenny MacAskill: We are doing that because we have not really done so before. We are stating for the record what we are doing. To some extent, the bill is a consolidation bill that sets out publicly what we are seeking to do and how we will do it. It comes back to some of the points that you made earlier. There is a lack of knowledge or awareness of what we are seeking to do. The bill is part of a journey of educating our people about the courts and law and giving them an opportunity to participate. We are setting down what we are seeking to achieve and the structures that will help to achieve it. We will proceed in that general direction.

Robert Brown: My final question is about section 1(5). You indicate that the sentencing purposes will not apply to people under 18. Section 1(5) states:

'Subsections (2) and (3) do not apply … in relation to an offender aged under 18'

but section 1(1) manifestly does. Will you explain more precisely the effect of that on offenders aged under 18?

Kenny MacAskill: Section 1(1) deals with the duty on the court; other sections deal with specific matters. Section 1(1) sets out the purposes. Sections 1(2) and 1(3) show what requires to be applied. Section 1(5) makes it clear that sections 1(2) and 1(3) do not apply with regard to under-

18s, so I think we have the appropriate checks and balances in setting out what we are trying to do, what is being done and who it does not apply to. If you read section 1(1) along with sections 1(2), 1(3) and 1(5), it is understandable.

Robert Brown: How does section 1(1) apply to offenders under 18, which it obviously does? What is the effect of it?

Kenny MacAskill: It sets out general principles to which regard has to be had. You described it as motherhood and apple pie. I think that it is an appropriate statement for a civilised society and democracy to make.

Robert Brown: Yes, but it is not something to which regard has to be had, because section 1(2) does not apply to offenders under 18. What is the purpose of it in relation to offenders under 18 if the courts are not required to have regard to it? How does it interact with anything that the courts have to do with offenders under 18? I could understand it if section 1(1) did not apply to offenders under 18—that would be a possible, if slightly peculiar, position. However, I cannot understand why section 1(1) applies when sections 1(2) and 1(3) do not apply.

Kenny MacAskill: I will leave George Burgess to explain the technical matter.

George Burgess (Scottish Government Criminal Justice Directorate): The approach that is being taken in section 1(5) in relation to under-18s and certain other groups is to disapply just the bits in sections 1(2) and 1(3) on the specific duties on the court. We have disapplied only what has to be disapplied. That is not to say that the courts might not recognise exactly the same principles of sentencing that are in section 1(3) as being, in the main, appropriate for under-18s. Section 1(1) really just defines the purposes of sentencing. We did not see any need specifically to disapply it for under-18s. The duty on the court to have regard to those purposes is disapplied, but the purposes themselves sit there. In a sense, the purposes beat the air for the under-18s. The court is not under any specific duty to have regard to them. Nevertheless, they are there and there is no reason to say that they are not the purposes of sentencing in relation to under-18s and the other groups mentioned in section 1(5).

Robert Brown: I will put the question another way. What are the purposes of sentencing and how are the courts to apply them to offenders who are under 18? What is the proposed statutory difference intended to convey? How will the courts deal with under-18s who have been prosecuted as opposed to offenders who are over 18? What differences are they supposed to take account of? Where is that to be found in the law?

George Burgess: It is not to be found in the law. Section 1 will not require the courts to have regard to any particular set of sentencing purposes when they deal with under-18s. Essentially, the duties on the courts to have regard to the purposes of sentencing apply only in relation to over-18s. The issue is perhaps more important when it comes to the principles of sentencing in section 1(3). Section 1(3) requires the court to have regard to certain factors. That is where we might recognise more of a difference in the approach that we want the courts to take when they deal with under-18s. A number of provisions in the Criminal Procedure (Scotland) Act 1995 already require special consideration to be given to younger offenders. There is perhaps more of a need to disapply section 1(3) for under-18s than there is to disapply the purposes of sentencing, but we have achieved what we think is necessary.

Robert Brown: I will leave it there.

The Convener: That might have to be looked at again.

Cathie Craigie: I have two points: one on the sentencing guidelines and one on membership of the sentencing council.

The Sheriffs Association raised concerns with the committee about the implication that the council will have to

'take into account the cost of custodial sentences in setting an appropriate guideline.'

Section 5(5) states that 'The Council must include' that cost in any guidelines but, as the Sheriffs Association points out:

'Cost is not actually relevant to the imposition of an appropriate sentence. It is not clear why it must be included in the guideline itself unless it is to have an effect on the creation of the guideline or, worse, to influence the court.'

Why is it necessary to include the cost of custodial sentences in the guidelines?

Kenny MacAskill: It is what we would do for a bill, and it is what we would expect to be done. We are not saying that the cost of a custodial sentence has to be weighed on the scales of justice, but an assessment of the costs and benefits of different disposals must be carried out. Disposals such as drug treatment and testing orders have cost implications for a variety of authorities. It is simply a matter of ensuring awareness of what those costs are. We are not seeking to constrain the courts. The bill does not say that they must use the cheapest option; it says that they must have some assessment of the option that they intend to use. Everyone who is involved in making use of the public purse must take cognisance of what the ultimate bill will be. You would correctly expect us to do the same for a bill. We expect people to understand the financial

implications of any course of action, even if they choose to accept those financial implications.

Cathie Craigie: You are clear that the courts will not have to take that cost into account.

Kenny MacAskill: There is nothing that says that the courts will have to take the cheapest option or that they cannot choose a disposal that costs more than X thousand pounds. The bill says that the courts must understand and be able to work out the implications of particular disposals. As I said, DTTOs have tariffs, and people need to understand the cost implications for others of using them. It is a matter of ensuring that, as a country, we have an element of joined-up working, without putting any constraints on the courts.

Cathie Craigie: I return to membership of the sentencing council, on which you have already answered a number of questions. The specific issue that I want to raise is the proposal to include a constable on the sentencing council. I heard what you said in answer to Robert Brown's question but, given that every police officer who is trained in Scotland is clear that their role is not to judge but to ensure that they bring criminals before the bodies whose role it is to judge, why should we cloud that position by including a constable on the sentencing council?

09:45

Kenny MacAskill: Because they would not be judging. It has been made quite clear that the sentencing council's role will be to give guidelines, not judge. The responsibility for judging people will lie with those who have been elevated to the bench in either a shrieval or a judicial capacity. They will provide their input, and the input of the police, in the form of a constable, will be important. They will be able to reflect the views of the police, based on what they pick up on in communities. However, they will not be there to judge; they will be there to give advice.

Cathie Craigie: Any person—including a police officer—on the sentencing council will make a judgment on what is an appropriate sentence for a particular crime. That is where I see possible conflict between the role of police officers and the role of a member of the sentencing council.

Kenny MacAskill: I do not like to be tautological, but I would have thought that the definition of 'judgment' would be the choice between A or B. However, the members of the council will not be asked to choose A or B; they will be asked to set guidelines. They will say, for example, 'We view the possession of a knife as a serious offence, and we expect courts to treat it that way.' They might say something similar about sectarian singing and so on. They will state views; they will not specifically judge people—no individual will come before them, which means that they will not make judgments.

We might want to consult the dictionary for a definition of 'judgment', but it is important to state that there is a significant difference between the role of those who sit on the bench and make decisions about an offender who has committed an offence and the role of people on the sentencing council, who will state their views on general matters. The former situation involves the making of a judgment; the latter involves the setting of guidelines. The two roles are quite distinct.

Cathie Craigie: We could argue that point. I do not agree with you.

Stewart Maxwell (West of Scotland) (SNP): I would share Cathie Craigie's concerns if the sentencing council created a grid-like framework that meant that a certain crime always resulted in a certain sentence, which is what happens in some states in the United States of America. However, that is not my understanding of what the Government has in mind.

Do you see the sentencing council as being about bringing together the widest possible range of expert opinion to do with crime and its impact on our society and communities in order to provide general guidance on what society believes to be appropriate sentences, as opposed to being about the creation of a rigid grid-like framework, which, I agree, would essentially involve passing judgment on people? Do you see a distinct difference between what you are proposing and what happens in some states in America?

Kenny MacAskill: Absolutely. If we adopted the grid-like framework that you describe, we could replace judges with automatons and simply press a button once the accused had been found guilty in order to get the sentence, but that is not what we have in mind. We have ensured that judges will continue to have the right to make decisions based on individual offences and individual offenders. The sentencing council will issue broad guidelines.

The Convener: I was not entirely satisfied with the answer that you gave when Robert Brown asked about the relationship between the sentencing council and the appeal court. How would you respond to the statement that Scotland has had a sentencing council for several centuries, and it is known as the Scottish court of criminal appeal?

Kenny MacAskill: The Scottish court of criminal appeal will remain sacrosanct and untouched by us. However, the idea that it has managed to take on board, in every instance, the wishes of the broader community, that it reflects the views of those who represent victims, or that many of its

decisions percolate down quickly, is not the case in practice. Significant progress is being made, however, and I welcome the steps that have been taken by the appeal court to ensure that its views and decisions are disseminated down, electronically or otherwise. The specific role of the sentencing council will be to build upon that, and to ensure that our judiciary is well advised on those views. The two are not contradictory—they run in parallel. The views of the court of criminal appeal will be extremely important in ensuring that we get that down. Its decisions are binding, but it is misguided to think that it allays the public's fears or that we should not have an opportunity to take a broader view.

The Convener: Surely the court of criminal appeal's decisions are disseminated quite quickly—you see them in the *Scots Law Times* every week. Scottish criminal cases are published regularly. I do not see that a problem exists.

Kenny MacAskill: It is accepted by the judiciary that the system is not working as well as it would like, and that decisions are not being disseminated down. Although the IT system seems to be up and running, there is considerable progress to be made. We envisage that the sentencing council will work with the appeal court to improve that; in fact, it is a matter of working not simply with the appeal court but with the Judicial Studies Committee. However, on the idea that everything is hunky dory—no, it ain't.

The Convener: Is it not the case that despite the best intentions of all concerned—and I have no doubt that those intentions are good—you will never solve the problem, in that any system in which the human element is present will always provide the occasional difficulty?

Kenny MacAskill: That is why we have an appeal court and are not changing the appellate system. That is why, if people feel that sentences are too lenient, the Crown has the right to appeal. That is why a sentence can be appealed if it is felt to be too harsh. If it is felt that there has been a miscarriage of justice, there can be an appeal. Indeed, one section of the bill will give the Crown the right of appeal—there has been something manifestly wrong in our system because the defence has had the right of appeal but the Crown has not. I look forward to the support of the committee on that.

You are correct—to err is human. We try to minimise that, but mistakes are made. That is why we have an appeal system, and it is why we are introducing the right for the Crown to appeal. It is why, if a sheriff is perceived as having given too harsh or too light a sentence, it can be appealed.

Equally, we must have a broader view of how we as a society view issues such as knife crime. We must make it clear to the judiciary that there is considerable fear and alarm in our communities and we want those communities to be represented. There has to be the right balance between having the checks that are necessary in every system, and the legitimate needs of communities and others—whether it is police, prosecution or victims—to be heard on what they view as the appropriate tariff for the offences faced by society.

The Convener: Since the start of the meeting, it has been intimated to me that Angela Constance will not be present. Aileen Campbell will be attending as her substitute. While there is no requirement in standing orders to do so, I would prefer substitutions to be for the entire meeting and to be intimated at the start. That being so, I ask Aileen Campbell to confirm that she is attending as a substitute for Angela Constance.

Aileen Campbell (South of Scotland) (SNP): I confirm that.

The Convener: Thank you. We turn to the issue of short custodial sentences.

Cathie Craigie: The committee has received and heard evidence arguing that short custodial sentences can be effective and that the current use of such sentences is generally appropriate. What are your views on that?

Kenny MacAskill: All the evidence seems to be that they are not effective. The statistics show that short sentences simply result in churn. However, we reserve the right for sheriffs—or the judiciary, although it would normally be a sheriff—to impose a short sentence if they feel that that is the only appropriate sentence.

We have preserved the correct balance. The idea that short sentences are effective is disputed by those who work with such prisoners, who say that they can do little with them—they cannot address their literacy and numeracy needs, their drug, alcohol or other dependency and their mental health problems. Such prisoners are simply contained and corralled, then released—prison staff cannot work with them. The statistics show that of those who are given a short sentence of under six months, 75 per cent reoffend within two years, whereas two thirds of those who are given a community sentence do not reoffend within two years. Community sentences appear to be much more efficacious.

That said, we acknowledge that some people are given a chance and do not take it. Imposing a short sentence might be appropriate, and we would not seek to interfere if a sheriff gave good reason, which might simply be that the individual would do nothing else and had to be punished. Alternatively, the sheriff might find some reason why a short sentence would be effective.

Cathie Craigie: You relied on the fact that the judiciary supports some of the proposed measures in part 1. However, on section 17, the submission from the judges of the High Court of Justiciary says:

'Our experience is that under existing arrangements courts resort to short custodial sentences only where there is no realistic alternative—for example, when all non-custodial measures have already been tried but failed or where the offender's criminal record is such that only a custodial sentence is likely to bring home to the offender the unacceptability of his or her repeated conduct. We doubt whether the proposed legislative changes will in practical terms achieve much.'

That is from people who deal with sentencing.

The Sheriffs Association made a similar comment and pointed out that

'short sentences have a value since a custodial sentence of up to 30 days is to be'

an

'option for breach of a level 1 … payback order.'

The sheriffs feel that custodial sentences are a means to deal with breaches of court orders and to remind the offender of the consequences of breaking the law.

Kenny MacAskill: Absolutely—that is why we have the 30-days option. We can take a horse to water, but we cannae make it drink. If somebody is given the opportunity to do a community payback order but they cock a snook at society—never mind those who seek to reform them—they must be punished. We will fully support any sheriff who says, 'We're sick and tired of your behaviour. If you think you can just sit at home and not go out to do some work to make up for the damage, you'll go to prison.' A fail-safe sanction must be available—the provision is in the bill because we recognise that.

I return to the idea that the system is all working out and everything is fine. I do not remember whether 14,000 or 16,000 short sentences are imposed each year. We have a revolving door. Such sentencing is not working. If it were working to stop offending, the imprisonment figures would be reducing, but they are not. People are going into and coming out of prison while their problems remain unchecked, because the prison system does not have the opportunity to address their alcohol problem, mental health issues, drug addiction or other difficulties.

Members probably know that, after I give evidence to this committee, I will give evidence to the Equal Opportunities Committee, which is extremely concerned about the number of women offenders, especially in Cornton Vale. I do not think that that committee would complain about a person who stabbed somebody or dealt in substantial quantities of drugs having to face the consequences of their action. However, I think that that committee will tell me that a serious issue is that women who have a heroin addiction or an alcohol problem enter prison with a short sentence and when they come out, their problem has not been solved.

The Government is seeking a joined-up approach. As you correctly said, there must be a fail-safe sanction, so that we can deal with a person who does not take the opportunity that we have tried to give them, but we must also take on board that sending some people to prison does not solve the problem for our communities. It is not about being tough or being liberal; it is about doing what works. The evidence is clear: tough community sentences work.

10:00

Cathie Craigie: That is all very well. I agree that there is an issue for the Scottish Prison Service to sort out when people are in prison. The public not only expect offenders to pay their debt to society, but think that we have a duty to address the issues that led to their breaking the law.

However, the judges of the High Court of Justiciary said in their submission:

'Our experience is that under existing arrangements courts resort to short custodial sentences only where there is no realistic alternative … We doubt whether the proposed legislative changes will in practical terms achieve much.'

The statistics that you gave do not represent people who do not deserve to be in prison.

Kenny MacAskill: We are not interfering with a sheriff's ultimate right, after considering the individual, the offence and all the options, to impose a short sentence if they think that there is no alternative. If you want me to tell the Equal Opportunities Committee that it is wasting its time, because there is no problem and everyone in Cornton Vale was sent there correctly, I can do so, but I do not think that that is what the committee has learned. I have great respect for our sheriffs and judiciary, but there is a problem that must be addressed.

Cathie Craigie: If only I had the power to instruct the cabinet secretary on what to say or do when he appears before a parliamentary committee.

What changes do you expect as a result of the measures in the bill?

Kenny MacAskill: We are looking to end the free-bed-and-board culture. Far too many people go to prison and sit there twiddling their thumbs. Their stay in prison is paid for by the taxpayer, which compounds the agonies arising from the crimes that they committed in their communities.

We want, first, such people to be punished and to pay something back, and secondly, to address people's underlying problems, whether we are talking about a young girl's heroin addiction or a young man's alcohol problem. That seems to be an appropriate approach, which would make our communities safer and address our problems. However, the ultimate decision will be made by the sheriff. The package must be taken in the round.

We are heading towards having community payback orders, so that there will be an opportunity to provide tough community punishments and to tackle the problems that underlie criminality, which in Scotland are frequently to do with drink, drug addiction or mental health issues. We acknowledge that the approach is not cost free. Robert Brown legitimately made that point, as did Harry McGuigan when he gave evidence to the committee, which is why I phoned him yesterday as a courtesy.

We are talking about a broad package in which we move away from an approach that is not working. We must acknowledge that our prisons are bursting at the seams, mainly with people who are serving very short sentences. The prison service cannot tackle the underlying problems of those people, who get free bed and board, which infuriates our communities. We want to deal with less serious offenders through community payback orders, which will free up our prisons to deal with the people who have to be there because they are a danger to our communities.

People must be given work to do and other opportunities that the committee has discussed. However, if someone cocks a snook at society when they are given such opportunities or if a sheriff thinks that a CPO is not appropriate, we will leave it open to a sheriff to impose a short sentence, so that we can strike the right balance. Something ain't working at the moment, which is why we are heading in the direction that I described. We acknowledge the legitimate concerns of committee members and COSLA; that is why we are ramping up our support and putting an extra £5.5 million into community justice.

Cathie Craigie: On the other hand, it has been suggested to the committee that courts might give longer sentences in order to circumvent the provisions in the bill. Could that be a problem?

Kenny MacAskill: No, I do not think so. Sheriff Fletcher touched on that in his evidence to you. I do not think that any sheriff would do that. They will give what they regard as the appropriate sentence. As I said, if they believe that a short sentence is appropriate, the Government will respect that. Where people seek to cock a snook, we will ensure that we give sheriffs full support.

I think that Sheriff Fletcher said it much more articulately than I could. He made it clear that that would not be the case, and that is how I see it.

Cathie Craigie: It has been pointed out to us that those who plead guilty at an early stage could have their sentences reduced by a third, which means that sentences of nine months could fall within the provision. Is that correct?

Kenny MacAskill: That is the rule under the current legislation. It applies whether the person appears on indictment in the High Court due to a serious drug offence or elsewhere. That is the rule that the Government inherited.

The Convener: It came from the Du Plooy judgment, which was a High Court decision, and it was then incorporated into legislation. Is that correct?

Kenny MacAskill: Yes.

The Convener: Mrs Craigie's point is that the top line of an individual's sentence could be 12 months, but on the basis of an early plea being tendered, it would be reduced by four months to eight months. Thereafter, because of early release, the individual could be out after a maximum of four months, which is below the six month cut-off period. That would negate what you seek to do.

Kenny MacAskill: George Burgess will give you the specific answer and I will give you a comment thereafter.

George Burgess: I do not think that the scenario that you presented would operate. The provision in section 17 operates on the sentence, which is the overall period. The fact that the person who is given the sentence would spend a shorter period than that in prison is not relevant to the calculation, which is done on the basis of the sentence. The 12-month sentence that might be reduced to eight months would not be caught by the provision.

The Convener: I accept that that will be the case under the legislation if it is approved, but the de facto position would be that the sheriff might well think that a sentence of 12 months was appropriate in a certain case, but because of the plea, a third would be taken off that, which would reduce it to eight months. Thereafter, because of early release, the individual would be out after four months. That negates Mr MacAskill's argument that individuals who find themselves in custody for short periods do not provide the Scottish Prison Service with the opportunity to rehabilitate and to combat drug or alcohol difficulties or whatever.

Kenny MacAskill: That is why, in later sections of the bill on which you might care to question me, or not, we take steps to end the arbitrary unconditional automatic early release that was

commented upon by the McLeish commission and which—as we never hesitate to remind each other, convener—was introduced by a Conservative Government many years ago.

You will be glad to know that the sentence will be stated publicly, for the record, in the court so that everybody, and not just the sentencer who imposes it, knows what the sentence is. There is clearly something wrong in our society when the sentence that is given is sometimes understandable only to the sheriff who dispenses it and to those with legal qualifications, rather than to everyone in the court, including the bereaved or the victims. It seems to us that, if somebody is to be released—and people have to be released when they are given determinate sentences—it should be based on some conditions.

We are addressing the matter by building on the Custodial Sentences and Weapons (Scotland) Act 2007. Letting people out early is not necessarily a bad thing if they show remorse and have been dealt with, but there is something wrong with a system in which people get out after the same period of time whether they show no remorse for what they have done or whether they have recanted and reformed and will be an exemplary citizen. We are addressing the situation that we inherited.

The Convener: You should not bandy words with me, Mr MacAskill. I feel forced to remind you that your members in the Westminster Parliament did not exactly rush to assist when the Conservative Government sought to remedy what had gone wrong. We can discuss that later.

Paul Martin (Glasgow Springburn) (Lab): I return to six-month sentences. You used the term 'less serious offenders'. What would be the profile of such offenders? What sort of crime would they have committed?

Kenny MacAskill: Ultimately, I will leave that to the sentencing council. You have to remember the variable nature of common-law offences in Scotland. A breach of the peace can result in someone being charged on indictment—rightly so—but it can also be a relatively minor matter. We have to have flexibility. You bandy around words in asking what constitutes an offence, Mr Martin. However, you must remember that a breach of the peace covers offences from the extremely serious to those that can be dealt with in a justice of the peace court or—at some future stage—by way of a fixed penalty or fiscal fine. If the offence is serious, it can result in a considerable jail sentence.

Paul Martin: You want to move away from six-month sentences. That is the issue. You said that you were considering that for less serious offenders, and I am asking for an example of what you mean. Should a housebreaker receive a sentence of less than six months?

Kenny MacAskill: I am giving you an example—

Paul Martin: Perhaps you will let me finish the question—

The Convener: Let him finish the question.

Paul Martin: Housebreakers can receive a sentence of six months or less. Are you saying that theirs is a less serious offence? Should housebreakers receive community sentences?

Kenny MacAskill: I am leaving the matter to the sentencing council to advise me on. I have seen a breach of the peace result in an extremely lengthy sentence. You must remember that the common law of Scotland allows for interpretation. Sentencers have the necessary flexibility to deal with offences that range from a serious assault to a fairly minor breach of the peace. The Solicitor General for Scotland has commented on that and other matters.

We can pander to scaremongering or recognise that the common law of Scotland allows flexibility in dealing with statutory offences. These things have to be taken in the round. We want to have a sentencing council that has the ability to deal with such matters. That will allow sheriffs to decide on individual cases. A breach of the peace can be extremely serious. If it means a lengthy sentence, the courts will get our full support. We seek to allow sentencers to take account of the views of the sentencing council and to do the job that we pay them to do.

Paul Martin: All that I am asking you to do today, cabinet secretary, is to assist the committee by telling us what you mean by the term 'less serious offenders'. You are asking us to accept your policy on short custodial sentences. However, the background notes on the bill make it clear that, when you use the word 'flexibility', you are talking about a presumption against six-month sentences. Sheriffs will have to explain why they have given such sentences. I am asking you to give an example of what you mean by a less serious offence. Housebreakers can receive a sentence of less than six months, as can those who are involved in child pornography. Is it acceptable that people who commit such offences receive a community sentence?

Kenny MacAskill: Public safety is paramount—it always has been. That is why we have rolled back the provision of private prisons and so forth. There will always be people who have to go to prison because they are a danger to our communities. If they have committed a serious offence, and no other sanction satisfies public safety or mores, they have to go to prison. Beyond

that, it is clear that there are shades of grey. That is why we recognise the right of individual sheriffs to take positions that differ from that of the sentencing council or appeal court. The convener mentioned that. Sheriffs tell us that they have differentiated in the case of offender X because of the different circumstances that apply in the case. That route is open to sheriffs.

The Convener: I will follow up the point that Mr Martin made. It is difficult to define on paper what is a serious or less serious offence. As you correctly state, cabinet secretary, breach of the peace, which is normally a minor offence, can be serious from time to time. Shoplifting of a value of £30 to £40 would hardly be a hanging matter, but how would we cope with an offender who has done that 30 or 40 times despite having gone through the full gamut of disposals from admonition to probation and community service?

10:15

Kenny MacAskill: Shoplifting might be fuelled by an addiction, which would trigger a view to be taken. Equally, people might shoplift as part of an organised gang, which is an extremely serious offence. I was a defence agent for 20 years, and I remember the problems that we had with people who had been driven out of London, Leeds and then Newcastle and who then came up here to shoplift at will as part of serious and organised crime. The specific offence of shoplifting—and the goods that they were caught with—might not necessarily have been high value, but I would fully support any sheriff who took extremely serious actions against such people.

We have to recognise the common sense of our judiciary and allow them to exercise it. That is why they already determine what matters can be dealt with by non-custodial sentences. We also have to provide other wraparound measures, which is why we are introducing quicker community punishments and additional measures. We cannot simply consider in isolation whether a sentence is custodial or non-custodial. That must be considered in the context of everything that we are doing: the additional funding that is going in, the additional resourcing that will be provided and the additional provisions that will give us the opportunity to keep offenders on a tight leash. Some people are unlikely to come to a court's attention ever again after their release but, as we well know from drug treatment and testing orders, there are instances in which people benefit from being kept on a fairly tight leash, which is why progress courts are being introduced.

The matter cannot be viewed in isolation; it has to be viewed in the round. The round is what we are offering as alternatives, what other measures besides simply punishment are available to tackle underlying problems, how we maintain those measures and how we get offenders into the punishment quickly.

Cathie Craigie: I agree that the matter cannot be viewed in isolation and strongly agree that people who are a danger or threat to communities should receive custodial sentences, but I am still concerned that section 17 will allow folk to slip through the net. I also have concerns about how we balance section 1(1)(d)—'the protection of the public' under the purposes and principles of sentencing—with what may happen if courts implement section 17. I have concerns that people who are a threat, a danger or even a nuisance to the communities will avoid custodial sentences and continue to be a nuisance to the community.

Kenny MacAskill: First, we have the fail-safe of the appeal court. If a sentence was felt to be entirely unreasonable, it could be appealed—presuming that the committee supports the bill's provisions on Crown appeals. If a disposal was breached, there would be an opportunity for the sentencing council and sheriffs to review how such offenders or offences are dealt with. Those systems are built into the proposals.

Any case in which we deal with people who have underlying problems and who are sometimes not the most rational will always require the exercise of judgment and be fraught with difficulties. That is what our sheriffs face at the moment. Unfortunately, the people they deal with, the nature of their offences and the problems that they carry will not be changed by legislation because they involve social and economic factors.

The bill allows the judiciary to give an offender a short prison sentence if they do not think that a non-custodial sentence is appropriate. It also allows for a community payback order to be appealed if it is felt to be an inappropriate sentence. If any recalibration is required, that can be achieved by the individual sheriff learning from their position, by the sentencing council and, ultimately, by the appeal court.

Stewart Maxwell: Section 23 deals with

'Offences aggravated by racial or religious prejudice'.

Does the Government intend to lodge an amendment at stage 2—or, indeed, stage 3—to take account of the passing of the Offences (Aggravation by Prejudice) (Scotland) Bill, which deals with additional aggravated offences against the lesbian, gay, bisexual and transgender and disabled communities?

George Burgess: It is more the other way round. Section 23 will bring the racial and religious aggravation provisions into line with the provisions in the Offences (Aggravation by Prejudice) (Scotland) Bill.

Stewart Maxwell: So there will be no difference between the two pieces of legislation.

George Burgess: That is right. The section ensures consistency.

Aileen Campbell: On the impact of short sentences on children, which I have previously pursued with you, cabinet secretary, Families Outside has said that children of a parent in prison are more likely to end up in prison in later life and to suffer from regressive behaviour such as bed wetting and failing at school. I acknowledge other members' comments that people who have done something bad in society must be punished with the appropriate sentence, but do you believe that the use of non-custodial sentences will also have a wider societal benefit?

I also flag up to members that Justice Albie Sachs, who has been involved with child impact assessments in South Africa, is giving a lecture tomorrow. Perhaps such issues can be tied in with the cabinet secretary's reasons for ensuring that people who receive short sentences do not necessarily need to go to prison as it can be much better for them to be dealt with outside. After all, prison impacts not just on the individual involved but on their families and on wider society.

Kenny MacAskill: That is already covered in the bill. Under section 1(4)(c), 'the offender's family circumstances' are taken into account; moreover, proposed new section 227B(2) of the Criminal Procedure (Scotland) Act 1995 as inserted by section 14 says:

> 'The court must not impose the order unless it has obtained, and taken account of, a report from an officer of a local authority containing such information relating to the offender as may be specified by Act of Adjournal.'

As I said to Cathie Craigie, after this meeting I will give evidence to the Equal Opportunities Committee's inquiry into female offenders in the criminal justice system. We recognise that female offenders have specific problems. For example, many of them have been victims of abuse; they are far more likely than male offenders to have mental health and addiction problems; and they often have to deal with child care problems. Indeed, as you point out, the danger is that offending behaviour will simply pass from generation to generation and on for eternity. We have to break that cycle, and the treatment of children is important in that respect.

Equally, as Mr Aitken will no doubt point out, we have to take into account victims' children, some of whom will have lost their mothers or witnessed their being harmed. There is a balance to be struck, but I assure you that in both the principles that lie behind sentencing and the specific opportunities afforded by community payback orders we will take women offenders' needs into account. As I said, I will soon be talking at length on that subject to another committee.

The Convener: Perhaps to a more receptive audience. [*Laughter.*]

Cathie Craigie: Judges and sheriffs have expressed concern that the provision in section 24, 'Voluntary intoxication by alcohol: effect in sentencing', is unnecessary because they already decide whether to take such matters into account. Do you have any comments on their evidence in that respect?

Kenny MacAskill: Intoxication by alcohol is not supposed to be used as a defence. However, if you go into any court in the land—as I did for 20 years until 10 years ago—you will hear defence lawyers saying, 'Yes, he did it, but he's very sorry. He's kind to dogs; he walks old ladies across roads; he wasn't there; he didn't do it; it wisnae him; he was drunk or under the effect of drugs.' There comes a time when we have to say clearly, 'It wisnae the drink that did it; it was you. If that's how you behave under the influence of alcohol, you have to accept the responsibility.'

The correct judicial interpretation is that alcohol is not meant to be used as a defence, but it is frequently so used by those who are participants in the legal process. For example, defence agents will say, 'Yes, he did it and he is very sorry, but it was the drink that did it.' We need to say, 'No, it was not.'

The bill will act as a trigger in giving that message to the public. On a previous bill, Bill Aitken argued that those who assault and attack emergency workers were already dealt with by the courts. However, as a society we sometimes need to say, 'We are not putting up with this.' We have made it clear, if a person attacks a paramedic who is doing their job, that we will not sanction that and that such crimes will be recorded for posterity. As a society, we sometimes need to say, 'It wasn't the drink that did it; it was you.' We need to make it clear that we are not putting up with flimsy excuses any more.

The Convener: I get the impression that we will not reach unanimous agreement round the table on short custodial sentences, so we will now go on to the issue of community payback. The questions will be led by Paul Martin.

Paul Martin: The policy memorandum on the bill states that community payback orders will be 'robust, immediate and visible'. First, what is meant by 'robust'?

Kenny MacAskill: We are committed to delivering robust community payback orders, which means that they must start on time and be completed quickly. We are also committed to

ensuring that enforcement is robust, because the community payback must be done.

As I said, we have already invested an additional £2 million to resource local authorities to deliver improved performance. We acknowledge that the recent audit showed significant failures, but our target is that unpaid work should start within seven days. That is why, as I said at the outset, we are investing an additional £5.5 million over the next two years. That is where we are coming from in terms of 'robust'. We want to ensure that the community payback order starts early and is kept on track. If people do not comply, there are sanctions for failure.

Paul Martin: Whether a community payback order starts on time will obviously be an issue for the agencies that deliver the framework. Will the sanctions that are to be put in place also apply to the agencies if they do not deliver on time?

Kenny MacAskill: To go back to the very beginning, many of the proposals came from the McLeish commission. I remember Lesley Riddoch saying that, when she visited court, she was gobsmacked to see how someone who was given a custodial sentence, whether of three months or of three years, was taken down below to serve their sentence—in more modern courts, they might not necessarily be taken below, but they are taken away in handcuffs by police or Reliance officers—whereas someone who was given a community sentence got a wee note of paper telling them to turn up at the social work department at an unspecified date, perhaps after calling a phone number. As I said earlier, I served as a defence agent for 20 years, but I never quibbled with that—that was just what happened. Anyone who got a prison sentence went down there and then, but for anyone who got a community sentence the details were worked out in due course. Why?

When people are given a community sentence by Edinburgh sheriff court, it might not be possible for them to be taken out of the back of the court to be given a brush, shovel or whatever and then put in a van to be taken down to Portobello beach, but the idea that community sentences will just work their way through is nonsense. I am extremely grateful to Lesley Riddoch and the other members of the McLeish commission. They came in without any baggage and said, 'Frankly, that's bonkers.' The situation was bonkers. That is why we want community sentences, whenever possible, to start within seven days. The notification of what people are expected to do and the provision of information to the social workers should happen there and then, and the community payback should then start within seven days. We want to make the procedure tighter. As I said, this is a journey of travel, and we are grateful to Lesley Riddoch for that.

Paul Martin: Cabinet secretary, I could not agree more on the importance of delivering community sentences on time, but my point is that, if the offender is to be required to serve the community sentence within a seven-day period, what will happen if the relevant agency does not deliver within those seven days? Will sanctions be taken against agencies? Sometimes local authorities might let down the offender by not ensuring that effective justice is delivered quickly. The offender might not be the one who lets the system down.

Kenny MacAskill: You are right. The audit showed us that the system is not working appropriately the length and breadth of the country. Work is in progress on that with COSLA, which flagged up that it wants to deal with those matters. COSLA is united with us on the issue, but it has said that local authorities will not be able to achieve that without resourcing. That is why we are committed to more resourcing.

There will be further audits by, for example, the Social Work Inspection Agency. I do not think that we would serve our system well by pillorying a council, although a sheriff might want to bring somebody from it before them if there was a manifest failure. We can assure you that there will be auditing by SWIA and that we will deliver what we have set out to do.

10:30

Paul Martin: How robust is that? An offender might be advised that swift justice will be served on them but, if the system is let down by the local authority, where is the robust mechanism to deal with that? You have acknowledged that the current congestion in the system is because local authorities are not delivering the service that they should, so surely there should be a sanction to deal with them. I am not advocating one; I am just asking whether you have anything in place.

Kenny MacAskill: That is why we have SWIA reports. When areas of the country are flagged up as having problems, the issue is raised in the parliamentary chamber—for example, the First Minister must answer questions on it at First Minister's question time. Nobody enters public service, or public life, to do Scotland down and make it less safe and secure. When local authorities are found not to be delivering, action is taken and, for example, new lead officials are brought in to address the problem. That is the current practice, but if you are suggesting that we need some statutory intervention to address problems immediately, I am willing to consider that. We already have audits, SWIA and the view that local authorities must do their best. If they do not, they are open to criticism locally and,

ultimately, here in this committee or in the parliamentary chamber.

Paul Martin: On visible community service, how will a community be able to identify that a community payback scheme is operating in their community?

Kenny MacAskill: We are already seeing that. I go to many places that have been painted or whatever through community service. Indeed, I was delighted to be advised by the minister of Portobello old parish church that the community service team will help with a fallen ceiling there. They cannot do the complicated cornice work that will have to be done, but they will do some of the hard donkey-work to ensure that the parish church is put back as it was. Do we need to have people in orange jumpsuits? No, but we need to ensure that, where appropriate, there are plaques. I have been in many a place where it was clear from plaques, whether on park benches or whatever, that community service work had been done there. I will therefore leave to the common sense of communities the decision about what work needs to be done locally.

Communities are already dealing with that question. In Buckhaven, for example, community service workers have been doing up local paths. Wherever possible, we must make it clear when community service work has been done in areas, although I do not necessarily think that Portobello old parish church would want a big plaque under the stained-glass windows in the church hall saying that it was all done by community service—I would happily support people saying that they do not want that, thank you very much. We must ensure, though, that people are out there doing what is necessary, whether picking up litter on Broughty Ferry beach, doing up paths in Fife or a variety of other work. Wherever possible and appropriate, we should say that the work was done by community service—that seems to me to get the right balance.

Paul Martin: But do you accept that the visibility issue is a challenge? Constituents have advised me of work in the local community that they understood was carried out by local contractors rather than community service. If you want community payback orders to be a visible process, do you acknowledge that that presents challenges in getting the message across to communities? I am not advocating any particular method of doing that; I am just asking whether you recognise that there is a challenge. Again, constituents have advised me that the local housing association's contractors did certain work that was, in fact, done by community service.

Kenny MacAskill: I want community service work to be done for two reasons. First, I want the kids—in many instances, it is young men—to pay back by the sweat of their brows for the harm that they have done. I make no apology for saying that. Secondly, I want people to be able to see their community getting better. In some instances, there will be a partnership between community service and others because some work, such as that for the ceiling in Portobello old parish church, requires skilled labour. That work cannot be dealt with by people who are on community service, for a variety of reasons.

It seems to me to be about getting the right balance. What matters is that offenders do some hard work to pay back for the damage that they have done and that our communities are improved, as opposed to our paying for three square meals for offenders in the free-bed-and-board culture of prison.

I saw a group of kids at Portlethen when I was travelling to Aberdeen. I am relaxed if folk who see a group of kids doing up the park at the side of the main dual carriageway to Aberdeen cannot tell from a distance whether they are council employees, kids doing community service or whatever. What matters is that they are doing the work and the community is being improved.

Paul Martin: I am sorry to labour the point, but the policy memorandum says that you want to ensure that

'sentences served in the community are robust … and visible'.

Therefore, I do not accept your latter point. You say that you are relaxed about the matter but, if you want sentences to be visible, the community needs to know that community payback work is being carried out.

Kenny MacAskill: Visibility comes in a variety of ways. Communities should know what work can be done. I visited a scheme in Fife, for example, in which people were asked to nominate work to be done. People could vote on the internet, as they can do for television programmes, or they could text in to say what they wanted to be done. Things were put in ascending order. In fact, there is more work in Scotland at the moment than community service kids can do.

It is about striking a sensible and legitimate balance. I want the work to be done and our communities to get better. Where appropriate, it should be said that community service people did the work. That might not be appropriate in places such as churches, but it seems to me that such an approach achieves the appropriate balance. That is what is meant by visibility. Communities should be allowed to know that such work can be done. People in Fife can say that they need the coastal path to be done up or other things to be tidied up or done. The level of skill that is required may be beyond the community service team or there could

be health and safety issues. My community council at Meadowbank, for example, asked me about getting kids to get rid of their spray paint. I investigated the matter and found that some equipment for removing paint is subject to health and safety regulations, so it would be inappropriate for them to use it. However, that is not necessarily to say that they could not paint over things.

Things will develop and evolve. The community justice authorities have a role in that, and the community service teams are doing a good job in driving things home. Fife provides a clear example of what can be done so that there is community involvement as well as community visibility.

The Convener: I think that Mr Martin feels that there is a false prospectus with regard to the definition of the word 'visible'. I have some sympathy with what he has said but, as it is unlikely that there will be consensus on the matter, I suggest that we move on.

Paul Martin: On resources, the cabinet secretary told us that he had a discussion with Councillor McGuigan yesterday. When he gave oral evidence to the committee, Councillor McGuigan focused on the provision of adequate resources to COSLA to carry out the necessary work. Have you advised him that you will provide all the resources that he requires to deal with COSLA's commitments?

Kenny MacAskill: That is clearly an issue for COSLA. Harry McGuigan was correct to raise the issue, which Robert Brown and Henry McLeish have also raised. We recognise that there must be resources, which is why I said at the outset that we propose to make £5.5 million available over the next two years, as well as the additional resources to which we have already committed. I hope that we will be able to get more resources, but much depends on whether we will be given consequentials and assistance with the swine flu pandemic, for example. The Government must meet needs, but we cannot provide as much as we would like because we have not received Barnett consequentials for prisons, nor have we yet been given assistance in tackling a clear issue of national urgency. However, I hope to provide more resources if we can.

We have got the £5.5 million. The courtesy call to Harry McGuigan meant no disrespect to the committee or Parliament; I simply wanted to let him know that we would be making an announcement. He is out of the country, but I understand that he is delighted by the progress that we have made. It is clear that the money is not a king's ransom. We would like to be able to get more money, but swine flu, Barnett consequentials and other things are causing difficulties for the Cabinet Secretary for Finance and Sustainable Growth.

Robert Brown: I would like to pursue the issue of resources, if I may. I am grateful that there will be additional funding, but I want to be clear that the funding relates specifically to the existing community orders. I think you said in your introductory remarks that it is designed to increase the speed and, perhaps, the quality of the current process. Will you confirm that?

Kenny MacAskill: Wilma Dickson will comment on that.

Wilma Dickson (Scottish Government Criminal Justice Directorate): The priority, particularly for this year and next, is to get up to speed. For a number of local authorities, there is quite a transition period for retooling and dealing with backlogs. At the end of that period, it should be possible to divert resources away from catching up and into investment in additional CPOs.

Robert Brown: I follow that, but we have had figures from Glasgow and other parts of the country about the extent of the backlog—I suppose that it has not been helped by the recent strike in Glasgow, although that is another issue. It seems to me that the bulk of the money will be required to bring the existing orders up to scratch and to hold them there. If that is not done, there will be a falling away again. At the end of the period, how much of the resource—I appreciate that there is another £2 million—that will not be needed just to keep the existing orders up to scratch will you be able to reallocate?

Wilma Dickson: It might be helpful if I say that one of the other things that you should take into account is that we need to resource the additional costs of progress courts and to put some extra capacity into electronic monitoring. Most of the money will go out to local authorities. Obviously, all the £1.5 million that will go out this year will go to local authorities on the normal distribution formula as quickly as possible, because we want to start on the catch-up as quickly as possible.

Robert Brown mentioned Glasgow. In Glasgow, the strike has been resolved. There is a way forward there, which is very positive. In addition, quite a substantial slab of the money for next year will go out to local authorities. We would expect that by the end of that period, the catch-up will have happened, and that there will be scope to redirect and build up more community payback orders.

Kenny MacAskill: We cannot be too prescriptive. Some areas have specific problems. Robert Brown mentioned Glasgow, but other areas are doing remarkably well. The money has to go mainly into front-line services, and spending decisions are—given the particular needs of the

criminal justice social work department—best made by local authorities, and not by me in St Andrew's house. We have given you the broad direction of travel. We are more than happy to work with local authorities on this, but ultimately it is their call.

Robert Brown: There are two or three other important issues. I think that most of us would agree about the quality of some community service orders at the moment. You mentioned the 42 per cent reoffending rates, which is one test. The rate is better than that which is achieved by short-term sentences but, arguably, not that much better, considering that you are dealing with a lesser category of offender. Are there mechanisms in place to improve the quality of community service orders by making them more focused on reducing reoffending rates and achieving more success?

Kenny MacAskill: Yes—although that has, to an extent, to be dealt with locally. It is about ensuring that we get best practice across the board. Equally, we have to recognise that there are particular problems in some areas because of their volume or geography. Community sentencing in the Highlands and Islands and in Dumfries and Galloway is particularly challenging because of the geography of those areas. It is about learning from good practice and figuring out what works in a particular area.

We must also consider what we have got with CPOs and recognise that as well as the community payback punishment aspect, we need to address the underlying problem—alcohol, drugs or whatever—in other ways.

Robert Brown: The committee is concerned about the number of breaches of community service orders—some of us have asked about that from time to time. The Government and the committee would probably agree that that has to be tackled. It is a matter not just of starting effectively but of keeping at them effectively, and dealing with breaches properly, while recognising the need for flexibility. Under the arrangements that you are putting in place, do you anticipate an increase in the number of breaches that will have to be dealt with by reference back to the courts?

Kenny MacAskill: We hope that progress courts will alleviate that. We have learned from DTTOs and from speaking to sheriffs that sometimes it is not simply about keeping people on a tight leash and berating them; sometimes it is about encouraging them, and saying how well they have done. We are giving sheriffs the flexibility to encourage people who are doing well to overcome their addictions, to become less of a nuisance in their communities and to contribute as net taxpayers who function manageably in our communities, rather than their being a drain on taxpayers.

10:45

We will provide the tools, such as the progress courts, to monitor those who might have a specific problem and who need to be kept in check. Sometimes, the aim is to encourage as well as to berate—I have picked that up from sheriffs. Electronic monitoring is also available to allow a belt-and-braces approach to be taken. Such matters must be worked out. Some of that is about embarking on a journey. We must set the parameters and have the structures of community progress courts. We have the resources—the additional money—and we must allow sheriffs and social work departments to work together. As you know, in areas that work well, much co-operation takes place between sheriffs who want to know what work is available and social workers who want to feed back information.

Robert Brown: The number of new orders will be crucial. I am bound to say that the presumption against short-term sentences implies that the intention is that in the bulk of such cases sentences will no longer be imposed and will be replaced by community orders. The financial memorandum talks about alternative scenarios of 10 and 20 per cent increases in community orders. If the new policy is to have any impact, such increases would be rather low.

I understand that about 19,000 community orders were given in 2007-08, if we add together community service orders, probation orders and supervised attendance orders. That is not a million miles away from the 14,000 to 16,000 short-term sentences that the cabinet secretary talked about. One imagines that, to make a significant impact on short-term sentences—we accept that some will continue to be imposed for all sorts of purposes—thousands of additional community service orders will have to come into the system, rather than the 10 to 20 per cent increase that the financial memorandum suggests. What was the basis for the prediction of 10 or 20 per cent? If such figures are achieved, will they make much difference in the overall scheme of things?

Kenny MacAskill: You are correct to raise the issue. We do not believe that a millennium moment will occur. In 2007-08, there were 8,191 direct sentence prison receptions for sentences of under six months, which equated to only 6,076 individuals. That shows that some people go to prison more than once for a short sentence and often more than once in the same year, through the revolving door.

Our assumption of a 10 or 20 per cent increase in the number of community orders would result in

an additional 1,931 or 3,862 orders, set against the 6,076 individuals. However, we are aware that sentencers do not change their sentencing behaviour overnight, so assumptions must be realistic. There will be no millennium moment, but we are on that drive and path. The number of orders can be increased not simply through the provision of finance, but through working the system better.

Robert Brown: You suggest that we will end up with significantly higher figures and therefore increased resources in future years. In that context, would it be an advantage to phase in introduction and to adopt the Liberal Democrats' suggestion of three months rather than six months as the cut-off point? I accept that such matters are, to a degree, arbitrary. Even with the extra resource that you talked about and some reallocation later, will the facilities be available to make the policy a success? You will perhaps accept that if the policy does not work effectively, is not seen to protect communities and does not increase success at preventing reoffending, communities will be considerably disillusioned.

Kenny MacAskill: Those concerns are valid and legitimate. I have talked about the additional funding—a bit more might be obtainable, but that depends on some factors—together with improvements in practice. We take into account the fact that sentencers will not change their habits overnight; some people always take time to change. Also, some people will still receive short sentences. Such matters can be dealt with—we are on a journey in that direction of travel.

Robert Brown: What assumption have you made about the long-term increase in community sentences, once the legislation is fully in place, the lead-in period is over and confidence-building measures have been taken? Are you talking about a 50 per cent, 25 per cent or 90 per cent increase?

Wilma Dickson: It might be helpful if I return to the figures and explain some of them. There is a difficulty in that there are different ways in which we count sentences. The higher figure of 12,000-plus short sentences is a perfectly accurate figure for the number of sentences that the courts impose. However, given that some people have served time on remand or are given three or four concurrent sentences, the figure for sentence receptions is much lower and the figure for the number of people who go into prison is lower still.

If we look at the figure for direct sentence receptions, the number of individuals in a year is only 6,100. In the assumptions that we have made for increased CPOs, the 10 per cent figure is 1,900 and the 20 per cent figure is 3,800. The individuals who get short prison sentences and go into prison represent a much higher proportion than may first appear to be the case. That is because, paradoxically and counterintuitively, the number of individuals who go into prison each year is about half the number of short sentences. We are probably talking more about that targeted population. On that basis, the assumptions of 10 per cent and 20 per cent give figures of 31 per cent and 62 per cent of present receptions. The number is not as negligible as it looks. If I failed to explain that clearly enough to the Finance Committee, it is probably my fault.

Robert Brown: That is helpful.

The Convener: I see exactly where you are coming from. Many accused avail themselves of the roll-up facility, particularly when they are in custody.

Cathie Craigie: My question is on community payback orders under section 14. Proposed new section 227B(5) of the 1995 act states:

'The court must not make the order unless the offender has, after the court has explained those matters, confirmed that the offender (a) understands those matters, and (b) is willing to comply with each of the requirements to be imposed by the order.'

What if the offender is not willing?

Kenny MacAskill: A person who says that they will not comply with an order will not get one. The situation will be the same as with bail: a standard bail condition is that the person must not commit another offence. If the offender says, 'I'm gaunae', they will be told, 'You're no getting bail.'

Cathie Craigie: So, if the offender is not willing to comply with the order, the court has recourse to a custodial sentence.

Kenny MacAskill: The point that I made earlier was that you can take a horse to water, but you cannot make it drink. If the offender was told, 'This is what you're gaunae do', but then said, 'I'm no doing it', the sheriff would be right to say that a custodial sentence is the alternative. If a bail condition is that the person cannot go to the pub or return to the matrimonial home, but the person says that they will do that, they will be remanded.

Cathie Craigie: I am not talking about bail conditions; I am talking about community payback orders.

Kenny MacAskill: You are talking about the court laying down an order and the person refusing to accept it. If they refuse to accept it, the order will not be given. People either accept the terms and conditions or face the forfeit. In such circumstances, I have no doubt that the offender would be given a custodial sentence.

The Convener: Right. This is an appropriate time to have a suspension. I am conscious that you have an appointment elsewhere, cabinet secretary. We will have a five-minute break.

10:53

Meeting suspended.

11:01

On resuming—

The Convener: I thank everyone for being back in their seats so promptly. Robert Brown will lead the questioning on serious organised crime.

Robert Brown: Why are the new offences of involvement in, and direction of, serious organised crime needed, given that people can already be prosecuted for conspiracy to commit a crime or inciting others to commit a crime? Is the common law under that heading not entirely adequate? Does it overlap with the new proposals?

Kenny MacAskill: It can be difficult to prosecute at the top end of criminal network offences. Indeed, that has been highlighted in the media south of the border. Although conspiracy can be charged for serious organised crime, the prosecution authorities have given evidence to the committee on the difficulties of doing so and proving the offence. Serious organised crime is a significant threat and we must address it; it is unacceptable. Therefore, it is appropriate to build a statutory basis for specific offences.

Robert Brown: Section 25(1) says:

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

To all intents and purposes, that sounds like a definition of common-law conspiracy. Will you elaborate on how it is different from the common law?

Kenny MacAskill: Clearly, it would be possible to libel that crime as conspiracy. Indeed, that option may remain for the Crown in some circumstances. However, with these provisions, we are recognising that serious organised criminal gangs operate in Scotland. Those gangs are involved not only in the drugs trade but in people trafficking and smuggling, for example. They also seek to undermine legitimate areas of the economy and drive hard-working Scots off the road or undermine their businesses. We must recognise that problem. As with the Emergency Workers (Scotland) Act 2005 and the bill's provisions on intoxication, we are sending a clear message about how seriously the Government and society view serious and organised crime.

The Crown has made the point that proving conspiracy can be difficult. It is therefore appropriate that we have an additional statutory basis that allows us, while keeping the appropriate balance in the scales of justice, to ensure that it is not as difficult to convict someone of involvement in serious organised crime as it is to convict them of conspiracy, and to send a message that society will take serious organised crime extremely seriously.

Robert Brown: There is no disagreement around the table on the importance of serious organised crime, for the reasons that Mr MacAskill mentions. However, my question is this: what is the difference between the definition of involvement in serious organised crime under section 25(1) or that of directing serious organised crime under section 27(1), and the definition of conspiracy that a judge would apply under the common law?

George Burgess: I point back to the evidence that the Lord Advocate and the Solicitor General for Scotland gave to the committee a couple of weeks ago. They explained the extent to which the new offences in the bill could get into the serious crime organisation a bit earlier in the chain—before the conspiracy had formed—and why, in their view, they would be better than relying simply on common-law conspiracy. I cannot really add to what the law officers said on that occasion.

Kenny MacAskill: I think that the provisions have their genesis in the serious organised crime task force, which included not only the law officers and the police but—so that we could deal with the tentacles of organised crime—Her Majesty's Revenue and Customs, the Serious Organised Crime Agency and the Scottish Prison Service. Some ideas were also taken from Canada, where the Solicitor General had seen the benefits that had accrued from such measures. It seems to us that, if tackling serious organised crime in the way that is proposed will have benefits—as in Canada—over using the common law of conspiracy, which is not necessarily delivering as we would wish, it is appropriate that we take action. As is perhaps always the case, the common law will still exist after we bring in the statutory offence, but the provisions are about tackling the specific problem that we believe exists in Scotland. As well as ensuring that we have the legislative basis to support those in SOCA, HMRC, the Scottish Crime and Drug Enforcement Agency and the police who are involved in tackling the issue, the provisions will ensure that the balance is not tilted too much against the opportunity to protect our communities.

Robert Brown: Let me move on slightly. It was suggested in previous evidence, as the cabinet secretary perhaps heard, that two people who together organised to steal a pie could be covered by the definition of 'serious offence' in section 25(2)(a). The criticism is that the bill mixes together very serious matters with potentially trivial matters at the bottom end of the scale. I accept that the prosecution can exercise a degree of

discretion, but is there not potential for narrowing the scope of those rather significant charges in the bill?

Kenny MacAskill: I know that that is not a flippant point, but it is also quite correct to point out that discretion needs to be exercised by the police, the SCDEA and the prosecution. We also need to recognise that folk will use the common sense that they are born with, so the Crown will not libel such matters on a whim or fancy. Indeed, if any such matter were so libelled, I would expect our judiciary to treat the charge with the contempt that it deserved by dismissing it fairly summarily. As I said, the provisions are intended to ensure that we have the appropriate statutory powers to protect our communities. We do not anticipate that the new offence will be used in huge volumes, but we believe that the ability to use it is necessary to protect our communities from the threat that they face.

Robert Brown: In that context, have officials given any attention to the possibility of narrowing down the scope of the provision to meet the objection—of the public, to some degree—that such charges sound, and are, very serious whereas they could be used for things that are not very serious at all? We surely do not want to water down or dilute the concentration on serious organised crime.

Kenny MacAskill: We are more than happy to reflect on that. However, as was pointed out earlier, the offence of breach of the peace can constitute anything from a minor matter, such as a ruckus out in the hallway there, to behaviour that is equivalent to stalking—I recall a defence agent once charging someone on indictment with a breach of the peace for that, and rightly so, given the person's threatening and intimidatory manner. However, the requirement for definition is clearly greater for a statutory offence than for an offence under the common law, which allows more flexibility, so I am more than happy to undertake to reflect on the points that have been made.

Equally, however, judicial interpretation will also be required if and when charges are brought in due course. As we discussed when we considered another bill recently—it might have been the Sexual Offences (Scotland) Bill or the bill dealing with the Somerville judgment—some matters will ultimately be decided by judicial interpretation. That point certainly came up in our consideration of the Somerville bill in the context of what would constitute being beyond the relevant period. We will reflect on the issues that have been raised, but the fail-safe of judicial interpretation should ensure that matters are not brought willy-nilly.

Stewart Maxwell: I have a brief follow-up question on the issue of duplication. When the Solicitor General gave evidence two weeks ago, he gave the example of malicious mischief, which is an offence under the common law but is usually prosecuted under statutes dealing with vandalism. Clearly, such duplication already happens. However, I want to move the discussion on slightly by asking whether the cabinet secretary agrees with the point that, although persons can already be charged with conspiracy, there is a great deal of usefulness in having a statute that specifies that they were involved in serious organised crime. In effect, having such an offence on the books allows it to be put on record what the conspiracy was about, given the difference between a mild conspiracy and involvement in serious organised crime. A specific statute of that sort allows it to be put on record that the individual has been involved in serious and organised crime, as opposed to just conspiracy, which, although it could be serious, might not be seen in the same light.

Kenny MacAskill: Absolutely. It is similar to the reason why we passed the Emergency Workers (Scotland) Act 2005 and a variety of other measures. Indeed, it is why the Parliament passed the hate crime bill more recently. It should be recorded—people should know that what they have carried out is viewed as significantly more serious than the milder actions that you referred to. To take the example of someone committing an assault by throwing a stone, if they are doing so at someone who, as part of their job as a paramedic, is trying to treat a person who has collapsed from a heart attack, the circumstances should be recorded. First, that is to know the number and extent of such incidents, as is the case for race hate. Also, it should be on the record what the offender was up to.

The Convener: There is a general aim that is shared round the table as to what we are trying to do here.

Kenny MacAskill: Absolutely.

The Convener: I note what you said in reply to Mr Brown—that you will consider the matter again.

Robert Brown: The focus of concern about the serious organised crime provisions lies with section 28, which is on knowledge or suspicion. I accept that there are exemptions, but you might agree that that element goes considerably beyond normal previous concepts of law, which have attempted to define what a crime and an attempt to commit a crime consist of. Section 28 moves very much into offences of omission, as it makes people guilty not for things that they have definitely and directly done themselves, but for things that they know about and have not seen fit to report to the proper authorities. Do you accept that the section has wide powers? Do you accept the concerns that have been expressed about it in some quarters? Is there any way in which those concerns might be alleviated by focusing more

directly on the people you are trying to get at? Who is the target of section 28 and how can you focus on those people?

Kenny MacAskill: You are right that it is a wide target. We know that serious criminals require facilitators—professional advisers, basically—whether for property deals, for legal matters or for accountancy. The provisions are a backstop, to an extent. We hope that the situations that they cover do not arise, and we fully support the work of professional and trade organisations in relation to money-laundering legislation and the wider ethos, rules and regulations. We hope that matters are resolved from within, rather than without. However, I would not hold my breath about that, given the nature of the money and benefits involved. Although the provisions in the bill are a backstop, which we want to work, we believe that the new offence adds impetus to get our approach right.

You are correct to say that the section concerns omission, in many instances, but there is a clear difference between somebody in a garage encountering a person coming in with £40,000 in used notes in a holdall and not asking any questions, and somebody who, in whatever capacity, is sorting out property deals for people seeking to launder money in the knowledge of where that money has come from.

Some of the provisions are about allowing discretion and judgment to be used by the police, the SCDEA, HMRC and, ultimately, the Crown and the courts. There are indeed areas that concern omission, but it is not so much the person whom we might ask, 'Where did you think the money was coming from?' whom we are targeting; we are targeting the people whom we know to be working as the scribes or authors of inventive schemes to take money that has been bled from our community to make themselves ever richer.

Robert Brown: Are the conspiracy and involvement elements not dealt with by section 25, or by the money-laundering regulations, perhaps with some additions to them? Could you be a bit clearer about the mischief that is not being met at the moment, which would not be covered by the money-laundering arrangements, by the common law of conspiracy or by section 25?

11:15

Kenny MacAskill: Without going into anecdotal tales, which is never the best way, I suggest that those matters have to some extent been covered, in principle, by the Solicitor General and that it will be the Crown and the police who drive them forward. They have flagged up a cause for concern. You are correct that there will be areas where there is overlap between what is clearly conspiracy and a variety of other matters. We are aware that serious organised crimes are being carried out in a variety of ways and we believe that we must take steps to combat such crime. This proposal has come from the serious organised crime task force to enable us to deal with activities that we know are going on, whereby people are buying up legitimate businesses and places such as new-build flats in order to hide drugs or carry out a variety of other activities.

The job of our Government is to ensure that the appropriate legislative framework is put in place to allow the police and the prosecution service to do their job. They have told us that they do not believe that the current law of conspiracy is appropriate. We hope that we do not have to prosecute individuals who are involved in professional services that are respected in Scotland and that do a good job in our communities, but we know that, for whatever reason, some people fall from grace. We want to ensure that we protect our communities. I am more than happy to go back and ask for greater detail, but I am not the person who should provide such detail; it should be provided by those who sit on the serious organised crime task force, whether it be HMRC or the SPS. We know that serious crime is being organised not only in areas of urban deprivation of Scotland but in areas of extreme wealth, where people have managed to get themselves because of what they have done and, tragically, it is sometimes also being organised from prison, where people have correctly been sent.

Robert Brown: I repeat that nobody around the table has anything other than a desire to tackle serious organised crime, but we are still entitled to ask you whether your proposal does what it says on the tin.

The committee has heard evidence that suggests that part of the issue is evidential rather than to do with the substance of the legal provisions. Might it be beneficial to look at that element—the procedure and evidential law—rather than at the substantial definitions? In that context, we understand that the United Kingdom Government is considering and consulting on the scope of the Regulation of Investigatory Powers Act 2000. Has the Scottish Government been involved in that and is there scope for a similar review of legislation in Scotland on the evidential side to ensure that we have all the weapons, not only substantial but—perhaps at least as important—evidential, to address these particularly difficult issues?

Kenny MacAskill: We have not been involved in that, but you are correct that the issue is not only the legislative framework but how we can apply our evidence and how we act in respect of

the powers for police, prosecutors and whatever else. We do not quite have an open book, but we established the serious organised crime task force to deal with these issues in a variety of ways. We are dealing with one matter that it has flagged up and we are more than happy to co-operate, adopt ideas and work with various authorities on these issues. As was made clear by the task force's recent announcement, we know that many of the criminal gangs that operate in Scotland are not based in Scotland. Many come from south of the border and some even come from beyond the shores of the UK. We work with UK authorities on the issue—for example, HMRC and SOCA sit around the table with us—and we also co-operate with Europol. There is genuine openness and we are willing to work in whatever way, with whatever authorities, in whatever jurisdictions, to tackle a global problem.

The Convener: This is an important topic. As there are no more questions on it, I will say that it is a matter to which everyone will give considerable thought before the legislation proceeds.

We now turn to the issue of retention of samples.

Stewart Maxwell: The committee has heard a variety of evidence about whether the retention of DNA samples should be extended to offenders who receive fixed-penalty notices. Some people have argued that many of those offenders go on to commit serious crimes and that the retention of their DNA would be an effective tool in detecting such crimes. Do you agree that the retention of such samples should be based not on the penalty that is received but on the offence that is committed?

The Convener: Before Mr MacAskill answers that question, I point out that the officials have changed. Denise McKay, from the legal directorate, and Rachael Weir, from the criminal procedure division, both in the Scottish Government, have seamlessly assumed their seats. Mr MacAskill may now proceed.

Kenny MacAskill: Stewart Maxwell makes a valid point. The Government has made it clear that we are open to reviewing matters—for example, Professor Fraser's review covered issues relating to children. We are getting people on board to work out what the correct balance should be. The Government is firmly opposed to any blanket retention of forensic data for an indefinite period; such data should not be retained indefinitely unless the person has been convicted in court.

However, we recognise that it is appropriate to consider the issue of retention with regard to youngsters who commit serious offences and people who commit offences that are dealt with using fixed-penalty notices, and I assure members that we are doing so.

Stewart Maxwell: I am delighted to hear that. Is it likely that the Government will either accept an amendment at stage 2 or lodge its own amendment on that point?

Kenny MacAskill: We are happy to consider our position on that, subject to provisos in the Parliament about matters being legal, appropriate and compliant with the ECHR.

Stewart Maxwell: I have written to you on that matter, as I am sure you are aware, and I look forward to receiving your response. You briefly mentioned DNA samples from children; the bill clearly provides for the retention of samples from children who have been referred to children's hearings for relevant serious and violent offences. Can you elaborate on the rationale behind those provisions and explain how the list of applicable offences will be developed?

Kenny MacAskill: We know that, tragically, there are a small number of youngsters who commit very serious sexual or violent offences, and who sadly continue in many instances to pose a threat beyond childhood. We are considering how to achieve the appropriate balance. It is important to remember that the provisions relate only to serious sexual or violent offences; we will consult with the forensic data working group on the list of offences.

Retention will be time limited, and both the child and the responsible adult will need to accept that the child has committed an offence, or a sheriff will have to find that to be the case. Children may also be victims and they have rights. Nothing will be done with the DNA that is retained unless another offence is committed. We are ensuring that appropriate people from a variety of backgrounds are involved in considering what should be on the list of trigger offences.

Stewart Maxwell: When is that likely to be forthcoming?

Kenny MacAskill: It will probably not be before the bill is passed, as it will take some time to work out. Some element of flexibility may ultimately be required, given the nature of the offences. I cannot give you a timescale, but I can certainly undertake to ask the members of the working group whether they have set a timetable. The bill will provide us with the appropriate powers, and we can then drill down to a much more specific level with the working group.

Stewart Maxwell: Just to be clear, do you expect that the working group will report before consideration of the bill is concluded?

Kenny MacAskill: We do not have a timescale. We could inquire about what stage the working

group has reached, but it is still being set up and we have not set a timescale for its work. We are not expecting the group to sit and do nothing, but we have allowed it to decide on a timescale—we have only established the framework and brought the members together. I am happy to ask the group's members whether they can give us any information that we can pass on to you about the timescale for the investigation.

Stewart Maxwell: I presume that you expect that the outcome of the working group's deliberations will not impact in any way on the provisions in the bill.

Kenny MacAskill: No—there is sufficient flexibility in the framework of the bill to allow us to use the outcomes from the working group to deal with more specific matters.

The Convener: It would be useful if we could find out the timing of the working group's report. It seems to me that we are getting things slightly out of kilter. I appreciate that there may be problems, but we would want to have the information from the working group prior to legislating. That may not be possible, but can we find out what is happening?

Kenny MacAskill: We undertake to give you that information.

Robert Brown: What will the interim position be if there is a gap between the passing of the bill and the working out of the list? What will happen in the meantime?

Kenny MacAskill: The legislation will not be brought into force. I presume that it will require the trigger of subordinate legislation thereafter to bring it in. To some extent, what we are legislating for in the bill is the powers. What will have to come through thereafter will be done through a Scottish statutory instrument. If Parliament passes the bill, it will give only a consequent power, and thereafter a statutory instrument will be required to come before the committee.

Stewart Maxwell: I understand the process, but could I clarify whether the SSI will list the specific offences to be included? Given the nature of the subject matter, I assume that it will be an affirmative instrument.

George Burgess: Perhaps I can assist. We should look at section 59 of the bill and the new section 18B that it inserts into the 1995 act. Section 18B(6) provides that a relevant offence is such an offence as ministers may prescribe. What ministers can prescribe has to be selected out of what is already defined in the 1995 act as relevant sexual and relevant violent offences, so there is already a limitation on the scope of the possible set of offences that can be specified—it is not a free-for-all for ministers to choose whatever they like. It will be an order made by statutory instrument. We will need to check on the procedure to establish whether the negative or affirmative procedure will be used, but the Subordinate Legislation Committee will no doubt have considered that in recent weeks.

Stewart Maxwell: I would be grateful—as I am sure the committee would be—for confirmation of which procedure will be used. Given the nature of the subject matter, I expect it to be the affirmative procedure but, if it is not, I hope that we can have some understanding of why it is not.

Kenny MacAskill: We will check that out for you.

Paul Martin: Will the minister clarify that it is not the Government's intention to move in line with the position in England and Wales on the retention of DNA?

Kenny MacAskill: Given that the position in England and Wales has been traduced, if I can put it that way, by the European Court of Human Rights, the short answer is no. First, it would be impossible to do that, given the views of the European Court of Human Rights. Secondly, we think that, as people in other jurisdictions have said, we have the correct balance. We must recalibrate it, and that is the point made by Mr Maxwell in relation to the need to consider the issue of serious violent offences committed by young people. We are also considering whether the retention of DNA samples should apply to offenders who receive fixed-penalty notices. However, we believe that indefinite retention of such samples has been shown to be illegal by the Marper judgment and that, in any case, it was not the appropriate way to go.

Paul Martin: When we took evidence from Chief Constable House, I questioned him on whether there are opportunities to prevent crimes from taking place at a later stage by identifying offenders at a much earlier stage. Do you not recognise that the system that is in place in England and Wales is a very effective detection method at a very early stage of the criminal's career?

Kenny MacAskill: We recognise the benefits of DNA evidence in, for example, the successful prosecution of Peter Tobin in the Vicky Hamilton case, which was to the great credit of both our police and the Solicitor General. Such evidence is used for detection, but I remind Mr Martin that the Marper judgment has been issued. That is the position in which we find ourselves not only in Scotland but south of the border and that is why courts have been saying that they think that the current position in Scotland strikes the correct balance. I pay tribute to your colleague Cathy Jamieson and others who put us in this position at

the outset. For the record, we do not want to go down the English route because we think that we have the appropriate balance, subject to the outcome of the matters that we are checking. Moreover, we cannot take that approach because of the European court judgment.

11:30

Paul Martin: For the record, I confirm that the position on DNA was introduced by an amendment that I lodged to the Police, Public Order and Criminal Justice (Scotland) Bill—not that I do not want to give credit to Cathy Jamieson where it is due.

The point on Peter Tobin is interesting because one of the questions that I raised with Chief Constable House was the possibility that we could have detected him at a much earlier stage of his criminal career if we had had the opportunity to retain his DNA much earlier. Do you not acknowledge, even on anecdotal evidence, that we could have prevented some of the murders that he committed if we had identified him much earlier?

Kenny MacAskill: I am a great supporter of the excellent work that forensic departments the length and breadth of Scotland do. I have seen the forensic department in Glasgow and pay great tribute to it. Indeed, it was a privilege for me as Cabinet Secretary for Justice to present an award—I have done it two years in a row—to those who have done sterling work. However, I am not quite sure what you are suggesting. I recognise the great benefits of forensic science to law enforcement.

Paul Martin: The question is clear. I posed the same question to Chief Constable House, who understood it. Could we have detected Peter Tobin earlier if we had been able to retain DNA samples decades ago?

Kenny MacAskill: I am not qualified to comment on the Peter Tobin case. You would be better asking my former school and football colleague Detective Chief Inspector Keith Anderson—now retired—who was the investigating officer, or Frank Mulholland, the Solicitor General, who prosecuted the case. I cannot comment on what could or should have been done. I am delighted at the excellent work done by Keith, Lothian and Borders Police and every other police force north and south of the border that collaborated and delighted at the sterling work that the Solicitor General did in bringing Peter Tobin to justice for the murders of Vicky Hamilton and Angelika Kluk. Beyond that, I cannot guess; I have never seen the files.

Paul Martin: Do you accept that the DNA retention opportunities that are provided to us allow us to identify criminals at much earlier stages of their careers? Yes or no.

Kenny MacAskill: Absolutely. That is why the Government is ensuring that the Scottish Police Services Authority is properly resourced and that the appropriate steps are taken to ensure that forensic science is all that it can be in Scotland. I pay great tribute to our forensic science officers in the SPSA.

The Convener: One might have considerable sympathy with what Mr Martin suggests, but there is a prohibitor in respect of the European court judgment, is there not?

Kenny MacAskill: Yes.

The Convener: That is as far as we will get today. Mr MacAskill has kindly agreed to fit in an extra meeting, at which we will deal with the licensing issues that arose last week. At that meeting, there will also be the opportunity to raise a number of other issues that we did not get time to deal with today. This morning's meeting has been exceptionally useful and exposed the cabinet secretary to fairly intensive examination on the Government's policy. I thank Mr MacAskill and his officials for attending.

11:33

Meeting suspended.

11:35

On resuming—

Subordinate Legislation

Debt Arrangement Scheme (Scotland) Amendment Regulations 2009 (SSI 2009/234)

The Convener: Item 2 is subordinate legislation. We will take evidence on the Debt Arrangement Scheme (Scotland) Amendment Regulations 2009, which is an instrument that is subject to annulment. A motion to annul has been lodged by Robert Brown and will be dealt with under the next agenda item. For now, the committee is simply taking evidence in order to inform our consideration of that agenda item.

Members have before them the submissions that have been received in relation to the regulations, and the briefing paper from the Scottish Parliament information centre on options for debtors. I welcome the witnesses: Yvonne Gallacher, the chief executive of Money Advice Scotland; and Vida Gow, money advice co-ordinator with Citizens Advice Scotland.

We have received written submissions from the witnesses, and we will move straight to questions.

Robert Brown: There has been some interaction with Money Advice Scotland and Citizens Advice Scotland about the Government's intention to lay the regulations before the Parliament. I cannot find the exact point in my papers, but it was suggested that there was a fair degree of agreement from your organisations about the direction of travel. Can you elaborate on the extent to which you were content—or otherwise—with the proposals when they were introduced?

Yvonne Gallacher (Money Advice Scotland): There has been agreement; we certainly agree that the regulation that allows schemes to be set up for a single debt is a way forward. However, the minimum contribution of £100 is an issue. I have just come from a conference in Crieff, and I can tell you that creditors and advisers unanimously agree that that type of policy will not work. That proposal needs to be reconsidered and consulted on.

There is certainly a need for money advice. We realise that the gateway has not dealt with as many people as we anticipated or hoped, but we can consider alternative solutions. Indeed, given the current climate, what is happening with home owner support and the need for approved advisers, providing only the electronic gateway while not making money advice compulsory will lead people down the wrong path.

Vida Gow (Citizens Advice Scotland): We were involved in some of the initial discussions about the changes. We welcome the idea that single debts will be allowed into the debt arrangement scheme, but, like Money Advice Scotland, we have considerable concerns about the restrictions that will be placed on the scheme with the minimum payment and the maximum term for repayment.

CAS research shows that there are already significant policy gaps with regard to citizens advice bureaux clients and that the regulations would expand those gaps and leave even more clients without a suitable option for going forward. We noted in our submission that a number of bureaux came forward to tell us what the impact would be on their clients if the regulations were implemented; three times as many bureaux have now come back to me on that. A large number of clients would not have been able to access the solution that they were offered if the regulations had already been in place.

The Convener: Some of my colleagues have questions, but we might circumvent that process if you simply illustrate the issues that you have with the regulations. I hope that there will be a measure of agreement between you on that.

Yvonne Gallacher: Basically, the issue is the exclusion of debtors. People who could pay up to £100 and for whom a protected trust deed is not an option will be taken out of the system. We should think back to why the policy arose in the first place. Home owners who are not necessarily middle class would be excluded under the policy. However, the minister spoke to us this morning and told us that he has revoked the regulations and that he will proceed with a consultation.

Cathie Craigie: On the issue of consultation, as I was involved when the Debt Arrangement and Attachment (Scotland) Bill was being considered, I know that there was wide consultation and involvement with the money advice and voluntary sectors to try to achieve something that would meet needs. We have received several written submissions, including from the two organisations that are represented today and, without fail, they raise the lack of consultation as a problem. The Executive note on the regulations states that stakeholders, including Money Advice Scotland, Citizens Advice Scotland and the Institute of Chartered Accountants of Scotland, were consulted during the review process. We are told that the Accountant in Bankruptcy

'has consulted with the money advice sector in relation to the specific impact of these changes on debtors and money advisers.'

Were you consulted at that stage by the Accountant in Bankruptcy?

Yvonne Gallacher: We have had on-going discussions with the Accountant in Bankruptcy, but the issue is the timing of the regulations—there was not sufficient time to examine them and we were not able to consult our sector or people in the credit and debt collection industries. As I said, at the conference that I attended, the delegates were concerned that they were not consulted on the issue in the way that they would expect.

The Convener: To an extent, we are talking in a vacuum, as Ms Gallacher has indicated that the regulations have been revoked.

Bill Butler: I am sure that you will have other things to say, convener, but I have a question for Ms Gow from Citizens Advice Scotland. Paragraph 24 of your written submission states that a better solution than that in the regulations that we thought that we were to discuss this morning would be the reform of protected trust deeds. Will you go into a little detail on why that would be better?

Vida Gow: There has been some discussion of that at the debt action forum—I was not involved in that, but my colleague Susan McPhee was. There was discussion of the protection of the client's main residence while they receive debt relief.

Bill Butler: Do you have anything to add, Ms Gallacher?

Yvonne Gallacher: Protected trust deed reform is certainly needed, but it is not a panacea and would not sort the problem with the debt arrangement scheme. We need to consider the issue globally and not look at just one solution. It is unfair even to consider that the people under the £100 limit that is in the regulations that we are considering could go into protected trust deeds, as that would not be an option for many of those people, particularly if they are home owners. Both our organisations have presented worrying evidence on the number of people who would be excluded.

Bill Butler: So you want a more holistic approach through which we consider the issue in the round.

Yvonne Gallacher: Yes—and that approach should include money advice. Creditors, debtors and money advisers are all agreed that that is the methodology that is required. We need an holistic approach that will help people to decide what to do, whether the solution is a protected trust deed, the debt arrangement scheme or whatever. We must consider how we can expand the gateway, but retain within it the money advice. Otherwise, people will end up with improper solutions, which will create difficulties for them further down the line.

Bill Butler: I would always agree that it is better to work in co-operation.

11:45

Stewart Maxwell: I agree with the convener that we are working in a bit of a vacuum, so I will just run quickly through the questions that I had, on which the witnesses might want to comment.

Is it appropriate for people to be given decades-long terms of repayment, particularly given the age of some who are involved in the scheme? For example, I believe that some pensioners were given repayment periods of up to 40 years.

On the issue of exclusion, will the witnesses comment on the fact that debt advice is not available in some areas, which means that many people are geographically excluded? Information that we received last week suggests that we have only 12 active money advisers in Scotland, so large parts of the country are excluded from the scheme.

On compulsory money advice, although I agree that people should seek out experienced money advisers for debt advice, is it appropriate that such advice should be compulsory? For example, if I was in debt and wanted to repay that through the debt arrangement scheme, I might have no wish to seek advice from either of the organisations that are represented here today because I felt that I had enough intelligence to read the available information and to make a decision based on my experience and on what was best for me and my family. Why should I be forced to go to an organisation to seek advice? Could I not take a decision myself? Is it not slightly condescending to say that everybody must go to a money advice organisation?

Vida Gow: Only 12 approved money advisers regularly submit debt payment plans under the scheme, but a large number of advisers submit debt payment plans less regularly. That might be due to their client base. Although advisers in certain areas submit plans more regularly, many more than 12 advisers are submitting applications—

Stewart Maxwell: I am sorry to interrupt, but Moray has no approved adviser in 2009. Is it not the case that people in Moray are excluded from the scheme?

Vida Gow: Some areas in Scotland currently have no approved adviser. We would certainly welcome anything that could be done to open up the scheme to as many people as possible. I believe that the debt arrangement scheme is a good scheme, so I would like it to be accessible to as many clients as possible. We should look at all the different ways in which we can do that. I agree

that the best solution is for people to access money advice, but I am aware that some people are currently restricted in that regard. We would like as many people as possible to be able to access the scheme.

Stewart Maxwell: Would not one way of doing that be to remove the compulsory element?

Vida Gow: Perhaps the requirement for an approved adviser could be removed. There have been discussions about allowing all money advisers to be involved in the scheme.

Stewart Maxwell: I also asked about the length of the terms of repayment.

Vida Gow: That is a difficult issue. Some programmes appear to have very long terms of repayment. As an approved adviser for four years, I dealt with some cases in which the debt payment plan looked, on the face of it, to be very long term because of the time period that I had agreed with my client. I had one client who agreed to make payments for five years, then retire and sell the property to repay the debts in full. That client's initial debt payment plan looked very long term, but all the creditors, as well as the Accountant in Bankruptcy, were made aware that the payments would be made only for the first five years. That would have looked like a very long plan because those extra details were not included in the statistics.

Yvonne Gallacher: With regard to what Vida Gow said about the length of programmes, under the current arrangements, creditors are quite prepared to accept anything because, at the moment, they are not lending very much and their activities are focused on debt collection. Obviously, the debt arrangement scheme will bring a lot of money back. It is true that the system needs to be modified, particularly with regard to the point that was made about access. However, in one way or another, people usually find their way to an approved adviser—I have personally assisted someone in such circumstances.

We need to think about flexibility and ways of being innovative in our approach. When the project was set up, we raised the issue of the risks around not having advisers in every area. Of course we do not want there to be a postcode lottery in Scotland. We want people to get advice. That is also what you and the creditors want. It is unfair to say that there are no advisers in an area because, although there might not be any approved advisers, there are usually systems to which people can refer and through which people can be passed on to approved advisers. We need to think about having peripatetic advisers who are flexible enough to go into areas where there are no approved advisers.

There are issues that need to be addressed, but we are in danger of throwing the baby out with the bath water. Everyone agrees that money advice is pivotal to the situation that we are discussing—that was the view of the delegates at the conference yesterday. I understand the point about money advice being perceived as being condescending. However, from their experience, money advisers and creditors know that money advice works. With respect to other systems, it is possible that people who go online to look for solutions—as is perhaps being done in England and Wales—could end up with the wrong solutions. That might result in their bankruptcy, which is not what anyone wants.

Nigel Don: Do you accept that people who have got themselves into such a mess in the first place really should be pointed in the direction of money advice before they try to get out of it?

Yvonne Gallacher: A succinct answer to that is that it depends on the circumstances. Obviously, we all want people to come for advice once they see the problems starting to emerge. However, more and more people who are unemployed or are about to lose their jobs are thinking about their situation and seeking advice. The advisers are overwhelmed at the moment.

Vida Gow: Creditors certainly recommend that clients come for money advice. They want clients to be given all the options. They want to be sure that the clients' incomes have been maximised, that they are making appropriate choices and that they are going forward with a programme that is affordable and includes an offer of payment.

Nigel Don: The papers that I have seen suggest that the vast majority of the creditors are what I might describe as commercial banks. Is that the case?

Yvonne Gallacher: Yes. The banks are concerned about this issue because, obviously, they want to get their money back. Local authorities feature quite highly as well, however.

Nigel Don: After banks and local authorities, who makes up the next biggest class of creditor?

Yvonne Gallacher: I think that there is a mixture. I know from information that the AIB published that, after the main banks—including credit card companies—and local authorities, there is a drop off in scale, and the other creditors are made up of catalogue companies, home credit companies and so on.

Robert Brown: The scheme is intended as a diligence stop, among other things, that would allow people to organise their affairs. Therefore, provided that creditors are getting a flow of money that they would not feasibly be able to get hold of by some other method, there is no particular

reason why a programme should not go on for longer than the recommended period, is there? It is in the interests of the creditor and the debtor that there should be a regularised arrangement for payment, even if the payment is a bit less than it might be in an ideal world.

Yvonne Gallacher: Under the debt arrangement scheme, the creditor gets full payment, which is why programmes are extended. The creditor will get its money back.

What has changed since the legislation was first on the statute book is that the interest charges have been removed. In other words, anyone who completes a programme will have paid back every penny but will not have to pay the interest.

Robert Brown: Clearly, something is wrong with the money advice system, as we are not getting through the numbers that were anticipated when the legislation was passed. From the evidence that we have had about the patchiness of the service around the country, it is clear that some issues are inhibiting the full use of the scheme.

I picked up from CAS that there are issues with the procedures for approving and using money advisers that we need to tackle. Do you agree that, for some reason, the system is too tricky procedurally? Are there issues that we should be tackling in order to encourage further use of the scheme?

Yvonne Gallacher: Money advisers would welcome a change in the procedure so that there were fewer forms and less bureaucracy. However, money advisers and the credit industry still feel that money advice is pivotal.

There is flexibility around certification and approval, which I explained in my submission, but MAS—and CAS, I believe—would be happier if people were not put through an approval system, because there are already checks and balances in place. I hope that that will be consulted on.

On home owner support, people are looking to money advisers for information about such support to help them through very difficult situations.

Robert Brown: To summarise that, you support the simplification of the scheme, with the reduction in the number of forms and so on. Is the online element helpful?

Yvonne Gallacher: It is helpful, but it must not be the only entry point. We want money advice to be pivotal.

Robert Brown: To pick up on Stewart Maxwell's point, do you want money advice to be required in every case? I entirely accept that it is usually highly desirable, but there might be a case in which it is not necessary, particularly if there is a shortfall in the number of money advisers and a three-month time gap, which is mentioned in one of the papers. Perhaps there needs to be a number of options. Have you any thoughts about how the system might be better organised?

Yvonne Gallacher: I think that people must be made to get advice even if they think that they do not need it. You have to trust us when we say that even the most sophisticated consumers, when faced with a complex debt situation, become stressed. They might normally be able to deal with complex situations, but, because of the pressure that they are under—perhaps they are being hounded or whatever—they find it difficult to cope, and they welcome intervention. That intervention is always client led, which means that the client is always able to say, 'You've helped me to come this far, but that is enough.'

Money advice needs to be there for them, because it will help them through the particular processes that are important. For example, they might not have thought about whether they are entitled to benefits or have payment protection insurance that they could take advantage of. Money advice is about considering the overall picture and creating a structure that will bring about a result.

Vida Gow: Money advisers' time will be freed up by some of the changes to the administration of the scheme, which takes up a huge amount of their time at the moment. If they have more time, they will be able to see more clients.

Stewart Maxwell: Is there not a risk in maintaining the compulsory element? At the moment, one of the problems is that, no matter how advisable it is to go to money advice, there are people who will not do that and will, instead, simply seek out private loan companies and so on, which might be much worse for them. The element of compulsion might make them go into those private schemes, because it seems easier than seeking money advice.

Yvonne Gallacher: Of course there is a risk that people will go to private debt management programmes. However, many money advisers are dealing with the casualties of the very companies that you are talking about. When people are in debt, they certainly do not need to pay more money to get out of it again.

In England and Wales, debt relief orders require approved intermediaries, so a precedent for that has already been set.

The Convener: We are grateful for your attendance. You might feel that, to an extent, it has been unnecessary, but I assure you that it has not. The committee has learned a lot about debt arrangement, and we could certainly have been doing with that knowledge.

12:00

Meeting suspended.

12:01

On resuming—

The Convener: We come to our second panel. We have with us Fergus Ewing, the Minister for Community Safety, who is accompanied by Sharon Bell, head of the policy development branch with the Accountant in Bankruptcy.

The Minister for Community Safety (Fergus Ewing): Thank you for the invitation to appear before the committee. Initially, the invitation was to debate a motion to annul the regulations, but I assume that that debate will not go ahead given that, this morning, I signed the revocation of the regulations. It might be useful if I explained how we arrived at this situation.

The Convener: That would indeed be useful.

Fergus Ewing: We have had fairly extensive engagement and discussion with a variety of stakeholders over a long period, starting last August. That was a result of a generally recognised desire to improve the debt arrangement scheme and to increase access to the DAS and debt payment programmes, which are the mechanism for making the DAS work. The engagement began on 21 August in a joint workshop with creditors and the money advice sector to discuss the DAS. Ministerial discussions took place last December, which Mr Maxwell will remember, and further discussions took place with various parties. That led to an announcement by me on 13 January 2009 at a conference at which there was full representation of stakeholders from the sectors with which the committee has been in touch of late. At that meeting on 13 January, I announced that we believed that it was necessary to change the DAS and that we planned to do so in July.

Since then, as members would expect, there have been meetings between the Government—mostly involving my officials—and the various parties that are involved, including the money advice forum, Provident Personal Credit, the bankruptcy and diligence implementation board, MAS and CAS. In tandem with that, as members will know, a debt action forum has been set up and has had seven meetings. The forum is considering the issue of debt in the round, but particularly how we respond to the problems that are thrown up by the recession, especially for those who lose their job as a result of the recession and through no fault of their own. Those people might well be faced with debt problems for the first time in their life, having worked for decades and then suddenly received a P45. We felt that we should examine debt law with a view to finding out whether more needs to be done. That has been done in the debt action forum, the report of which I believe has now been published.

Sharon Bell (Accountant in Bankruptcy): It has been published today.

Fergus Ewing: In tandem with that, we identified that, because the DAS was introduced in 2004, it was time to consider how it was performing and, in particular, how it was accessed and how many people had access to it. In 2007, there were about 260 DPPs, although more than 90,000 people sought advice from citizens advice bureaux. As Citizens Advice Scotland would acknowledge, one might expect that about 10 per cent of people who seek debt advice would be able to repay their debt and would therefore go for the vehicle of the DAS rather than a debt relief scheme of protected trust deed or bankruptcy. However, 10 per cent of 90,000 is 9,000, whereas 260 is one third of 1 per cent of 90,000.

The evidence that the committee received earlier from Vida Gow and Yvonne Gallacher was, as the convener said, useful for the committee to get a handle on and a better understanding of the DAS. Some of the questioning from committee members brought out the acknowledged need to broaden access to the DAS. One route of doing so is the internet. Mr Maxwell highlighted the kind of individuals who might want to do it themselves and who are capable of doing so. That point is undoubtedly reasonable, but we must ensure that those who are not familiar or comfortable with the internet can make paper applications. I understand that Mr Brown and Mr Butler raised that issue in an informal meeting. In addition, other money advisers or professional advisers such as solicitors and insolvency practitioners could be given a role that is not currently afforded to them. The Accountant in Bankruptcy, which is an agency of Government, has shown itself to be highly efficient in successfully administering the low-income, low-assets bankruptcy scheme, which involved 9,425 awards in the year 2008-09. There is therefore broad agreement on the objectives.

I will move swiftly on to events last week. Last Wednesday and Friday, the Government first saw the written representations that the committee has received. Yesterday, I met officials to discuss the submissions for the first time, once we had had an opportunity to analyse them. It is fair to say that we need to carry out further analysis. I therefore decided this morning, in the light of the submissions from stakeholders, some of whom we heard from this morning—although there are others from whom we have not heard—that the wisest, most appropriate and sensible action would be to have as a matter of urgency, and I hope in the next few weeks, a series of further discussions and engagements with the earlier

witnesses and other stakeholders to discuss the issues that they have raised with regard to a threshold and a time limit.

We have not had a formal consultation process. Therefore, in tandem with those discussions, and given the concerns that have been raised, the complexities of the issues and the interaction of the DAS with protected trust deeds, bankruptcy and general advice, it would be appropriate to have a formal consultation in the summer on how to improve the DAS.

I am sorry for the length of the explanation—although I did not include all the details. I thought that it was only fair to explain to the committee why we intimated the revocation of the regulations only this morning. We have been working within short time limits. I hope that members will understand that we acted as quickly as possible following receipt of the documents, which I understand was on Wednesday and Friday of last week. The decision that we took this morning was made in the confident belief that the meetings that I will arrange—most of which I hope to attend personally—will lead to a measure of consensus that will allow us to come back with what I suspect will be a revised proposal in the autumn to achieve the objectives that are, by and large, shared by the majority of stakeholders.

The Convener: Knowing you, Mr Ewing, I would expect nothing less. However, I must express my concern about the way in which the matter has been handled. Not only was there scant consultation—which inevitably was going to cause problems somewhere down the line—but we had a situation whereby last week the committee had to arrange a special session. I am most grateful to you for facilitating your officials' attendance at that, but it took up time. It was obvious from members' research into the matter that there were difficulties. Members, individually and collectively, have spent a lot of time examining the situation.

The committee has been sitting since 10 to 9 this morning, but we would not have sat so long if we had anticipated that the matter would be dealt with. A member of your party—a substitute member of the committee—has been put to considerable inconvenience. You will understand my irritation at that, particularly given the fact that you revoked the regulations while the committee was sitting.

You made a number of arguable points, which we will no doubt debate with interest on a constructive basis, in the fullness of time. However, I put it to you that the matter has been dealt with in a most unhappy manner. Although I do not for a moment think that any discourtesy was intended, you will appreciate that a lot of unnecessary work has devolved to the committee at a time when it is coping with the Criminal Justice and Licensing (Scotland) Bill, which is enormously complex.

Fergus Ewing: I entirely take those comments on board. Certainly, no discourtesy was intended and I regret that some members have been put to inconvenience. Apart from that, I sought to give in my opening remarks a candid and full explanation of where we are. I found this morning's evidence session with the two previous witnesses to be very useful and I think that it will help to inform the way ahead.

The Convener: Do members have any other comments?

Bill Butler: How long will the formal consultation last? I take it that the consultation period will be telescoped over the summer, but I hope that the consultation will be as widespread and comprehensive as possible.

Fergus Ewing: Certainly, we want to consult as quickly as possible, but we also need to ensure that a wide range of stakeholders are involved and have the full opportunity to respond. I hope that the consultation can quickly commence over the summer. I have not yet determined how long the consultation period should be. Over the hot summer months, in tandem with the consultation, I intend to engage personally with stakeholders—including those who were not represented here today—to discuss some of the issues that we heard about this morning.

Robert Brown: I thank the minister for agreeing to the consultation, which is a valid and proper way forward. Will he assure us that the consultation will also look at the number of approved money advisers? As he will have heard, the Accountant in Bankruptcy's written submission states that only 12 approved advisers regularly submit debt payment programmes under the scheme. That is quite a big issue—linked to the patchiness of advice across the country and the lack of take-up—that we need to get right. Perhaps the current requirements involve too much bureaucracy, or perhaps there is another underlying explanation. I hope that the consultation will consider not only the technical aspects but the wider issue of how the scheme can meet the objective of providing a reasonable diligence stopper by opening up repayment arrangements to rather more people than seems to have been achieved—even with the nudge of the change in interest payments—since the scheme came into effect.

Fergus Ewing: I can give Robert Brown a clear assurance that those matters will be raised both in the meetings that I have alluded to, which I hope will be arranged to take place over the next few weeks, and in the consultation. Plainly, it is important to consider what elements of money

advice should be available, whether that advice should be mandatory and whether it should be mandatory in the different circumstances of the DAS, protected trust deeds, bankruptcy and other possible routes for coping with debt through either repayment or debt relief. Plainly, that important issue, which was raised this morning, will be looked at in the consultation and will form part of our discussions.

12:15

Cathie Craigie: You said in your opening remarks that there had been extensive engagement with stakeholders since August. I am sure that you agree that we are in this position because although the engagement with stakeholders might have been extensive, their views and input were obviously not taken fully into account when the statutory instrument was made. That concerns me. I hope that your department and the Accountant in Bankruptcy will learn from that.

The Executive note that accompanies the regulations indicates that the views of stakeholders, including Money Advice Scotland and Citizens Advice Scotland, were all taken into account and incorporated in the review, and that the Accountant in Bankruptcy consulted the money advice sector on the specific impact of the changes. However, that is clearly not the case. I am concerned that a document that committee members rely on to be 100 per cent correct does not, in my opinion, tell the full facts. That is probably more of a comment than a question.

Fergus Ewing: Among the stakeholders whom we have consulted—in addition to those represented at the committee this morning—and engaged with at a series of workshops are HMRC, North Ayrshire Council, Eversheds, the Institute of Revenues Rating and Valuation, Lloyds TSB, the Institute of Chartered Accountants, Highland Council, Dumfries and Galloway Council, Glasgow City Council, South Lanarkshire Council, Argyll and Bute Council, Fife Council, Edinburgh Napier University, the Law Society of Scotland and the Scottish Government legal directorate. Plainly, we have found from time to time in government that securing agreement from everybody on everything is challenging and difficult. However, I was reassured by the witnesses' positive comments this morning that the proposal to open the DAS to those with a single debt is a good idea that would get support, and that the proposal to transfer the administration of the DAS to the Accountant in Bankruptcy would free up the time of citizen advice bureaux and Money Advice Scotland so that they could get on with helping people rather than dealing with bureaucracy. We also heard this morning that an online application process—subject to caveats, which we will need to explore—would be welcome.

The two main issues that are in dispute, which the meeting has helped us to focus on, are the threshold and the length of period. I am bound to reflect that the original regulations in 2004 did not envisage that there would be a period longer than 10 years. The policy intent was that a fair and reasonable period would be five years, with a case-by-case review of up to 10 years. It was not expected that debt payment programmes would last longer than 10 years—far less was it expected that they would extend for 40 years. Clearly, the idea of paying 10p or 20p a month is ludicrous. We must consider carefully the idea of having a threshold, but the meeting has allowed us to focus clearly on the issues on which there is disagreement. That indicates the way ahead. Our approach is that we will have further discussions—festina lente, and it is good to talk.

The Convener: Is it still good to talk, Mrs Craigie?

Cathie Craigie: It is still good to talk—I love talking.

I make the point that, had discussions on the Government's intentions taken place before the statutory instrument was printed, we would not be in this situation. The good suggestions of all the organisations, which you have highlighted, would have been taken into account, the improvements to the scheme would be going ahead successfully and we would not have had the current delay. I hope that everyone has learned from this mistake.

Bill Butler: I say to Cathie Craigie—ita vero.

The Convener: Not having had the benefit of a classical education, I think that most of us are in the dark.

As there are no further questions, I thank Mr Ewing and Ms Bell for their attendance—unnecessary as it might have been—and suspend the committee briefly while witnesses and anyone else who feels like doing so leaves.

12:19

Meeting suspended.

12:20

On resuming—

The Convener: Item 3 would have involved formal consideration of the motion to annul the instrument. However, as the instrument has been revoked, this item is redundant.

Cathie Craigie: Convener, I take your point to the minister about the committee not knowing about the situation. We are maturing as a

Parliament. There should have been a way to inform you about what was going to happen. The time of today's witnesses could have been better used. The same could be said of those who will have to attend at a later date when we consider the matter again. Although we had a wee question-and-answer session, it was not necessary. We could simply have decided not to deal with the matter because the instrument had been revoked.

The situation has been handled badly. I believe that the minister said that he was aware of the issue last Wednesday and Friday. I am sure that you could have been informed, convener, so that we had more notice.

The Convener: Your point is well made.

Stewart Maxwell: In fairness to the minister, I think that he said he first got sight of the written evidence on Wednesday and Friday.

Cathie Craigie: Wednesday and Friday last week.

Stewart Maxwell: Yes. However, every week we receive written evidence from people who disagree with something or other. I doubt that there is anything that any committee deals with that someone does not disagree with. The fact that somebody writes to disagree with something does not necessarily mean that a minister will immediately revoke an instrument.

It is fair to say that it was reasonable to have discussions on the matter yesterday, as the minister indicated he had done. It is, of course, unfortunate that the timescale was so short, and what has happened this morning is also unfortunate. However, it is a little unfair to suggest that a decision could have been taken last week on the basis of a couple of written submissions that turned up on Wednesday and Friday. To suggest otherwise is a little disingenuous.

Cathie Craigie: I disagree with you, Stewart.

The Convener: Without raking over the coals, it is, to say the least, unfortunate that literally at the last moment I was passed a note to say what was likely to happen. As Cathie Craigie says, the witnesses could have been told that they did not need to attend.

Anyway, we have dealt with the matter and we should move on.

Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2009 (SSI 2009/203)

The Convener: The next item, which is consideration of a negative instrument, is somewhat less controversial and should not take us terribly long.

The Subordinate Legislation Committee drew the instrument to the attention of Parliament on the ground that the parent act contains no authority for the instrument to have retrospective effect. The Government considers that the instrument is intra vires.

As members have no comments, are we content to note the instrument?

Members *indicated agreement.*

12:24

Meeting continued in private until 13:00.

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