



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# JUSTICE COMMITTEE

Tuesday 2 March 2010

Session 3

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**Tuesday 2 March 2010**

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**JUSTICE COMMITTEE**  
**8<sup>th</sup> Meeting 2010, 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)

\*James Kelly (Glasgow Rutherglen) (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 ALSO ATTENDED:**

Richard Baker (North East Scotland) (Lab)

Aileen Campbell (South of Scotland) (SNP)

Trish Godman (West Renfrewshire) (Lab)

Rhoda Grant (Highlands and Islands) (Lab)

Kenny MacAskill (Cabinet Secretary for Justice)

John Scott (Ayr) (Con)

**CLERK TO THE COMMITTEE**

Andrew Mylne

**LOCATION**

Committee Room 2



# Scottish Parliament

## Justice Committee

*Tuesday 2 March 2010*

[The Convener *opened the meeting at 10:13*]

### Criminal Justice and Licensing (Scotland) Bill

**The Convener (Bill Aitken):** Good morning, ladies and gentlemen. Welcome to the meeting. I remind everyone to ensure that mobile phones are switched off in order to avoid disrupting proceedings. All members of the committee are in attendance, so there are no apologies. I welcome Aileen Campbell MSP and Richard Baker MSP. I also welcome Rhoda Grant, who had escaped my vision. All of them are here in connection with amendments to the Criminal Justice and Licensing (Scotland) Bill.

Item 1 is consideration of a paper by the clerk—paper J/S3/10/8/1—on the options that are available to the committee if it wishes to take evidence on amendments to the Criminal Justice and Licensing (Scotland) Bill at stage 2. The key questions for the committee are summarised in paragraphs 18 and 19 of the paper.

10:15

An unfortunate, but perhaps inevitable, part of dealing with such complex legislation is that late in the day we receive amendments, some of which are far reaching. No one is to blame for that; all the amendments from the Government and from members that have been lodged late in the day are, of course, worthy of consideration and will be considered. However, the amendments concern several issues on which the committee has not taken evidence. We should have the benefit of evidence on those issues before making determinations on the relevant amendments.

I refer members to paragraph 6 on page 2 of paper J/S3/10/8/1, which highlights several issues. The double-jeopardy issue has largely gone away, because of a comment by the Cabinet Secretary for Justice in the chamber the other day and because of private discussions that I have had with him. I am reconciled to the situation for the moment—although we will see what develops—so we need not take evidence on that.

However, we must consider taking evidence on the new offence of stalking, which Rhoda Grant proposes in amendment 402, and on the new offence of threatening, alarming or distressing behaviour, which is in Scottish Government

amendment 378. We should also take evidence—possibly restricted—on the minimum sentence for having in a public place an article with a blade or point, which is in Richard Baker's amendment 10 and my amendment 10A, which would apply after section 24. Other issues are penalties for the offences of brothel keeping and living on the earnings of prostitution, which are in Government amendment 370, and the offences of engaging in, advertising and facilitating paid-for sexual activities, to which Trish Godman's amendment 8 refers.

My view is that we should arrange to take evidence on those matters. I ask for members' comments.

**James Kelly (Glasgow Rutherglen) (Lab):** There is no doubt that the bill is complex. Many stage 2 amendments have been lodged, several of which deal with matters that were not discussed at stage 1 and on which the committee did not have the opportunity to take evidence. Given that, the clerk's note sets out several matters on which our considering whether to take further evidence is valid.

In relation to Rhoda Grant's amendments, the Government's counter-amendments and the amendments on prostitution, it is clear from representations made to committee members that many strong feelings have been aroused on both sides of the arguments about both subjects. It makes sense for the committee to take further evidence and to take stock before considering how to proceed with those amendments.

I take on board the convener's points about knife crime. It has been the subject of much analysis and discussion in public, so we are more informed about it, although I would not be against taking limited evidence.

**Stewart Maxwell (West of Scotland) (SNP):** I agree with the convener. Apart from the fact that several amendments have been lodged slightly late in the day, the issue is that a number of amendments concern new issues on which the bill contains nothing. We took no written or oral evidence on many of those matters at stage 1.

I slightly disagree with James Kelly about knives. We took no evidence whatever on knives at stage 1. People have views on the appropriate sentences for knife crime, but it would be reasonable—to say the least—to take proper evidence on that. I am slightly concerned about James Kelly's use of the word "limited". Of course, all the evidence that we take will be limited, but evidence on knife crime should be no more limited than that on other subjects.

Although I have a great deal of sympathy with Trish Godman's amendment, I am concerned about the fact that we have had a lot of late

submissions on the issue with which it deals—we have received new material only this morning—so further evidence requires to be submitted to, and considered by, the committee on that amendment, and on the other ones that have been mentioned, before we move forward.

**Robert Brown (Glasgow) (LD):** I agree with a good deal of what has been said, not least the convener's summation. I agree that there are three areas on which we should divide our attention, but it is worth making a few additional comments.

Stalking—which Rhoda Grant's amendment deals with—and the Government's proposed new breach-of-the-peace-type statutory offence represent new areas as far as the bill is concerned, but they are relatively discrete areas, on which it would be possible for us to take substantial evidence without departing from the general issues in the bill. In a sense, that makes them easier to deal with.

The proposed prostitution-type offences are pretty wide ranging. The concern is that over the years, all sorts of views have been expressed about the best way of tackling the issue. Everyone is anxious for progress to be made and for the harm that is caused by prostitution to be diminished, but it is a big issue. To be frank, it is the sort of issue that would benefit from the setting up of a body such as a Government commission to examine the ins and outs of where we are and whether legislative changes would be worth while. Such matters are difficult to deal with by way of a by-blow in the context of a bill that is primarily about other issues.

On knife crime, it is true that there is a lot of information and heated opinion in the public domain, but there is much less clear research evidence—the committee has certainly not seen any—on what effects, deterrent or otherwise, particular sentences might have, were the legislation to be changed in that regard. I am talking about the cost implications and the effect on the number of people in prison, for example. As Stewart Maxwell rightly said, we require to take not limited but quite substantial evidence on all that. It is not just a matter of repeating the views on either side; it is a question of seeing what lies beneath those views and testing the evidence in the way that the committee would normally do and has done at stage 1 on other issues. We need to adopt a wider approach to the amendments on knife crime.

**The Convener:** I think that we should take limited oral evidence on that, but I am more than happy to ensure that relevant academic studies and statistical information be made available. I am sure that the clerks will involve Stewart Maxwell and Robert Brown in that.

**Robert Brown:** What format will the evidence seeking take? At stage 1, we would normally advertise in the usual way. At the very least, we should do something of that sort this time round, although I appreciate that the timescales are difficult and that, as the paper points out, there may be a need to defer our conclusion of stage 2, which would obviously affect the progress of the bill.

**The Convener:** As Robert Brown says, there is a time inhibition, but clearly our proposal would be to take any oral evidence before we had to deal with the relevant amendments. We are okay for this week and for next week—there is enough for us to get on with. We can certainly advertise in the usual manner and see what results that brings in, but I propose that we have a brief and limited oral evidence session on this topic involving two witnesses two weeks hence. We can, of course, return to it during consideration of the amendments.

**Stewart Maxwell:** I do not object to that course of action; I just suggest that the Scottish Parliament information centre may be of great assistance in directing requests for factual and research evidence. That would be preferable to issuing a general call.

**The Convener:** That is a helpful suggestion, which we will certainly take up.

**James Kelly:** The suggestion that the convener has outlined is sensible. It will allow us to take some oral evidence that captures the issues and gives us a sense of the differing views on them. As other members have said, our inviting written submissions will allow us to explore matters in more detail and come to a more considered opinion before we deal with the amendments.

**The Convener:** I would like to bring our discussion to a conclusion. We have agreed to take evidence under the headings that have been stated. Is it agreed that we should take what is the easiest administrative route and carry on considering amendments this week and next week, that we attempt to complete the evidence two weeks from today, and that we deal with the question of written evidence along the lines that have been suggested, in particular by involving SPICe?

**Members indicated agreement.**

**Stewart Maxwell:** For clarity, are you suggesting that we take written and oral evidence on the issues of knives and prostitution and written evidence on Rhoda Grant's amendments on stalking, as per Robert Brown's comments, or are you suggesting that we do the same for all three issues?

**The Convener:** We will have to take oral evidence on stalking, as well.

**Stewart Maxwell:** That is fine. I just wanted clarification.

**The Convener:** I am sorry if I did not make that clear.

**Stewart Maxwell:** I know that we are under time pressure, but I would prefer to treat the areas with the respect that they deserve, and to give them the time that they deserve. If that means going back and asking for a slight extension, it would be appropriate to do that.

**The Convener:** I think that the Minister for Parliamentary Business has been made aware of the difficulties under which we are operating. I have indicated to him that we will do our best but that a time extension might well be necessary.

The other decision that we have to make is whether to invite written submissions and, if so, by what deadline. At this stage, I welcome Trish Godman and John Scott, who have joined us for the current agenda item. I understand that Mr Scott wishes to say something.

**John Scott (Ayr) (Con):** I thank the committee for considering taking evidence on stalking. In particular, I am here to support my constituent Anne Moulds, who has—

**The Convener:** You have heard what we are going to do about the issue.

**John Scott:** I put on the record my thanks.

**The Convener:** That is appreciated. Ms Godman—do you have anything to add at this juncture?

**Trish Godman (West Renfrewshire) (Lab):** Yes. I agree with Stewart Maxwell that the issues are serious and that the more evidence the committee has, both written and oral, the better informed you will be in making decisions. I certainly support that position. Thank you.

**The Convener:** As has been made fairly clear, you are pushing at an open door.

Which persons or organisations do we wish to speak to? On knives, John Muir and the chief constable of Lothian and Borders Police, David Strang, who has had things to say about the issue, are the obvious choices.

**Nigel Don (North East Scotland) (SNP):** I echo a thought that I heard from across the table. I have great respect for John Muir. We have heard from him many times, and those of us who are on the Public Petitions Committee have heard from him more. If I may say so, what we need is not opinion, however well informed it is, but the benefit of research and a wider view of what works and

what does not. I say that with the greatest respect to the views of John Muir and David Strang. I therefore suggest that we wait to see what kind of written responses we get, what research is available and where the experts are before we decide from whom we should hear.

**The Convener:** Those two aspects are not mutually exclusive. I believe that we need to take oral evidence, but that is enough for us to be going on with. We do not require to make final decisions today as to who will be involved.

**Robert Brown:** As what I said before perhaps suggested, I support what Nigel Don said. I agree that we should not exclude other people's evidence, but we need people such as the Scottish Consortium on Crime and Criminal Justice not just to give written evidence but to give oral evidence so that we can test people about exactly what they are saying. I wonder whether we will need two evidence-taking sessions, either in one go or in successive weeks. I know that it would be difficult to find the time for that and that you are anxious to cut the evidence down, but the matter is important.

**The Convener:** It is important. Clearly, I would prefer to take more time to get a satisfactory result rather than to move forward too expeditiously, but time is finite, as I said.

**Richard Baker (North East Scotland) (Lab):** Absolutely, convener. I do not disagree that the committee should take further evidence on knife crime, because it has not been considered during stage 1, but it is important to reflect on the fact that we have had a parliamentary process through the petition by John Muir, which was also the subject of a summit in the chamber. We received a huge amount of research and evidence as part of that process, which the committee should take on board. In addition, victims of knife crime, particularly Mr Muir, have informed and strong opinions on the issue. It is important that the committee give those their due credence and respect.

**The Convener:** We do not need to finalise the decision today, but there has been a reasonable exchange of views and we know our direction of travel. The Cabinet Secretary for Justice, who is present, will appreciate our difficulties. As ever, we will do everything possible to proceed with the matter expeditiously.

## Subordinate Legislation

### Transfer of Property etc (Scottish Court Service) Order 2010 (SSI 2010/40)

### Scottish Court Service (Corporate Plan) Order 2010 (SSI 2010/41)

10:30

**The Convener:** Agenda item 2 is a refreshingly simple item on subordinate legislation. There are two instruments that are subject to negative procedure for our consideration. I draw members' attention to Scottish statutory instrument 2010/40 and to the cover note on it, which is paper J/S3/10/8/2, and to SSI 2010/41, to which paper J/S3/10/8/3 refers. The Subordinate Legislation Committee did not draw any matters to the attention of the Parliament in relation to the orders. Do members have any comments?

**James Kelly:** I support both SSIs. On the Scottish Court Service corporate plan, it is sensible that a bedding-in period of a year be allowed before the three-year plan kicks in in 2011.

**The Convener:** Are members like-minded? Do we agree simply to note the orders?

**Members** *indicated agreement.*

**The Convener:** I suspend the meeting briefly while we get our papers in order for the third agenda item.

10:32

*Meeting suspended.*

10:33

*On resuming—*

## Criminal Justice and Licensing (Scotland) Bill: Stage 2

**The Convener:** Item 3 is the first day of stage 2 proceedings on the Criminal Justice and Licensing (Scotland) Bill. The committee will consider amendments to parts 1 and 2 of the bill and will not proceed beyond that. I welcome the Cabinet Secretary for Justice, Kenny MacAskill, who is accompanied by senior officials from his department. In the event of our reaching amendment 103, in the name of Bill Wilson, Angela Constance will speak to it. Members should have copies of the bill and of the marshalled list and groupings of amendments for today's consideration.

### Section 1—Purposes and principles of sentencing

**The Convener:** Amendment 26, in the name of Robert Brown, is grouped with amendments 27 to 32, 37 and 38.

**Robert Brown:** I am glad to welcome several familiar faces to the table along with the cabinet secretary this morning. My comments on the group will be reasonably lengthy, but they will deal with some of the issues that we will come to later.

**The Convener:** That is perfectly understandable.

**Robert Brown:** The first three groups of amendments relate to the Government's desire to state the purposes and principles of sentencing in statutory form. Broadly, I am against that, as it gives unnecessary rigidity to the law and leads to unintended consequences. There is little doubt in my mind as to the purposes and principles of sentencing. They are applied every day in the courts, and they are understood by the public. They involve, in various ways, the protection of the public, punishment, deterrence, reform, vindication of public repugnance against particular crimes, and compensation for victims, either by allowing them to see justice done or by including some sort of reparation to them.

It is the job of sentencers to apply those principles to various degrees in various situations, and that is where the professional skill of the sentencer comes in. Their job changes over time, in accordance with changing social norms. Prison reform, and the introduction of a wide range of community sentences, has meant that the sentence is intended not just to protect the public but, if possible, to reform the offender. There was not much evidence of that sort of thing in the days when people were hanged for stealing a sheep.



As soon as those principles are analysed and set down, inadequacies become apparent. What about mitigatory factors? What about the youth or poor upbringing of the offender—which is more important? What about the interests of the victim? If someone can be reformed by on-going supervision that lasts for five years, is that proportionate to an offence of breach of the peace? Is that an economic use of public funds?

My primary proposition is contained in amendment 38, and also in amendment 40, in group 3, which between them would delete sections 1 and 2. However, the first group of amendments seeks to improve the statement of the purposes and principles of sentencing, if we are to have it at all. That should be the first exercise.

Amendment 26 proposes that, although there cannot be a hierarchy of purposes of sentencing, it is all subject to the overriding purposes of fairness and justice, and the committee will recall our significant evidence on that from representatives of research bodies including the Scottish Consortium on Crime and Criminal Justice. Fairness and justice are wide concepts. They embrace justice to the offender, to the victim and to society, and they are the correct, overriding purposes of sentencing. Fairness and justice must take priority because, as has been said in evidence, the system has limited capacity to deliver other objectives such as deterrence and reform.

Amendment 27 makes the other purposes of sentencing in section 1 non-inclusive, and it allows flexibility for existing jurisprudence. It is a guard against unintended consequences or omissions. For example, the purposes of sentencing as drafted do not quite include the element of the indication of public distaste for particular crimes. There is a broad social desire to indicate the unacceptability of domestic violence, for example, but that is not quite covered by the other purposes that are in the bill.

Government amendment 37 successfully meets the committee's view that there should be a clearer division between the purposes and principles of sentencing.

Amendment 28 arises from the evidence of the Scottish Consortium on Crime and Criminal Justice, whose representatives spoke about the principle of parsimony. The general point is that the state is entitled to interfere with the liberty of the citizen only to the extent that is necessary to achieve its purpose. The state intentionally draws out punishment and the reduction of crime as its key interests. Amendment 28 introduces the important principle of proportionality: that the sentence should fit the crime but should not be

overly harsh and excessive—nor should it be inadequate.

Amendment 29 inserts further words into section 1(3)(a). The court needs to have regard to the nature and character of the crime, not just to its seriousness. It could be argued, for example, that a sex crime was less serious than a murder, on the basis that no life has been lost, but there are some such crimes that, by their nature, character and detail, are even more deserving of punishment than a particular murder offence.

Amendment 30 adds to the principles the early acceptance of guilt, which has traditionally been accepted as mitigatory, while the absence of such acceptance has been regarded as aggravatory. That is for all sorts of good reasons, not least of which is saving the victim and other close witnesses the ordeal of giving evidence. Omitting that aspect is another example of the possible unintended consequences of trying to state such principles in a statutory form.

Amendment 31 is intended to deal with the oddity that was noted by the committee in section 1(5), which is that the purposes and principles of sentencing only sort of apply, and only partially, to offenders under 18. That is linked to amendment 33, in group 2. The treatment of offenders under the age of 21 has always differed in kind from that of offenders over the age of 21, whether in terms of a greater latitude for youth, incarceration in a different sort of establishment or other ways.

There are, of course, other cut-offs—at 12, 13, 16 and 18—but they can be accommodated within the high-level principle of drawing attention to the fact that the offenders' age is under 21. Again, the issue is missing from the bill. However, it is a vital and necessary principle that regard be had to the youth and, perhaps, immaturity of the offender.

Amendment 32, in the name of Aileen Campbell, is intended to place emphasis on the well-known fact that imprisoning a parent, especially a woman—I refer members to the evidence that we heard recently heard about Cornton Vale—has evil effects on his or her children, which, in turn, are likely to rebound on society. I would like to hear the debate on this amendment, with which I have some sympathy in principle. What would Aileen Campbell's position mean in practice? Could it or should it mean that an offender with dependent children could escape prison in circumstances in which a childless offender would not? It is possible that that happens under the existing law. If it does not, however, what are the implications of the amendment?

Section 1 is an important section, and I have, in my amendments, attempted to improve areas in which the bill is not quite right and could be

damaging. However, I remain concerned that there are certain things on which we have not heard evidence or about which we have not thought, but which could distort existing or future practice, not because we intend that to happen or because the motivations are not good, but because we have accidentally omitted something or overstated or understressed something else.

The committee was prepared to consider some leeway on the issue because stating what sentencing is for is viewed as a preliminary to the creation of the proposed sentencing council. However, after reflection, I have come to the view that that is not a valid proposition, and that the sentencing council can stand on its own without sections 1 and 2, if it is desired to proceed with it when we come to the consideration of the substantive matters on that area.

I move amendment 26.

**Aileen Campbell (South of Scotland) (SNP):**

In February 2008, Scotland's Commissioner for Children and Young People published a report called "Not seen. Not heard. Not guilty. The rights and status of the children of prisoners in Scotland". The report argues, in relation to sentencing, that the children of prisoners are the invisible victims of crime and of our penal system. As well as the emotional loss of contact with a parent or significant carer, children might suffer from a financial disadvantage, a need to move house, bullying, shame, stigma, stress, regressive behaviour and the loss of a care-free childhood. The report also found that, in many social inquiry reports, information on children was included only if they were at risk from the offender, and further research suggests inconsistencies in relation to those reports.

As you know, convener, I have taken an interest in this issue since it was first raised by the children's commissioner, and I wrote to the committee on the subject while it was taking evidence on the bill at stage 1. I have also raised the issue with the cabinet secretary, and I have been grateful for the support of a range of children's organisations in developing a way forward. Action for Children and Children in Scotland have provided important perspectives on the rights of children in these situations. Families Outside, which supports people with family members in prison, has also done important work in this area, and estimates that there are currently 16,000 children in Scotland who are affected by the imprisonment of a parent or guardian.

It is also worth noting, as Robert Brown did, that the recent Equal Opportunities Committee report on female offenders cited Home Office figures showing that about half of the children of female prisoners will end up in prison. In light of that, it is essential that the best interests of the children of

offenders are taken into account as part of the sentencing process.

I recognise that some members of the committee might have concerns about the rights of victims of crime and the desirability of consistency in sentencing on the basis of the crime that has been committed. I am not suggesting that parenthood should be a get-out-of-jail-free card. There will always be circumstances in which nothing but a prison sentence will be appropriate. Indeed, on some occasions, a custodial sentence will be in the best interests of the child. However, I think that information about a person's caring responsibilities should be one of the factors that a court must consider when deciding on a sentence, while accepting that the independence of the judiciary is a cornerstone of the Scottish criminal justice system.

10:45

**The Cabinet Secretary for Justice (Kenny MacAskill):** Robert Brown's amendments to section 1 are no doubt partly inspired by the Justice Committee's stage 1 report.

Amendment 26 seeks to add fairness and justice as the primary purposes of sentencing. I recognise the committee's view that

"principles of fairness, justice and proportionality are at least as important as the purposes already included".

I set aside for now the fact that amendment 26 would erect those as purposes, rather than principles as the committee had suggested. That may not have been helped by the lack of a proper label for the part of section 1 that constitutes the principles of sentencing, which we are now putting right in amendment 37.

Who could disagree with the importance of fairness and justice? I note, however, that if our proposals have been criticised as teaching granny to suck eggs, the proposals in these amendments are even more liable to criticism. References to fairness and justice are simply too high level to be of any use. We have instead in section 1 an expression of what is needed to deliver justice and ensure fairness.

Amendment 27 seeks to make the list of purposes in section 1(1) inclusive rather than exclusive. I recognise that the committee, in paragraph 36 of its report, took the view that the lists in subsections (1), (3) and (4) should be non-exhaustive and unranked. I agree with that, except in relation to the purposes that are set out in subsection (1).

Subsection (1) should be a complete expression of the purposes of sentencing, and that is what we believe we have created. Allowing the courts or others to establish their own purposes that do not

fall within the list in subsection (1) would undermine the justice and fairness that the committee seeks. As we have said in the explanatory memorandum, the list is not intended to prevent the courts from considering other matters—including the non-exhaustive set of principles in subsection (3)—when sentencing offenders.

Amendment 28 would establish proportionality as the primary principle of sentencing. By proportionality, the amendment means the least oppressive sentence that is consistent with securing the reduction of crime and the protection of the public. That is in line with the suggestion by the Scottish Consortium on Crime and Criminal Justice to the committee that we include a principle of sentencing parsimony, but that suggestion was apparently not picked up by the committee in its conclusions.

I admit that the suggestion has some attractions. Sentences should certainly be no more oppressive than necessary, and by setting out the five purposes of sentencing in subsection (1), we avoid any suggestion that sentencing is all about punishment. However, I wonder whether it is right to single out the two purposes of securing the reduction of crime and the protection of the public in the way that amendment 28 does. Why are punishment, reform and rehabilitation and reparation excluded? Why should a court not require an offender to make reparation to his victim, just because that would not be necessary to reduce crime or protect the public? Amendment 28 is flawed, so I cannot accept it.

Amendment 29 would require the court to have regard to the nature and character of an offence as well as to its seriousness, as the Sheriffs Association suggested. I have difficulty in seeing what, if anything, that would add. In my view, the seriousness of an offence is a product of its nature and character; they are not really distinct elements. If we were to include all three words in the provision, we would be likely to tie the court in knots as it tried to work out what Parliament meant. I believe that the single word “seriousness” does what we want it to.

Amendment 30 would require the court to have regard to pleas of guilty and the stage at which they are tendered, as suggested by the Royal Society of Edinburgh. However, such provision is not necessary, as section 196 of the Criminal Procedure (Scotland) Act 1995 already requires the court to take into account the stage in proceedings at which an intention to plead guilty is indicated, and the circumstances in which that indication is given. The court is then required to state whether the sentence that is imposed is different from what it would otherwise have been.

The committee will be aware of other provisions that require particular factors to be taken into account in sentencing, including those in the Offences (Aggravation by Prejudice) (Scotland) Act 2009. Those requirements are already in place, and there is no need to place the courts under a double duty to take those factors into account. Section 2(1) of the bill is also intended to ensure that other enactments, such as those that I have mentioned, take precedence over the purposes and principles of sentencing to the extent that they are inconsistent.

Amendment 31 would add a further sentencing principle, which would require the court to have regard to whether the offender was aged under 21 at the time of the offence. We certainly agree that the age of the offender is relevant to sentencing, but we believe that it is already covered by section 1(3)(e), which requires the court to have regard to the information that is before it about the circumstances of the offender.

There are, of course, other limitations in the Criminal Procedure (Scotland) Act 1995 on the sentencing of young offenders, including the requirement for a social inquiry report. There is some risk that, even though the list of matters in section 1(3) of the bill is inclusive, the reference to a specific age in amendment 31 may limit the ability of the court to take account of age more generally.

Accordingly, I invite the committee to reject Robert Brown’s amendments.

I am grateful to Aileen Campbell for lodging amendment 32. The purposes and principles that are set out in section 1 provide that courts must have regard to a number of elements, including the information that is before them about an offender’s family circumstances. Amendment 32 highlights the need for courts to be aware of the wider implications of their sentences, particularly their impacts on the children of offenders. It strikes an appropriate balance between justice for victims and sentencing in the best interests of the children of offenders. Therefore, we support it.

At stage 1, it was queried what exactly was meant by the term “principles of sentencing” in section 1. Amendment 37 is intended to bring clarity to section 1 and to identify clearly the principles of sentencing to which the courts must have regard.

Amendment 38 seeks to leave out section 1 in its entirety. I recognise that the committee was not convinced that, taking section 1 in isolation, a sufficiently good case had been made for its inclusion, but it recognised our view that an opening section that sets out in broad terms what sentencing is for may be a useful preliminary to the creation of a Scottish sentencing council.

The committee invited us to justify the necessity for setting out the purposes and principles of sentencing in the bill and to provide assurance that the provisions in sections 1 and 2 would not inadvertently change the law. The very fact that other amendments to section 1 have been lodged and debated demonstrates the value of section 1. If the purposes and principles of sentencing were widely agreed on and consistently understood, as some of those who gave evidence to the committee suggested, there would be no need for debate—we would all have drunk them in with our mother's milk and would understand them implicitly. If we want our justice system to work effectively, we need a common understanding of what sentencing is for, and it is the Parliament's role to provide that. We believe that setting out the purposes and principles of sentencing is important, not just as a preamble to the Scottish sentencing council provisions, but for its own sake.

**James Kelly:** I support amendments 26 and 27 and oppose amendments 28 to 32. I would like to make brief comments on two of the amendments in particular.

On amendment 28, in the name of Robert Brown, I think that we all agree that a prime principle in sentencing should be getting its proportionality and fairness correct. However, I am not comfortable with the words

“imposing the least oppressive sentence”,

which are inconsistent with the principle of proportionality.

I am not minded to support amendment 32, in the name of Aileen Campbell. I think that we all agree that it is important to take into account the children of offenders and the impact that any sentence may have on them, but it is also important to strike a balance. When a crime, particularly a violent crime, has been committed, we must balance the rights of the children against the rights of victims. If we went down the proposed route, there could be inconsistency in sentencing—Aileen Campbell alluded to that—and people who had committed the same crime could be given different sentences, depending on whether they had children. That is not an appropriate way to proceed. Obviously, courts are able to consider background reports. That allows the sheriff in sentencing to consider issues relating to the offender's family, and that is the appropriate way to take such matters into account. If the amendment were agreed to, it could raise issues to do with inconsistency of treatment. I therefore oppose amendment 32.

**Richard Baker:** I have anxieties about setting down the principles and purposes of sentencing in legislation, and I share some of the concerns that Robert Brown has expressed. There can be

unintended consequences in setting down the principles and purposes of sentencing in legislation. It has been clearly understood that matters that have previously been set down would inform the exercise of justice by the judiciary and the courts. As in many other instances in legislation, it can be dangerous to define such matters in law, particularly because of unforeseen omissions and because the application and evolution of justice policy changes over time, as Robert Brown rightly said. I appreciate that he seeks to improve the principles of sentencing if section 1 is passed and, in that spirit, I support amendments 26 and 27, but not 28, 29, 30 and 31, not least because aspects of those amendments are already taken into account by our justice system.

I appreciate the intention behind amendment 32 and agree that the welfare of those children whose parents are in the criminal justice system is extremely important. The matter was raised during the recent debate on female offending, although the amendment is not gender specific. When the matter was first raised by the children's commissioner, it was highlighted that the courts take such matters into consideration already. Although I appreciate the intention, I am not persuaded of the need for the amendment or for the matter to be included in the bill.

I am sure that we all agree that the most important factor in determining a sentence must be the severity of the crime, but it is also right that the welfare of children involved must be a consideration and that a balance must be struck. If the amendments are accepted, the need for the court to take into account the offender's family circumstances will be retained. We also need to consider that, unfortunately, in some circumstances it will be better for the child to have their parent removed. I acknowledge that Aileen Campbell made that point in her speech. I appreciate the concern raised by the children's commissioner in his briefing on the matter that in many cases at present, information about an offender's children does not come before the court and is not included in social inquiry reports. I do not think that anyone would argue that that should remain the case, although amendment 32 does not create such a specific requirement. In seeking to strike the right balance on such an important matter, I appreciate the intention behind the amendment, but I am not persuaded that we should put it in the bill.

I know that colleagues will listen to the rest of the debate before reaching a conclusion on amendment 38. However, having observed the difficulty of improving section 1, I think that there are strong reasons not to include it and I agree with Robert Brown that it is not necessary to retain

the section as a preamble to the sentencing council.

**Stewart Maxwell:** I am content with the cabinet secretary's comments about amendments 26 to 31. His arguments are reasoned and make perfect sense to me. I have concerns about amendment 32 and share some of the views expressed by Richard Baker and James Kelly, not about the principle involved but about whether what it seeks to achieve should be in the bill and whether it is necessary. As I understand it, the courts already take into account the offender's family circumstances and section 1(4)(c) says that the matters to be taken account of include "the offender's family circumstances". I am not sure what including the words

"responsibilities the offender has for the care of children or dependent adults"

would add to what is in the bill. I have not yet firmly made up my mind about it, but it seems odd to add those words. I am slightly concerned that highlighting that consideration as something that a court must take into account—as opposed to any other family circumstances—would run the risk of skewing the court's decision and it might be better to leave the wording as "family circumstances".

11:00

**The Convener:** As there are no other contributions, I will make one of my own. Amendment 38 would delete section 1. It is important to clear up any misunderstanding following the cabinet secretary's comments that Robert Brown was constrained in what he could do. We are required to look at the individual sections to see how they might be improved prior to determining whether to accept or reject them. Robert Brown has operated—very professionally, if I may say so—on that basis, although I do not agree with some of his arguments.

Section 1 is not vital. Members have heard me say that legislation should be specific and should not be open ended and, in that respect, section 1 fails. The purposes and principles of sentencing have been well established over the centuries and there is little or no need to put them in statute. A basic principle of legislation is that it should be simple and readily understandable. Section 1 will leave us very much open to uncertainties, because it is inevitable that something will be omitted or open to dual interpretation, despite the best intentions of everyone concerned. I am minded to support amendments 37 and 38.

I will not go through the other amendments in the group seriatim. Some are unnecessary and go against the grain of natural justice. The case for amendment 32 is arguable and has been advanced very eloquently by Aileen Campbell, but

I think that the amendment is unnecessary. In proceeding to sentence, a court will require a social inquiry report if the offender is under 21 or has not previously been in custody. Any social inquiry report is bound to reflect the offender's family circumstances, and if the social worker who prepared the report failed to draw the court's attention to the family circumstances, I have no doubt that the defence solicitor would bring the matter firmly before the court. Although amendment 32 is well intentioned and constructive, I am unable to support it.

**Robert Brown:** I thank the convener for his kind words. The debate has been useful and interesting and has demonstrated and illustrated my central point, which is that the inclusion of a statement of the purposes and principles of sentencing, which has no obvious utility, is fraught with difficulties. I stand by amendment 38, which would leave out section 1. That approach has been borne out by the debate.

On the details, the convener is right to say that section 1 is perhaps not the most important section in the bill. Nevertheless, if we are to agree to include a statement of the purposes and principles of sentencing, we must get the balance right. I am grateful for members' support for amendments 26 and 27. The cabinet secretary said that a reference to fairness and justice would be too high level to be of use. I do not agree that those are high-level issues in this regard. As a number of witnesses to the committee made clear, the concepts of fairness and justice underlie the whole basis of our approach to the criminal justice system and give guidance in practical circumstances—even if they are in with the bricks in terms of how judges and sheriffs view such matters.

On amendment 27, the cabinet secretary stuck by the approach in section 1(1), which he suggested provides the final word on the matter. However, that is not the final word, as was illustrated by the emergence of certain issues in the debate. Restorative justice is not mentioned in that context, as witnesses pointed out.

I will move amendment 28, which raises an important issue about the approach that we take, but I accept that there is a debate about whether the provision should be restricted to paragraphs (b) and (d) of section 1(1) or should be wider in context. The issue could be dealt with at stage 3, if appropriate.

On amendment 29, I am not persuaded by the cabinet secretary's suggestion that the nature and character of an offence are implied by the word "seriousness". Amendment 29 would add depth and meaning and—at least as far as I can see—would not have unintended consequences.

On amendment 30, I accept the cabinet secretary's point. I add only that, if we are to lay out the purposes and principles of sentencing in one place, it would not be inappropriate to repeat a reference to the mitigatory effect of an early plea of guilty. It makes sense to do that and it adds transparency to the procedure.

You could argue about the wording of amendment 31—I am prepared to discuss that—but I think that it brings out the age issue in a slightly different way from how Aileen Campbell brought out the issue of children. That is important if we are dealing with high-level purposes and principles. I was not persuaded by the cabinet secretary's point in that regard.

On amendment 32, the evidence that we got from the children's commissioner about what is put into social inquiry reports and what is not is not unimportant. I must confess that I was surprised to hear that, according to the survey that was carried out, there were a significant number of instances in which information about children was not present in the report. That needs to be dealt with and I hope that the cabinet secretary will take on board the observations that have been made in that regard to see whether there are other ways of tackling the issue. I share the view that other members have expressed that the phraseology of amendment 32 either does not add anything to what is in section 1(3)(e) or has a slightly distorting effect, which is not terribly helpful. I think that Stewart Maxwell expressed similar views and concerns about that.

At the end of the day, one has to make a judgment as to whether section 1 is necessary. I stand by the view that, even with the amendments, it is not necessary and that, if anything, it will have unintended and perhaps damaging consequences for the way in which the courts operate—there is no apparent public utility in doing things in that way.

I will press amendment 26.

**The Convener:** The question is, that amendment 26 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

#### For

Brown, Robert (Glasgow) (LD)  
Butler, Bill (Glasgow Anniesland) (Lab)  
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)  
Kelly, James (Glasgow Rutherglen) (Lab)

#### Against

Aitken, Bill (Glasgow) (Con)  
Constance, Angela (Livingston) (SNP)  
Don, Nigel (North East Scotland) (SNP)  
Maxwell, Stewart (West of Scotland) (SNP)

**The Convener:** The result of the division is: For 4, Against 4, Abstentions 0. I use my casting vote against the amendment.

*Amendment 26 disagreed to.*

*Amendment 27 moved—[Robert Brown].*

**The Convener:** The question is, that amendment 27 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

#### For

Brown, Robert (Glasgow) (LD)  
Butler, Bill (Glasgow Anniesland) (Lab)  
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)  
Kelly, James (Glasgow Rutherglen) (Lab)

#### Against

Aitken, Bill (Glasgow) (Con)  
Constance, Angela (Livingston) (SNP)  
Don, Nigel (North East Scotland) (SNP)  
Maxwell, Stewart (West of Scotland) (SNP)

**The Convener:** The result of the division is: For 4, Against 4, Abstentions 0. I use my casting vote against the amendment.

*Amendment 27 disagreed to.*

*Amendment 28 moved—[Robert Brown].*

**The Convener:** The question is, that amendment 28 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

#### For

Brown, Robert (Glasgow) (LD)

#### Against

Aitken, Bill (Glasgow) (Con)  
Butler, Bill (Glasgow Anniesland) (Lab)  
Constance, Angela (Livingston) (SNP)  
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)  
Don, Nigel (North East Scotland) (SNP)  
Kelly, James (Glasgow Rutherglen) (Lab)  
Maxwell, Stewart (West of Scotland) (SNP)

**The Convener:** The result of the division is: For 1, Against 7, Abstentions 0.

*Amendment 28 disagreed to.*

*Amendment 29 moved—[Robert Brown].*

**The Convener:** The question is, that amendment 29 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

#### For

Brown, Robert (Glasgow) (LD)

**Against**

Aitken, Bill (Glasgow) (Con)  
 Butler, Bill (Glasgow Anniesland) (Lab)  
 Constance, Angela (Livingston) (SNP)  
 Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)  
 Don, Nigel (North East Scotland) (SNP)  
 Kelly, James (Glasgow Rutherglen) (Lab)  
 Maxwell, Stewart (West of Scotland) (SNP)

**The Convener:** The result of the division is: For 1, Against 7, Abstentions 0.

*Amendment 29 disagreed to.*

*Amendment 30 not moved.*

**The Convener:** I call amendment 31, in the name of Robert Brown.

**Robert Brown:** I will not move amendment 31, because I might come back to its phraseology at a later point.

**The Convener:** You are reserving your position and not moving amendment 31.

*Amendment 31 not moved.*

*Amendment 32 moved—[Aileen Campbell].*

**The Convener:** The question is, that amendment 32 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Constance, Angela (Livingston) (SNP)  
 Don, Nigel (North East Scotland) (SNP)  
 Maxwell, Stewart (West of Scotland) (SNP)

**Against**

Aitken, Bill (Glasgow) (Con)  
 Brown, Robert (Glasgow) (LD)  
 Butler, Bill (Glasgow Anniesland) (Lab)  
 Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)  
 Kelly, James (Glasgow Rutherglen) (Lab)

**The Convener:** The result of the division is: For 3, Against 5, Abstentions 0.

*Amendment 32 disagreed to.*

**The Convener:** The second group of amendments comes under the heading "Circumstances in which courts not to have regard to purposes and principles". Amendment 33, in the name of Robert Brown, is grouped with amendments 34 to 36.

**Robert Brown:** Amendments 33 and 34 are designed to get rid of, respectively, section 1(5)(a) and section 1(5)(b).

On section 1(5)(a), as I mentioned previously and as was pointed out in the committee's stage 1 report, it is odd and unnecessary to disapply the purposes and principles of sentencing to offenders under the age of 18. I appreciate that there should be differences in how we deal with young

offenders, but those should be additions to the normal purposes rather than exceptions. It really cannot be said that punishment, deterrence, reform, protection of the public and the reduction of crime apply with less force to young offenders than to others, although the balance may vary.

Section 1(5)(b) is unnecessary. Where a specific sentence is set by law, nothing in the bill would override that express direction. Even with fixed sentences, such as the minimum recommended term for murder, there are issues on which the purposes and principles of sentencing would be brought to bear. An interesting point is whether the presumed sentences, which we will consider later in various forms, are fixed by law and therefore come within section 1(5)(b), which is possibly the case. In any event, the matter is already covered by sections 2(1) and 2(3).

I have no particular comments on amendments 35 and 36, on which I await the cabinet secretary's comments with interest.

I move amendment 33.

**Kenny MacAskill:** Amendment 33 would leave out section 1(5)(a), with the effect that the requirement to have regard to the purposes and principles of sentencing would apply when the court is dealing with offenders aged under 18. The committee's stage 1 report queried the application of section 1(1) to young offenders. Section 1(1) has no application to young offenders, as the duty on the court to have regard to the matters in section 1(1) is disapplied in respect of young offenders.

As the committee recognised, the matters referred to in sections 1(1) and 1(3) are still relevant to young offenders, but further principles need to be considered in relation to young offenders, although we have not sought to set them out in the bill at this time. However, if the committee takes the view that the purposes and principles in the bill, and the associated duties on the courts, should apply to offenders under the age of 18, we will be content for amendment 33 to be agreed to.

Amendment 34 would leave out section 1(5)(b), with the effect that the requirement to have regard to the purposes and principles of sentencing would apply even when dealing with an offence for which the sentence is fixed by law. In our view, that would be pointless. Where Parliament has fixed the sentence for an offence, such as a life sentence for murder, there is no point in requiring the court to have regard to the purposes and principles of sentencing only to arrive back at the answer that Parliament has already dictated. It is important to remember that the exclusion operates only

“so far as the sentence ... is fixed by law”,

so the purposes and principles will still be relevant in setting the punishment part of a mandatory life sentence or in other cases in which a mandatory sentence can be mitigated in exceptional circumstances.

Grouped with those amendments are our amendments 35 and 36. Amendment 35 will make a minor technical amendment to section 1(5)(c), which sets out a list of mental health disposals that are available to courts. Courts are not required to have regard to the principles of sentencing as set out in sections 1(2) and 1(3) in circumstances in which those disposals are to be used. The purpose of amendment 35 is to complete the list of mental health disposals that are available to courts. Amendment 36 is consequential on amendment 35.

**Stewart Maxwell:** I speak in favour of amendment 33, in the name of Robert Brown. When the issue came up during stage 1, it made little sense to the committee that the purposes and principles of sentencing that are outlined in section 1(1) should not apply to offenders under the age of 18, therefore Robert Brown is quite correct to move amendment 33 to delete section 1(5)(a). That is perfectly sensible.

However, I do not support amendment 34. As the cabinet secretary has argued, disapplying the purposes and principles to the imposition of sentences where the penalty is “fixed by law”, as section 1(5)(b) says, makes perfect sense, therefore I will not support amendment 34, which would delete section 1(5)(b).

**The Convener:** Amendments 35 and 36 are perfectly straightforward and require no comment.

As amendment 33 seeks to ensure a degree of consistency, I am minded to support it. However, I see little merit in amendment 34 for reasons similar to those that Stewart Maxwell has advanced.

11:15

**Robert Brown:** With regard to amendment 34, it was valid to raise the issue. I am not entirely satisfied with the cabinet secretary’s response but, given that this is a technical issue, I am prepared to go with the Government’s view. As a result, I will not move amendment 34.

*Amendment 33 agreed to.*

*Amendment 34 not moved.*

*Amendments 35 to 37 moved—[Kenny MacAskill]—and agreed to.*

*Amendment 38 moved—[Robert Brown].*

**The Convener:** The question is, that amendment 38 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Aitken, Bill (Glasgow) (Con)  
Brown, Robert (Glasgow) (LD)  
Butler, Bill (Glasgow Anniesland) (Lab)  
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)  
Kelly, James (Glasgow Rutherglen) (Lab)

**Against**

Constance, Angela (Livingston) (SNP)  
Don, Nigel (North East Scotland) (SNP)  
Maxwell, Stewart (West of Scotland) (SNP)

**The Convener:** The result of the division is: For 5, Against 3, Abstentions 0.

*Amendment 38 agreed to.*

## **Section 2—Relationship between section 1 and other law**

**The Convener:** Amendment 39, in the name of Robert Brown, is grouped with amendments 40 and 54.

**Robert Brown:** This group of amendments centres on the relationship between the sentencing principles—which are no longer in the bill, but I think that we still have to consider a way forward—and the proposed sentencing council. I have to say that I regarded it as not just wrong but a constitutional outrage that a quango should be established that not only could give direction on sentencing to the courts but would itself be excluded from having to follow the very purposes and principles of sentencing. We will debate the sentencing council later, but I very much welcome the likely change in its status and relationships.

Obviously, in light of agreeing to amendment 38, we will have to consider further how everything works together, but for the present purposes I will be moving and pressing the amendments in this group. Amendment 39 seeks to get rid of section 2(2), thereby subordinating the sentencing council to the law and taking away any power that it might have to go off on its own tangent outwith the sentencing purposes and principles. That is as it should be.

Amendment 40 seeks to continue the process of preventing the statutory enactment of these measures, which is only reasonable and follows what has already been agreed. Amendment 54 seeks to complete that process by expressly requiring sentencing guidelines to comply

“with the purposes and principles of sentencing”

laid down in section 1. I am well aware that that stipulation has in a sense become obsolete, but



the principle behind it should be agreed to. We can consider how to put it into legislative form when we tidy up the effects of these amendments at stage 3. It means that we will have to make some tricky decisions, but stage 3 will allow us to sort things out in a practical way.

My point is that the sentencing council has to be subordinate to the general principles of sentencing, although I accept that we might have to look at the phraseology later on. As I say, I will move amendment 54 at the appropriate point.

I move amendment 39.

**Kenny MacAskill:** As I have already said, the committee invited us both to justify the necessity for setting out the purposes and principles of sentencing in the bill and to provide assurances that the provisions in sections 1 and 2 would not inadvertently change the law. Amendment 39 seeks to leave out section 2(2), which effectively provides that sentencing guidelines take precedence over the purposes and principles of sentencing, and amendment 40 seeks to leave out section 2 altogether.

I recognise that the committee found difficulty with the relationship between the purposes of sentencing in section 1 and the sentencing guidelines to be issued by the Scottish sentencing council. Specifically, the committee commented that the sentencing council does not appear to be required to reflect the purposes in preparing guidelines but the courts are obliged by section 2(2) to give precedence to the guidelines, should they and the purposes of sentencing come into conflict.

We are imposing new duties on the courts and it is essential that the courts are clear how those duties fit together. That is what section 2 does, and I consider that it is an essential part of the structure. Amendment 54 requires that sentencing guidelines are consistent with the purposes and principles of sentencing. Section 2(2) clarifies the relationship between the purposes and principles and the sentencing guidelines. It provides that, if a sentencing guideline is not consistent with the purposes and principles, the court need not comply with the purposes and principles to that extent. It is likely that sentencing council guidelines will be issued within the context of the purposes and principles of sentencing, as noted by the committee.

However, we cannot know what issues will be dealt with by sentencing guidelines in the future, and we feel that it is necessary to provide the scope and leeway for guidelines to tackle specific and detailed issues that cannot be predicted. A guideline on a particular type of offence might well give greater prominence to one of the purposes of sentencing or a particular principle. We would not

want the council to be troubled with arguments about whether that is “consistent” with the purposes and principles.

We believe that it is right that specific guidelines about specific offences should have precedence over the more general requirements of section 1. If the committee agrees to the amendments in a later group, which will provide for the High Court itself to set sentencing guidelines, the argument for that will be even stronger.

We resist amendments 39, 40 and 54.

**The Convener:** The arguments have been fairly well canvassed already, but I return to Robert Brown to wind up and to press or withdraw amendment 39.

**Robert Brown:** My only observation is that, obviously, the Government will have to deal with the passage of amendment 38, which deleted section 1. The cabinet secretary’s comments have not come to grips with all of the implications of that. I have reread amendment 54 in particular, and I think that it stands by itself, despite the departure of section 1, although obviously

“the purposes and principles of sentencing”

now relate primarily to common-law purposes and principles of sentencing. We may need to examine that phrase in the future, but it is a useful constraint, notwithstanding the departure of section 1 and, I hope, section 2. I press amendment 39.

**The Convener:** The question is, that amendment 39 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Brown, Robert (Glasgow) (LD)

**Against**

Aitken, Bill (Glasgow) (Con)  
Butler, Bill (Glasgow Anniesland) (Lab)  
Constance, Angela (Livingston) (SNP)  
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)  
Don, Nigel (North East Scotland) (SNP)  
Kelly, James (Glasgow Rutherglen) (Lab)  
Maxwell, Stewart (West of Scotland) (SNP)

**The Convener:** The result of the division is: For 1, Against 7, Abstentions 0.

*Amendment 39 disagreed to.*

*Amendment 40 moved—[Robert Brown].*

**The Convener:** The question is, that amendment 40 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Aitken, Bill (Glasgow) (Con)  
 Brown, Robert (Glasgow) (LD)  
 Butler, Bill (Glasgow Anniesland) (Lab)  
 Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)  
 Kelly, James (Glasgow Rutherglen) (Lab)

**Against**

Constance, Angela (Livingston) (SNP)  
 Don, Nigel (North East Scotland) (SNP)  
 Maxwell, Stewart (West of Scotland) (SNP)

**The Convener:** The result of the division is: For 5, Against 3, Absentions 0.

*Amendment 40 agreed to.*

**The Convener:** I suspend the meeting for five minutes.

11:23

*Meeting suspended.*

11:29

*On resuming—*

*Section 3 agreed to.*

### **Schedule 1—The Scottish Sentencing Council**

**The Convener:** Amendment 41, in the name of the cabinet secretary, is grouped with amendments 42 to 48 and 15.

**Kenny MacAskill:** In paragraph 112 of its stage 1 report, the committee expressed concern that the existing wording of the schedule could result in a membership of two sheriffs principal and no sheriff. Amendment 41 addresses those concerns by providing that, in addition to the Lord Justice Clerk and one other High Court judge, one of the judicial members must be a sheriff. One member must also be a justice of the peace or a stipendiary magistrate.

Government amendment 43 provides that the final judicial member may be a High Court judge, a sheriff, a sheriff principal, a justice of the peace or a stipendiary magistrate. That provides the Lord Justice General with more flexibility in appointing the judicial members, meaning that, in line with the committee's recommendations, a balanced judicial membership can be created. Furthermore, Government amendments have been lodged to recast the council as an advisory body and provide the High Court with the power to approve sentencing guidelines. In light of those points, I do not support amendments 42 or 15.

Amendment 44 and consequential amendments 45 and 46 seek to remove the prosecutor from the membership of the council. Input from the prosecution service is key to ensuring that the sentencing council creates balanced and well-thought-out guidelines. Although the bill requires

consultation with the Lord Advocate, among others, on draft guidelines, that is no substitute for having prosecutorial experience at the council table.

Government amendment 47—and amendment 13, in the name of Bill Butler—will have the effect, when considered together, of responding to comments by the committee in its stage 1 report about listing the constable as a legal member of the council. It is essential to have police representation on the council. The police play a critical role in the front line of the criminal justice system and have a particular insight into the impact of offences on members of the public and on communities, as well as an understanding of long-term crime prevention. Government amendment 47 moves the constable from the list of legal members of the sentencing council to the list of lay members. I will, therefore, support amendment 13, in the name of Bill Butler, as it works together with Government amendment 47.

Amendment 48 adds two further members to the sentencing council, drawn from community justice authorities and the Scottish Prison Service. I am aware that, when we consulted on the creation of the sentencing council and subsequently during stage 1, there were calls for those two areas to be represented on the council, given their experience in offender management. The committee did not support those calls. The current membership of the council provides for two lay members; there is no reason why they should not be drawn from those who work with offenders in prisons and the community, if that were thought to give the council the best mix of experience and skills.

I move amendment 41.

**The Convener:** I now face the onerous task of calling myself to speak to amendment 42 and other amendments in the group.

Amendment 42 would enable representatives of the lower courts to be on the sentencing council. It stipulates that one member must be a justice and another must be a stipendiary magistrate. The stipendiary magistrate system is unique to Glasgow but has played a valuable role in the Scottish justice system for many years. By virtue of their office, the stipendiaries have become exceptionally experienced and are probably better placed even than sheriffs to express views on summary justice issues. In due course, the stipendiary system—albeit under a different name—may be extended to other jurisdictions. The Gill report recommends the appointment of district judges, who would resemble stipendiary magistrates and have limited civil jurisdiction. On that basis, it is highly desirable that a stipendiary magistrate be appointed to any sentencing council, to ensure that there is the appropriate input on summary matters.

Generally, this group of amendments has considerable merit. I am particularly attracted to some of Bill Butler's amendments, which will have the effect of achieving a greater degree of balance on the proposed council.

I listened carefully to what the cabinet secretary said about the prosecutor's membership of the council. Committee members will be aware that amendment 44, in my name, seeks to delete that provision. The long-established principle of the Scottish courts is that the Crown has no locus in so far as sentencing matters are concerned. That said, having listened to the cabinet secretary, I am persuaded that, on this occasion, there should perhaps be some input from the Crown. I intend therefore not to move amendment 44.

**Robert Brown:** I support Government amendment 47 for "one constable" to become a non-legal member of the council. Initially, I preferred Bill Butler's formulation under his amendment 15, on the sheriffs and magistrates issue, but my interest is in the end result. I do not support the convener's amendment 45 with its dilution of the prosecutor role. I think that he has conceded the argument; we need to retain the role. The prosecutor has a vital input to make to the sentencing council, but only if the council is constituted as an advisory body, as the Government concedes.

On my amendment 48, views were expressed on the Scottish Prison Service in submissions and evidence to the committee. Again, it is important to recognise the changes that I hope we will pass later today on the role of the sentencing council. If the intention had been for the council to be the top dog, so to speak, in giving orders to the courts, I would have been strongly against the prosecutor—or, in this instance, the Scottish Prison Service and others—being involved in its membership. However, having the sentencing council as an advisory body is a different ball game, and it would benefit from the input of the Scottish Prison Service and a community justice authority. In their various ways, the SPS and CJAs know about the effects of sentences on offenders. They also know about resources and the inputs that are required, and many other relevant issues. Despite the view that the committee expressed, albeit in a different context, I hope that members will, on reflection, regard my proposed additions as sensible additions that will add to the breadth and effectiveness of the sentencing council.

**Bill Butler (Glasgow Anniesland) (Lab):** I support the cabinet secretary's amendment 47 on the inclusion of "one constable". It is an eminently sensible suggestion, particularly when it is taken with my eminently sensible suggestion in amendment 13, which picks up on a concern that the committee raised at paragraph 112 of its stage

1 report. As the committee said, we do not want to unbalance the council's judicial composition. I lodged amendment 15 to try to get a balanced composition. That said, I accept that the cabinet secretary's and convener's amendments take us towards the eminently sensible position of a balanced composition on the putative council.

I do not accept that the SPS should be on the council. That view ties in exactly with the concerns that the committee raised in paragraph 112. I acknowledge Robert Brown's point, but the principle of better caution means that I will not support it at this stage.

**Stewart Maxwell:** I speak in support of amendments 41 and 43, in the name of the cabinet secretary. If I am not mistaken, Bill Butler has accepted that the amendments deal with the issue that he is trying to deal with in his amendment 15. I am sure that the cabinet secretary's amendments have dealt with it.

I also support the cabinet secretary's amendment 47 and Bill Butler's amendment 13. It is clear that amendment 13 deals with the issue that the committee raised in its stage 1 report and in the stage 1 debate. The cabinet secretary's proposal under amendment 47 that "one constable" should become a lay member is entirely sensible and acceptable.

I disagree with Robert Brown's amendment 48. The sentencing council was never intended to be "top dog", to use his words. That is not how it has been laid out and the context has not changed much, if at all, such that we should now support including a CJA member and an SPS representative as he suggests. We should stick with what we agreed in our stage 1 report and not support amendment 48.

**James Kelly:** As the convener and Bill Butler have said, it is important to get right the balance and the expertise on the sentencing council. Several of the amendments are complementary in seeking to achieve that aim.

I oppose amendment 48, in Robert Brown's name, because I am uncomfortable with the Scottish Prison Service being represented on the council. The SPS comes under the umbrella of the Government, so having an SPS representative could undermine the sentencing council's independence.

**Angela Constance (Livingston) (SNP):** I will comment on Robert Brown's amendment 48. I have long-standing sympathy with the idea of the SPS being represented on the sentencing council, and I was somewhat surprised that, when the SPS gave evidence to the committee, it did not appear to have the appetite for that, if my recollection serves me right. Given that, I will not support

Robert Brown's amendment, with a bit of a heavy heart.

**The Convener:** I can see that.

*Amendment 41 agreed to.*

**The Convener:** Amendment 12, in the name of Bill Butler, is grouped with amendments 13 and 14.

**Bill Butler:** The policy intention behind the amendments is to secure the minimum balance that achieves a judicial majority of one on the council. The balance of judicial to non-judicial members is currently five to seven. The amendments would remove the reference to a constable, to which the cabinet secretary and other members have referred. I am grateful that the Scottish Government has shown, by lodging amendment 47 and supporting amendment 13, that it is willing to delete the constable. My amendments would make two other changes in favour of the judicial membership.

That is basically it. As I say, the amendment to leave out the constable would achieve the balance that we all want, so I hope that members will see fit to support amendments 12 to 14.

I move amendment 12.

**The Convener:** We are all of a mind about what we are trying to achieve. Once the amendments in the group are agreed to, they will achieve our aim.

**Kenny MacAskill:** The Government amendments in group 7, which we will deal with later, will recast the sentencing council as an advisory body that drafts sentencing guidelines for formal endorsement by the High Court. Those amendments will mean that guidelines will be issued with the High Court's full authority. That is in line with the committee's recommendations.

Amendments 12 to 14 relate to the sentencing council's membership. Amendment 12 would ensure that sheriffs and justices of the peace were guaranteed representation on the council. I am conscious that concern was expressed at stage 1 that the provisions did not ensure that they would be represented.

Amendment 13 removes the constable from the council's membership. However, it is essential that the police are represented, as has been said, because the police have a critical role. Government amendment 47, which we have dealt with, makes a constable a lay member of the council. We would have sought to lodge an amendment in identical terms to amendment 13; in order for the amendment to be accepted, we require the council to have police representation, as amendment 47 makes clear.

11:45

Amendment 14 would reduce to one the number of lay members on the council. It is essential that the council has a balance of opinions from legal and lay sources. The lay members may be drawn from the general public, from those with prison service or criminal justice social work experience, or from academia. It is essential to have balanced representation on the council if it is to improve public confidence in our system. For that reason, we cannot support amendments that seek to create a judicial majority on the council, particularly given our amendments that make the council an advisory body. That approach reflects the committee's argument that a council with a judicial majority and a structure that left the final say on guidelines to the court would not represent a sufficient advance on the current arrangements.

I ask Bill Butler to withdraw amendment 12 and to not move amendment 14. I fully support amendment 13.

**Bill Butler:** I hear clearly what the cabinet secretary is saying. We just have a disagreement on the matter. I will not waste time by saying anything other than that I urge members to support amendments 12 and 14.

**The Convener:** The question is, that amendment 12 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

#### For

Aitken, Bill (Glasgow) (Con)  
Brown, Robert (Glasgow) (LD)  
Butler, Bill (Glasgow Anniesland) (Lab)  
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)  
Kelly, James (Glasgow Rutherglen) (Lab)

#### Against

Constance, Angela (Livingston) (SNP)  
Don, Nigel (North East Scotland) (SNP)  
Maxwell, Stewart (West of Scotland) (SNP)

**The Convener:** The result of the division is: For 5, Against 3, Abstentions 0.

*Amendment 12 agreed to.*

*Amendment 42 not moved.*

*Amendment 43 moved—[Kenny MacAskill]—and agreed to.*

*Amendment 44 not moved.*

*Amendment 13 moved—[Bill Butler]—and agreed to.*

*Amendments 45 and 46 not moved.*

*Amendment 47 moved—[Kenny MacAskill]—and agreed to.*

*Amendment 48 not moved.*

*Amendment 14 moved—[Bill Butler].*

**The Convener:** The question is, that amendment 14 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

#### For

Aitken, Bill (Glasgow) (Con)  
Butler, Bill (Glasgow Anniesland) (Lab)  
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)  
Kelly, James (Glasgow Rutherglen) (Lab)

#### Against

Brown, Robert (Glasgow) (LD)  
Constance, Angela (Livingston) (SNP)  
Don, Nigel (North East Scotland) (SNP)  
Maxwell, Stewart (West of Scotland) (SNP)

**The Convener:** The result of the division is: For 4, Against 4, Abstentions 0. The casting vote is for the amendment, on the basis of what I said earlier.

*Amendment 14 agreed to.*

*Amendment 15 not moved.*

**The Convener:** The next group is on the appointment and term of office of members of the Scottish sentencing council. Amendment 49, in my name, is grouped with amendment 50.

Amendment 49 simply makes a requirement that any appointments are made with the approval of the Lord Justice General. In doing so, it changes the emphasis of the bill. The advantage is to take away some powers from Scottish ministers and ensure that the appropriate degree of detachment is taken in respect of appointments. I stress that I am in no way suggesting that the Government—or indeed any other Government of which I have had experience in this august assembly—is likely to bring about any undue influence in that respect. However, democracy is a tender plant that requires to be nurtured carefully, and the appropriate detachment is required in such circumstances. That is the justification for the amendment.

I move amendment 49.

**Kenny MacAskill:** Amendment 49 would require the approval of the Lord Justice General before the Scottish ministers could appoint the lay members of the Scottish sentencing council. Paragraph 2 of schedule 1 currently requires the Scottish ministers to consult the Lord Justice General before appointing the lay members of the council and also requires the Lord Justice General to consult the Scottish ministers before appointing the remaining members of the council. I see no merit in creating an imbalance between the procedures for appointing the lay and other

members of the council, nor for creating what would, in effect, be a joint appointment procedure for lay members alone. The procedure is not about picking teams to be pitted against one another in the council. I expect the council to operate by consensus.

Government amendment 50 will clarify that the rule preventing any member from sitting on the council for more than five years does not apply to the Lord Justice Clerk as chairing member.

**The Convener:** In winding up the debate, I simply adhere to my earlier comments. A degree of detachment is required. I cast absolutely no aspersions on any previous Government or the present one, but that detachment is necessary.

The question is, that amendment 49 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

#### For

Aitken, Bill (Glasgow) (Con)  
Brown, Robert (Glasgow) (LD)  
Butler, Bill (Glasgow Anniesland) (Lab)  
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)  
Kelly, James (Glasgow Rutherglen) (Lab)

#### Against

Constance, Angela (Livingston) (SNP)  
Don, Nigel (North East Scotland) (SNP)  
Maxwell, Stewart (West of Scotland) (SNP)

**The Convener:** The result of the division is: For 5, Against 3, Abstentions 0.

*Amendment 49 agreed to.*

*Amendment 50 moved—[Kenny MacAskill]—and agreed to.*

**The Convener:** We turn to the role of the judiciary in the approval and publication of sentencing guidelines. Amendment 51, in the name of the cabinet secretary, is grouped with amendments 53, 16, 18, 18A, 18B, 57, 58, 19, 59, 20, 61, 66, 22, 68, 70, 23 and 75. I draw members' attention to the pre-emption information that is shown on the groupings list. In addition, amendment 20 pre-empts amendment 61, but that was inadvertently omitted from the list.

**Kenny MacAskill:** During stage 1 it became clear that there were substantial concerns about the influence of sentencing guidelines on judicial discretion and how the Scottish sentencing council would function alongside the High Court. In light of that, and in line with the committee's recommendations, we have re-examined the status of the sentencing council and lodged amendments that will recast it as an advisory body that will prepare sentencing guidelines for endorsement by the High Court. We believe, as

the committee does, that that will address the tension between the principle of the separation of powers and the influence of sentencing guidelines on judicial discretion.

Amendment 53 is the key amendment. It amends section 5(1) to require the sentencing council to prepare guidelines on the sentencing of offenders for the approval of the High Court. That means that guidelines must have the endorsement of the High Court before they can come into force. Government amendments 51, 58, 59, 61, 66, 70 and 75 are consequential. They amend the provisions to reflect the altered role of the sentencing council and the High Court in preparing and endorsing new and revised guidelines. In due course, I will support Robert Brown's amendment 56, which is in group 11, as it provides that it is no longer for the sentencing council to decide when a guideline comes into effect. Under our new model, that will instead be for the High Court to decide.

Amendment 68 will insert a new section that sets out the process of approval or rejection of the guidelines that the council prepares for the High Court.

Bill Butler's and Robert Brown's amendments would amend the provisions on the Scottish sentencing council. Those amendments, which no doubt reflect elements of the committee's report as well as evidence that the committee received during stage 1, would change the approval process for sentencing guidelines and require them to be approved by the Lord Justice General, which in effect would make the sentencing council an advisory body. The Government amendments have a similar effect, by recasting the sentencing council as an advisory body that drafts sentencing guidelines for formal endorsement by the High Court sitting as the court of appeal. The Government amendments mean that guidelines would be issued with the full authority of the High Court, which is in line with the committee's recommendations.

Robert Brown's amendments 18A and 18B would further amend the guideline approval process that is set out in Bill Butler's amendment 18. Amendment 18A would allow the Lord Justice General to approve sentencing guidelines with or without amendments, but does not require him to state his reasons for any amendments. Government amendment 68 provides for the High Court to approve guidelines with modifications, but requires it to state its reasons.

Amendment 18B provides that the clerk of justiciary must publish approved sentencing guidelines, whereas Government amendment 68 provides that the sentencing council must publish such guidelines. When we come to group 12, we will deal with Government amendment 72, which provides for the sentencing council to publish

guideline judgments that are pronounced by the High Court. The intention is to ensure that all sentencing guidelines and guideline judgments are available in one place and are accessible to the public. That does not affect the role of the Scottish Court Service in relation to the publication of High Court opinions. In light of that, I cannot support Bill Butler's or Robert Brown's amendments in this group.

I move amendment 51.

**Bill Butler:** In my view, the principal amendment in the group is amendment 18, which would make it clear that the Lord Justice General, rather than the sentencing council, would have the final say, should any difference of view arise about a proposed sentencing guideline. The Lord Justice General could refer it back to the council, and the council would have to revise it to address the concerns that had been raised.

The reference in proposed new subsection (7A)(a) of section 5 to "Lords Commissioner of Justiciary" is how I understand judges are referred to formally in a criminal context. The phrase covers all the same judges who, in a civil context, sit in a Court of Session, inner house and outer house. The proposed drafting would allow the Lord Justice General to decide how many and which judges to involve in consideration of the proposed guidelines. The choice could be different each time. In practice, he would presumably select a small number of judges who had particular experience in criminal cases, depending on their availability. There is nothing to preclude the judges who are consulted in that context from including judges who are already members of the council.

The approach that I have suggested mostly involves amending section 5. In particular, it involves seeking to qualify the existing reference to the council publishing guidelines to make it clear that it could do so only after having had them approved by the Lord Justice General.

My amendments 19, 20 and 23 are consequential on amendment 16. Amendment 22 is necessary to reflect the fact that, by virtue of amendment 16, the council will, under section 6, finalise only proposed guidelines rather than guidelines.

**Robert Brown:** I will not move amendments 18A, 18B and 57, which the cabinet secretary commented on.

We are discussing an important group of amendments. The committee as a whole is grateful to the Government for responding to the evidence and the views of the committee on where the sentencing council should stand vis-à-vis the court and the Government. I have thought from the beginning that all our constitutional principles on the independence of the judiciary and the rule of

law require the High Court to give the final imprimatur on sentencing guidelines, and my view was reinforced by the evidence of the Lord Justice General, the Lord Justice Clerk and other significant witnesses.

I think that the Government's amendments ensure that that will be the case. I must confess that I have got slightly lost on the interrelation between them and Bill Butler's amendments, but I am happy to support whatever is necessary to achieve the purpose.

**Stewart Maxwell:** I am happy to support Kenny MacAskill's amendments 51 and onwards. As all members of the committee understand, the issue here is the delicate balance between the independence of the judiciary and the right of the public to expect clarity that enables them to understand sentencing. In that regard, the Government's amendments respond to the stage 1 report.

I am disappointed that, as a result of the previous set of amendments, the judiciary will not only appoint members of the sentencing council but will have a majority on it and will get to approve the guidelines that it produces. I am not quite sure how much further forward that takes us; I think that the balance has been rather skewed the other way. However, I am happy that the Government has lodged amendments to deal with part of our stage 1 report, and I will support them.

**Richard Baker:** I do not share Stewart Maxwell's anxiety about the position that we have reached. The important thing is what will work, and I think that the changes that we proposed will make the system work better. In addition, I put on record my welcome for the change in policy that the cabinet secretary has proposed.

We have been guided by what we think will work. We want a more transparent system of sentencing that people can be confident is consistent, but clearly it is also important to respect the separation of powers and the role of the judiciary, and to have the judiciary's co-operation in developing a proposal to make the system work. That has been the motivation behind all Bill Butler's amendments, both in this group and on membership of the council. It will still be possible for lay members, including victim representatives, to be on the council.

I am sure that the key issue of making the proposition work is what lies behind the cabinet secretary's amendments 53 and 68, which are a welcome response to the points that the committee raised in its report. I strongly believe that nothing will be lost in relation to what it is hoped that the sentencing council will achieve. The amendments will bring practical benefits in

ensuring that the council works well and that guidelines will be used effectively by the courts.

12:00

**The Convener:** If no other member wishes to make a contribution, I will speak.

I freely and frankly acknowledge that the Government has made every possible effort to achieve a satisfactory outcome on the issue. I appreciate that, as with many of the other issues with which we are dealing, the proximity of amendments has made life a bit difficult for us all. Perhaps we can all learn a lesson and consider it at an earlier stage in future, so that we do not have to go through a fairly convoluted process to arrive—largely—at the situation that we seek to reach.

*Amendment 51 agreed to.*

*Schedule 1, as amended, agreed to.*

#### **Section 4—The Council's objectives**

**The Convener:** Amendment 52, in the name of Robert Brown, is in a group on its own.

**Robert Brown:** Amendment 52 is designed to give some shape and definition to the objectives of the sentencing council by bringing to the fore the effectiveness of the use that is made of prisons and of community sentences. Every professional who is involved in the criminal justice system knows that prison is the most expensive and the poorest and least successful way of meeting most criminal justice objectives—beyond, of course, the central objective of protecting the public. Equally, community sentences are often patchy and are far less successful in reducing crime or reforming offenders than we sometimes like to think.

Consideration of those issues should be at the heart of what the sentencing council will do. Consistency is no doubt a virtue, public awareness is invaluable and the research role will be vital, but what will tick the boxes and make the sentencing council worth the considerable expenditure that is proposed will be its impact on helping us to get the most effective use out of the considerable resources that are swallowed up by the criminal justice system. I hope that the committee will support that addition.

I move amendment 52.

**The Convener:** Are there any other contributions?

**Stewart Maxwell:** I have more of a question for Robert Brown than a contribution. The last line of amendment 52 states:

"by reference to the purposes and principles of sentencing".

Given that we have removed all that from the bill, does Robert Brown believe that amendment 52 is still valid? Should the amendment be agreed to? If it is agreed to, would that line have to be deleted at stage 3?

**The Convener:** That is a contribution to the debate rather than a specific question, but I have no doubt that Robert Brown will answer that point in summing up.

My brief contribution is to say that I would have asked the same question as Stewart Maxwell, and I underline the necessity for an answer at the summing-up stage.

**Kenny MacAskill:** The convener and Stewart Maxwell have both alluded to the last line of amendment 52. The definition of “optimum” is a more difficult matter; I suspect that members around the table would have different views about what might be “optimum” depending on the emphasis that is given to particular purposes of sentencing. I doubt that the sentencing council would find that an easy requirement to put into practice and, accordingly, I cannot support amendment 52.

**Robert Brown:** I accept the point about the last line—the context has obviously changed as a result of earlier decisions—but that can be readily dealt with by deletion at stage 3, or now, if that is possible, although it is probably not worth getting into such complications. Nevertheless, it is important that the principle of the amendment is given effect, leaving any subsidiary matters to be sorted out later on.

I do not accept the cabinet secretary's objections to amendment 52. Any word that is used in statute can give rise to issues of definition, but we should bear it in mind that we are giving a steer on what the sentencing council will do. It is, in a sense, up to the council to define the words and to operate in that general direction of travel. The provision would not affect in an immediate sense how people would be sentenced—it affects the work of the sentencing council. Against that background, I confess that I am not really too bothered about the precise meaning of words in the same way as the cabinet secretary. I press amendment 52.

**The Convener:** The question is, that amendment 52 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Brown, Robert (Glasgow) (LD)

**Against**

Aitken, Bill (Glasgow) (Con)  
Constance, Angela (Livingston) (SNP)  
Don, Nigel (North East Scotland) (SNP)  
Maxwell, Stewart (West of Scotland) (SNP)

**Abstentions**

Butler, Bill (Glasgow Anniesland) (Lab)  
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)  
Kelly, James (Glasgow Rutherglen) (Lab)

**The Convener:** The result of the division is: For 1, Against 4, Abstentions 3.

*Amendment 52 disagreed to.*

*Section 4 agreed to*

### Section 5—Sentencing guidelines

**The Convener:** Amendment 53, in the name of the minister, has already been debated with amendment 51. I point out that if amendment 53 is agreed to, amendment 16 will be pre-empted.

*Amendment 53 moved—[Kenny MacAskill].*

**The Convener:** The question is, that amendment 53 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Brown, Robert (Glasgow) (LD)  
Constance, Angela (Livingston) (SNP)  
Don, Nigel (North East Scotland) (SNP)  
Maxwell, Stewart (West of Scotland) (SNP)

**Against**

Aitken, Bill (Glasgow) (Con)

**Abstentions**

Butler, Bill (Glasgow Anniesland) (Lab)  
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)  
Kelly, James (Glasgow Rutherglen) (Lab)

**The Convener:** The result of the division is: For 4, Against 1, Abstentions 3.

*Amendment 53 agreed to.*

*Amendment 54 not moved.*

**The Convener:** Amendment 394, in the name of Angela Constance, is in a group on its own.

**Angela Constance:** I should say in the interests of clarity and transparency that I lodged amendment 394 after representations were made to me by Action for Children Scotland. Amendment 394 would require the Scottish sentencing council to publish guidelines on the sentencing of young offenders, including when it would be appropriate for the young offender to be referred to the children's hearings system.

I am aware that section 5(3)(c) of the bill already states that guidelines may relate to



“the particular types of sentence that are appropriate for particular types of offence or offender”.

That might cover young offenders, but amendment 394 would require that the Scottish sentencing council's guidelines did that; it is about the difference between “can” and “must”. As mentioned in earlier debates, the motivation for the amendment is consistency in sentencing and good practice. We are all aware that the criminogenic and rehabilitation needs of young offenders are different to those of adults. The opportunities and challenges of working with young offenders are also very different.

Reflecting on the earlier debates about the composition of the Scottish sentencing council, which now has a judicial majority and therefore less room for other experts, I propose that it is now more appropriate for the application of sentencing guidelines to young people to be particularly specific.

I move amendment 394.

**Robert Brown:** I support the principle of what Angela Constance is trying to do with amendment 394, but I do not think that she has got it quite right.

“Sentencing guidelines must in particular relate to the sentencing of offenders”.

Does that mean every sentencing guideline? I rather think that it does. I accept that it could be a priority of the sentencing council to focus on the position of offenders under the age of 18. That is valid and I would support that.

The amendment seems to go beyond sentencing, which I am not sure is correct either, and deals with when young offenders are sent to the children's panel. Although I appreciate that such a decision can be part of the sentencing process, more normally it is made before the case arrives at court so it is obviously more a matter for the Parliament than the sentencing council. It might be worth while looking again at amendment 394, but I cannot support it in its present form.

**Stewart Maxwell:** I echo some of Robert Brown's comments. Although I understand the principle behind Angela Constance's amendment, the use of the word “must” gives me some concern. I can think of examples of sentences for offences that have nothing to do with under 18s. There are issues about the inflexibility that the amendment would bring to the process. On reflection, I would find it difficult to support the amendment as drafted.

**The Convener:** Before the minister responds, I say that I find amendment 394 unobjectionable and understand Angela Constance's direction of travel. However, I point out that it is highly likely, as she will know from her criminal justice social

work experience, that in the circumstances that she is considering, even though the offender is over 16, a court might well seek the advice of the children's panel prior to final disposal of the case. In the circumstances, unless the member can persuade me in her summing up, I am not minded to support the amendment.

**Kenny MacAskill:** As was mentioned by other committee members and the convener, sentencing guidelines already cover the matters raised in amendment 394. Section 5(3)(c) of the bill says that sentencing guidelines will relate to

“the particular types of sentence that are appropriate for particular types of offence or offender”

and so covers the sentencing of under 18s. It would not be helpful to require each and every sentencing guideline to deal with under 18s and references to children's hearings. Where appropriate, we can rely on the sentencing council to ensure that that is covered in its work. I accept the spirit in which Angela Constance lodged amendment 394 and subsequent ones, but we view it as unnecessary.

**Angela Constance:** Given the comments and contributions from my learned colleagues, I seek leave to withdraw amendment 394.

*Amendment 394, by agreement, withdrawn.*

**The Convener:** Bearing in mind the time and that this is a sensible point to adjourn, the committee will finish its consideration of the bill today and move into private session.

12:13

*Meeting continued in private until 13:15.*



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