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Official Report

JUSTICE COMMITTEE

Tuesday 13 April 2010

Session 3

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JUSTICE COMMITTEE
12th 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)
Margaret Curran (Glasgow Baillieston) (Lab)
Trish Godman (West Renfrewshire) (Lab)
Rhoda Grant (Highlands and Islands) (Lab)
Johann Lamont (Glasgow Pollok) (Lab)
Kenny MacAskill (Cabinet Secretary for Justice)
Margo MacDonald (Lothians) (Ind)
Bill Wilson (West of Scotland) (SNP)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 13 April 2010

[The Convener *opened the meeting at 10:05*]

Criminal Justice and Licensing (Scotland) Bill

The Convener (Bill Aitken): Good morning, ladies and gentlemen. Let us get the meeting under way. The entire committee is present—there are no apologies. I remind everyone to switch off mobile phones to avoid any interruption to proceedings.

This morning, our principal business is stage 2 consideration of the Criminal Justice and Licensing (Scotland) Bill. However, we have to deal with the preliminary matter whether to take evidence on amendment 516, in the name of Sandra White, on the licensing of lap dancing clubs and other adult entertainment venues. Paper J/S3/10/2/1, prepared by the clerk, explains the available options.

I am in the committee's hands.

Stewart Maxwell (West of Scotland) (SNP): I think that this issue is slightly different from the other stage 2 amendment issues on which we decided to take oral evidence. Up until that point, we had taken zero evidence on those matters. As the *Official Report* and our stage 1 report show, we examined the area in question to some extent at stage 1; I am quite happy to receive further written evidence, but I do not think that we should delay stage 2 even further to take oral evidence.

The Convener: That is my own preferred option. Do members agree?

Members *indicated agreement.*

The Convener: In that case, we will seek written evidence, which will be provided within an appropriate timescale. The clerk will organise things.

Criminal Justice and Licensing (Scotland) Bill: Stage 2

10:07

The Convener: Item 2 is day 3 of stage 2 proceedings on the Criminal Justice and Licensing (Scotland) Bill. The committee will not proceed beyond the end of part 3 today; indeed, it is highly likely that we will get only as far as the end of part 2, which—perhaps unfortunately—contains a concentration of complex and controversial items.

I welcome to the meeting the Cabinet Secretary for Justice, Kenny MacAskill, who will be joined by officials various. Indeed, I understand that his team will change over the course of the morning as we come to deal with different matters. I also welcome to the table non-committee members Bill Wilson, Rhoda Grant and Richard Baker. It is highly probable that other members will join us when items of particular interest come up. Members should have their copy of the bill, the third marshalled list and the third grouping of amendments for consideration.

Section 15—Non-harassment orders

The Convener: Amendment 399, in the name of Rhoda Grant, is grouped with amendments 400 to 402, 402A, 378 and 544.

Rhoda Grant (Highlands and Islands) (Lab): First, I pay tribute to Ann Moulds, her group Action Scotland Against Stalking and their vigorous campaign to highlight the problem of stalking in Scotland, which convinced me that I should lodge amendments 399 to 402.

The term "stalking" is used generally to describe repeated and unwelcome conduct that a person finds alarming or threatening. Due to the wide range of such behaviour, it is difficult to define stalking. Some of the behaviour may be perfectly innocent, such as making a telephone call or standing in the street, but becomes threatening and alarming due to the context of the relationship between the stalker and the victim. Therefore, stalking is a context-dependent crime the unacceptability of which depends on the context in which it occurs. Previously, such crimes were prosecuted as breaches of the peace. However, following the ruling in the case of Harris v HM Advocate in 2009, that approach may no longer be possible. That ruling said that there must be some public element to the behaviour if it is to constitute a breach of the peace. Amendments have been lodged by the Government and by Robert Brown that seek to close that loophole. Those important amendments deal with abusive crimes, and I urge the committee to give them due consideration; nevertheless, they do not address stalking, which

was not adequately covered by breach of the peace.

Amendment 402 is required if we are to make stalking a crime, as the amendment names a new offence of stalking. Action Scotland Against Stalking has made it clear that the approach that was taken in the Protection from Harassment Act 1997 in England and Wales, which does not name the crime of stalking, has kept stalking hidden in the same way as breach of the peace has done in Scotland. There are many misunderstandings around stalking concerning what it is, its prevalence and the devastating consequences that it can have. That is partly because the actions involved in stalking cases are not, in themselves, criminal offences; it is the combination of those actions that causes fear and distress. By calling that behaviour stalking, we recognise it and mark it as unacceptable. In proposed subsection (6) of the new section that amendment 402 would insert, we define the kinds of behaviour that would constitute such conduct, although the list is not exhaustive. It is important that the list is not restrictive, as stalking behaviour can be extremely subtle and not easily recognised as stalking. However, listing examples of stalking behaviour makes it easier for people to recognise the actions that will be considered to constitute stalking.

Amendments 399 to 401 follow on from the introduction of a new offence of stalking and relate to section 234A of the Criminal Procedure (Scotland) Act 1995. Because many stalkers repeatedly harass their victims, sometimes over a period of years, it would be appropriate for a non-harassment order to be applied for in all cases following a conviction. My amendments would require a procurator fiscal to do that. That would remove the discretion of the prosecutor but it would not remove the discretion of the court, which would still be able to decline an application if it were not convinced that an order would be appropriate.

I do not think that Robert Brown's amendment 402A is required. However, as it takes nothing away from amendment 402 I would not oppose it.

I move amendment 399.

The Cabinet Secretary for Justice (Kenny MacAskill): Amendment 402 is intended to create a statutory offence of stalking. It would make it an offence for a person to engage in a course of conduct with the intention of causing physical or psychological harm to another person or of causing that person to fear for their own safety or for the safety of any other person. An offence would also be committed if the accused engaged in a course of conduct and knew, or ought in all the circumstances to have known, that the conduct would be likely to cause such harm or arouse such apprehension or fear, regardless of whether that was the accused's purpose.

We are aware that, in the light of the outcome of recent court cases, there has been concern that the common-law offence of breach of the peace, which—as Rhoda Grant correctly said—has previously been used to prosecute behaviour constituting stalking, may not be sufficient. In the case of Harris v HM Advocate, the appeal court concluded that some public element is essential for a breach of the peace to be committed and that the public element will not always be present in stalking cases. To address that, the Government has lodged amendment 378, which creates a new statutory offence of engaging in threatening, alarming or distressing behaviour. The offence will criminalise conduct that, either recklessly or by intention, is likely to cause a reasonable person alarm, distress or fear for their personal safety or for the personal safety of another person. That would include the sort of behaviour that is covered by amendment 402.

The need to create such an offence has arisen as a result of the appeal court's opinion in Harris v HM Advocate, which concluded that some public element is essential for the offence of breach of the peace to be committed. The court's decision does not affect the majority of cases of breach of the peace, in which the offence takes place in a public place—for example, in a street or in a pub. However, there is real concern that the decision has been making it more difficult to prosecute criminal behaviour arising from domestic disputes and other circumstances, such as stalking cases, in which there is not necessarily a public element. In the past, such behaviour could have been successfully prosecuted as breach of the peace, but that may no longer be the case.

10:15

Amendment 378 creates a new offence that criminalises conduct that, either recklessly or by intention, is likely to cause a reasonable person alarm or distress or create fear for their personal safety or that of another person. There is no requirement for a public element so the problem that arose in the Harris case should not arise again. The conduct could take place in the presence of the perpetrator and the victim only, or indeed without their being together, in the case of written threats, phone calls and so on. That is particularly relevant where threats are sent by text or e-mail—a relatively recent problem about which we have all heard.

Stalking can include a range of alarming, distressing and frightening behaviours, such as repeatedly following or spying on a victim or otherwise watching them; the repeated sending of unwanted threatening correspondence; and the

making of repeated nuisance phone calls or the sending of repeated nuisance texts or e-mails. When a person engages in such activity and the circumstances are such that their behaviour would cause a reasonable person alarm or distress or create fear for the safety of any person, that will constitute the offence of engaging in threatening, alarming or distressing behaviour.

Although we support what amendment 402 seeks to achieve, we do not believe that it goes far enough. The offence in amendment 402 requires "a course of conduct", whereas we suggest that it is important that, in appropriate cases, it is possible to prosecute an individual who engages in such unacceptable behaviour once. It does not address the problem that arises from the Harris case, which means that it might no longer be possible to prosecute unacceptable behaviour that is committed in a domestic setting and which would have been prosecuted as a breach of the peace if it had been committed in public. It would also be necessary to prove that the behaviour caused harm to, or created fear for the safety of, the victim or someone else. We suggest that such behaviour is unacceptable and that it should therefore be treated as criminal regardless of whether the victim actually suffers harm or fear. It should be enough that that was the intention. Those issues are addressed in the Government's amendment 378, which also covers the behaviour that is caught by amendment 402. I therefore hope that the committee will support the Government's amendment 378 in preference to amendment 402.

We understand that some of those who have given evidence expressed support for both amendment 378 and amendment 402. However, as we have explained, amendment 402, on stalking, covers a narrower range of conduct than is covered by amendment 378. The Crown Office has expressed concern that there would be a disadvantage in having a narrowly defined offence alongside an offence with a wider definition. Because of the many circumstances that present themselves in criminal conduct, the prosecutor would, in the event of a choice, often be bound to prefer the offence with a wider definition to ensure that all the conduct was captured in the charge. We understand the desire of many committee members to see both amendments go through and we are happy to seek to consider whether we can incorporate the particular matters that Rhoda Grant's amendment 402 seeks to cover into an expanded Government amendment in due course.

We understand that amendment 402A seeks to ensure that Rhoda Grant's amendment 402 does not inadvertently criminalise legitimate public protest or industrial action. However, the Government's view is that, even if amendment 402 was accepted, amendment 402A would be unnecessary. For an offence of stalking to be committed, it is required that the accused acted with the intention of causing physical or psychological harm or knew, or ought to have known, that their conduct was likely to cause such harm or arouse fear or apprehension. Legitimate public protest and industrial action should not cause people physical or psychological harm and should not cause people to fear for their personal safety.

In addition, amendment 402 provides a defence to a charge of stalking where the conduct is, in the particular circumstances, reasonable. It would be for the courts to decide, but it could certainly be argued that, depending on the circumstances, legitimate public protest or industrial action would be covered by the defence that it amounted to reasonable conduct. As such, amendment 402A is unnecessary and I invite Robert Brown to not move it.

The purpose of Robert Brown's amendment 544 is to modify the common-law offence of breach of the peace to ensure that it covers behaviour that takes place in private. As I noted, the need for action on breach of the peace arose as a result of the appeal court's opinion in Harris v HMA, which concluded that some public element is essential for the offence of breach of the peace to have been committed. We appreciate that there is concern that the appeal court judgment makes it difficult for the criminal law to intervene in domestic disputes and other circumstances in which breach of the peace has traditionally been used to prosecute, such as stalking cases, when there is not necessarily a public element. That is why we lodged amendment 378, which creates a new offence that criminalises conduct that, either recklessly or by intention, is likely to cause a reasonable person alarm or distress or cause them to fear for their personal safety or that of another person. There would be no requirement for a public element. The conduct could take place in the presence of the perpetrator and the victim only, or without them having to be together at the same time, in the case of written threats, texts, phone calls and so on, which I mentioned.

The appeal court judgment, which concluded that a public element was necessary in cases of breach of the peace, overturned a 1959 judgment in the case of Young v Heatly, in which the appeal court recognised that although a public element was usually required in cases of breach of the peace, there was a class of special cases in which the offence constituted a breach of the peace, even though it occurred in private. It may have been Robert Brown's intention to restore the outcome of the 1959 judgment, but amendment 544 goes a great deal further in providing that any behaviour that constitutes a breach of the peace in public may also do so in private.

The advantage of Government amendment 378 over Robert Brown's amendment 544 is that it recognises that behaviour in public and behaviour in private may be judged differently. For example, a member of the public who was shouting and swearing in the street would normally be judged differently from a member of the public who was shouting and swearing at a television. Government amendment 378 provides for incidents such as domestic abuse or stalking to be tackled, but it does not seek potentially to criminalise behaviour in private simply because the same behaviour in public might well constitute a breach of the peace. Therefore, we are unable to support amendment 544.

I understand that amendments 399 to 401 are intended to amend the provisions in section 234A of the Criminal Procedure (Scotland) Act 1995 on non-harassment orders to require the prosecutor to apply to the court for a non-harassment order to be granted in respect of a person who has been convicted of stalking. I agree that in many cases it would be appropriate to make a non-harassment order in respect of a person who has been convicted of behaviour that constituted stalking, and the provisions in the bill that amend section 234A of the 1995 act will make it easier for the prosecutor to apply to the courts for an order.

However, the Government does not believe that there should be an automatic requirement for the prosecutor to apply for a non-harassment order in respect of any person who has been convicted of stalking. Non-harassment orders are intended to deal with people who are considered to pose a risk of future offending. Many people who are convicted of stalking behaviour may pose a risk of future offending against their victim, but others may not. The offender may have moved away from where the victim lives or may have been sentenced to a long term of imprisonment, in which case an NHO may not be necessary. Clearly, whether an NHO is necessary will depend on the facts and circumstances of each individual case. It should be for prosecutors to decide on a case-by-case basis whether it is appropriate to apply to the court for a non-harassment order to be granted.

We support amendment 378 and resist all other amendments in the group, on the understanding that we take on board the committee's desire to see some correlation between the two offences that we are discussing.

Robert Brown (Glasgow) (LD): In this group, amendments 402A and 544 are in my name. As Rhoda Grant and the cabinet secretary have indicated, the group raises a number of overlapping issues.

I agree with the cabinet secretary's comments on amendment 400—I think it might be a case of overkill. Under the criminal law in Scotland, the Crown has traditionally acted in the public interest as master of the instance. In other words, it is up to the prosecutor when to bring charges and on what basis, when to continue with or abandon a prosecution and when to ask for specific orders. It may well be that a non-harassment order is appropriate in many cases in which there is a stalking conviction, but circumstances vary and the discretion should remain with the Crown.

Amendment 402 seeks to introduce the specific offence of stalking. There has been quite a bit of debate about that, but the case for the new offence has been well put. Stalking is a crime that, in essence, is different from breach of the peace because it involves the repeated, deliberate targeting of a particular victim and is often made up of a series of actions that, in normal circumstances, may themselves be unexceptional.

However, it is vital that the definition is got right because an offence that is too widely or imprecisely stated will produce injustice. I hope that the cabinet secretary's officials—who I accept are not in favour of amendment 402—have pored over it carefully to ensure that it does what it says on the tin. I continue to hold the view that the definition must be looked at extremely closely, as it may be too wide. More particularly, the defences in subsection (5) of the proposed new section that amendment 402 seeks to insert are likely to produce considerable trouble.

I am not sure that I am altogether persuaded by the cabinet secretary's point about a single action as opposed to a course of conduct. By its nature, stalking seems to be a course of conduct. I readily accept that, in any event, significant instances of a one-off nature would continue to be dealt with under breach of the peace, so I do not think that that is a problem. I am keen to hear the cabinet secretary's views on the matter, as it is important to get it right.

I do not think that the reasons behind amendment 402 arise out of the Harris case per se, although that adds another dimension.

The defences that are set out in the proposed new subsection (5) that amendment 402 would introduce are modelled on the phraseology of the Protection from Harassment Act 1997. However, the 1997 act is not quite the same as the legislation that we are discussing today, as it basically establishes a procedure for providing orders, rather than establishing a criminal action and the immediate offset—a crime is committed under the 1997 act only on breach of a non-harassment order. For example, proposed subsection (5)(a) suggests that a course of action would be legal if it were

"authorised by ... any rule of law".

If my memory serves me correctly, various enactments make it legal to walk upon the public highway. Is it possible that walking up and down outside someone's house, even with malicious intent, could be authorised in that sense, thereby providing a loophole to a stalker? I remind members that the rule of construction is that penal statutes are, rightly, construed strictly against the Crown.

Further, the catch-all defence in proposed subsection (5)(c) suggests that a course of action would be legal if it

"was, in the particular circumstances, reasonable".

I should say that that is phrased differently from the way in which the cabinet secretary's amendment 378 is phrased. The difference between the use of the word "reasonable" in the two amendments does not amount to a difference of approach. However, some questions remain around the issue of reasonableness. To whom should the course of action seem reasonable—the accused or the man on the number 18 bus, for example? Reasonable by what criteria?

I continue to have a concern about the effect of the proposals on legitimate public protest and lawful industrial action. Students of trade union history will know that early restrictions on what we would now regard as legitimate trade union protest arose from judicial extension of contract and property law into the criminal sphere. Subsection (6)(e) of the proposed section that amendment 402 would introduce defines "conduct" as including

"entering or loitering in the vicinity of ... the place of work or business ... or of any other person",

which very much touches on the area of industrial action. Are we entirely sure that such legitimate conduct is authorised by existing trade union law, as opposed to simply not being forbidden by it? I suggest that there is a subtle difference there. I do not pretend to be an expert on trade union law, but I hope that the issues that I have raised will be closely considered by the cabinet secretary's officials.

Further to the issue of public protest, what about football fans who are distressed at their club's performance and want to demonstrate at the football ground? We have seen examples of that in the recent past.

"Conduct" also includes the sending of letters, e-mails and texts. What about whistleblowers or people who go a bit over the top in castigating their MSPs or—perhaps more likely—their MPs for their sins? Would that behaviour be criminalised? Some of us might think that that would be a good idea, but I am not sure that most of us would.

People have various and heated views about Orange order parades, Irish republican parades, demonstrations about middle east issues and so on. Some such marches can arouse apprehension and fear in the minds of onlookers—some are intended to do exactly that through a demonstration of strength. However, that does not necessarily make them illegal. The right to freedom of expression gives people a certain latitude, providing that they keep within the law. Are we not at risk of narrowing that latitude too much and unreasonably getting involved in people's motives and intentions when they engage in legitimate public protest?

It is against that background that I lodged amendment 402A to ensure that the law of unintended consequences does not throw its arm over lawful and reasonable public protest or industrial action. I think that we are dealing with a significant point. Others have expressed the view that the proposals do not change the existing defence but I think that they do.

The Government's amendment 378 is designed to deal with a perceived anomaly in the definition of breach of the peace, following the recent decision of the appeal court in Harris v HMA. Effectively, the amendment provides a statutory basis for breach of the peace, which I think is the wrong direction to go in. Breach of the peace is an ancient and useful measure. Its flexibility will be damaged if it is put on a statutory basis. I also note that there has been little consultation on the proposal. It would be preferable to deal with the consequences of the appeal court's decision by amending the law in a much more minor way so that it reverts to what the situation was thought to be before. Kenny MacAskill mentioned the Young v Heatly case, which I recall from my student days and which set the right tone. If I recall correctly, it was something to do with a headmaster making inappropriate suggestions to a pupil and the pupil not being upset but the public possibly being outraged.

My amendment 544 attempts to do what I have suggested by saying that

"A person's behaviour may constitute a breach of the peace".

The amendment is intended to restore flexibility to the courts. I readily accept that I may not have got the phraseology right, but the amendment is a reasonable stab at it, and it echoes the Government's amendment. The distinctions that the cabinet secretary made do not stand up. If we get things slightly wrong, it is easier to correct them at stage 3 than to fiddle about with a significant and complicated amendment such as amendment 378, which tries to start from scratch and put the whole issue on a statutory basis. The committee has been concerned about doing that in other areas and about any unintended

consequences. Against that background, I stand by my position on the amendments.

10:30

Stewart Maxwell: I entirely agree with Robert Brown's comments on amendment 400 and the role of the Crown Office, so I will not repeat his arguments.

In relation to amendment 402, on the offence of stalking, the cabinet secretary and others are correct that there was a great deal of sympathy for the position that was laid out by witnesses, especially Ann Moulds. The issue is not whether we agree with the intention but whether the amendments, or some combination of them, achieve what they set out to achieve. There is some doubt about that. I do not know whether Rhoda Grant would agree, but the best course of action might be for her not to move amendment 402, and for us to have further discussions on amendment 402 and the other amendments, with a view to re-engaging at stage 3. There is an opportunity between stages 2 and 3 for us to try to incorporate Rhoda Grant's specific points—with which I have a great deal of sympathy—into the wider amendment 378. At the moment, there is some confusion and doubt about how the amendments would operate, whether together or independently. My preference at this stage would be for Rhoda Grant not to move amendment 402 and for the committee to revisit the issue at stage 3, perhaps after further discussions with the cabinet secretary and officials. Although a valid point is being made here, at this stage I am not entirely convinced about which route would provide the correct detail that should be inserted into the bill in order to deal with the problem that the amendments seek to address.

Robert Brown's amendment 402A is unnecessary. I do not agree with his comments on subsection 6(e) of the new section that amendment 402 would introduce, in relation to place of work or business. I am not sure that I follow his logic about why that would be a threat to legitimate trade union activity.

In relation to amendment 544, I have some sympathy with Robert Brown's argument about the flexibility that breach of the peace gives, as opposed to laying everything out in statute. We are perhaps at a difficult point. If we leave things as they are there is clearly a problem. I am not sure that amendment 544 will achieve what it sets out to achieve, which is to return to a position of flexibility. There is some doubt about that, which is why I am minded to support the statutory route. While I agree in principle with what Robert Brown is saying, I do not think that he will achieve his aims with amendment 544.

James Kelly (Glasgow Rutherglen) (Lab): I support Rhoda Grant's amendments. She has put her case well and I pay tribute to her for the amount of work that she has done to get the amendments to this stage. It is clear from evidence to the committee that stalking causes a lot of distress throughout Scotland, and she is correct to try to bring a specific offence of stalking into statute. The effect would be to protect a greater number of people in communities throughout Scotland. From that point of view, amendment 402 is positive.

In relation to Robert Brown's amendment 402A, I am not totally convinced by the points that he made about the rights of trade unionists. I am not convinced that the amendment would add anything to Rhoda Grant's amendment 402.

I note the intent of amendment 378, which is more wide ranging than Rhoda Grant's amendment 402 and which would address many concerns about threatening and aggressive behaviour. Amendment 378 is well intentioned and would deal with specific crimes such as domestic abuse. However, members have had representations from several organisations raising concerns about the way in which the amendment has been drafted and its wide-ranging nature. It would be wise to reflect on those submissions and consider whether the amendment could be redrafted for stage 3.

Stage 3 would also be an appropriate time at which to take on board Robert Brown's comments about his amendment 544. Two different avenues are available to us in trying to achieve the same thing. Further discussion might produce a more tightly worded amendment that has broader support.

Nigel Don (North East Scotland) (SNP): I will briefly address amendment 378. As James Kelly noted, we have received several submissions on the issue. I do not buy them lock, stock and barrel, but there are important points in them. First, nowhere does the proposed new section describe the mischief that it seeks to address. That makes it wide ranging, so the court would be looking for any behaviour that happened to fit within the words. I wonder whether that is appropriate. Perhaps the provision should be drafted to address stalking specifically, if that is the intention, and any other issues that it is intended to address specifically. Obviously, that cannot be done now—it would be a stage 3 addition. I am slightly concerned that amendment 378 is too wide ranging and that the court and the Crown would get no inkling as to where the limits were intended to be.

Secondly, and perhaps more importantly, amendment 378 might make it difficult to say uncomfortable things in public. We as MSPs will

appreciate this point. I go back to my days as a councillor, when I once had to address a public meeting on a local housing issue. The folk in the area did not particularly want to hear what I had to say to them, but I could make the points perfectly reasonably and the perfectly reasonable people in the room could hear them reasonably—they did not like what they heard, but they did not take offence. However, if a perfectly reasonable person in that meeting had been sitting next to somebody who was plainly agitated and had already made it clear that they were not happy with what was going to be said, it would perhaps have been reckless of me to say something, because that would have put the perfectly reasonable person in fear that the unreasonable person sitting next to them would react in a way that would be violent, aggressive or a breach of the peace.

By my reading, and that of others, that situation seems to be caught by the amendment. We would therefore find ourselves drifting in a situation in which the aggressive complainer could hold a public event to ransom. The fact that somebody might get cross about something could prevent people from saying things that were perfectly reasonable for anybody else to hear. I am deliberately pushing the situation to the limit to make the point that amendment 378 might be a little too wide ranging and might have unintended consequences. Am I happy that the Crown, the police and the courts can sort out such matters? Yes, but I am conscious that we are considering creating law whose boundaries would not be defined in the bill, and I think that the police, the Crown and the courts could do with a little more guidance on what we are trying to achieve.

The Convener: The series of amendments that Rhoda Grant, the Government and Robert Brown have lodged seeks to build on the protection that is given—largely to women—under the 1995 act. The case for all the amendments is arguable and they have merit.

As members know, my preference for all law is simplicity. To my mind, the catch-all offence of breach of the peace covers such offences. However, like other members, I have been persuaded by the evidence that we have heard that a change in the law is needed.

If we work from the premise that we should do something, it is clear that we must consider what is the best approach. First, we have amendments from Rhoda Grant on non-harassment orders, which would strengthen section 234A of the 1995 act. Amendments 400, 401 and 399 have considerable merit, but I am not persuaded that they are needed, given what the cabinet secretary said. In many cases, it will be entirely appropriate to apply for and make a non-harassment order, but I see dangers in having a blanket requirement to do so.

I turn to the offence of stalking. Having agreed that we should do something, we need to examine Rhoda Grant's amendment as opposed to the Government's amendment, although I acknowledge that the amendments are not mutually exclusive. I revert again to my wish for simplicity. There are dangers, so we should keep matters as simple as possible—I have a track record on that.

Amendment 378, which the Government lodged, presents possible dangers about which I have serious concerns and on which I will require reassurance at some stage. Subsection (1) of the new section defines the crime by how a reasonable person would interpret the behaviour that is complained of. I have no difficulty with that concept, which is much used in Scottish civil and criminal law. However, subsection (2) is a little less firm than I would prefer. It should require the conditions in both paragraphs (a) and (b), as opposed to either the condition in paragraph (a) or the one in paragraph (b), to be met. That would be a reasonable requirement.

My principal concerns are with subsection (3), which renders an accused person guilty of an offence when no alarm is caused and when nobody is even aware of the accused person's conduct. I appreciate the difficulties that the present law causes, but what is proposed is not the way forward. I have not been persuaded that the wording in subsection (3) is apposite. I have every confidence in our police and prosecutors, but to legislate in respect of acts in private that do not cause fear, alarm or distress is a little idiosyncratic. I know that amendment 378 is well intended, but I am a little concerned that its terms could cause difficulty.

It is ironic that Rhoda Grant's amendment 402 falls into the trap of seeking to define the conduct. In normal circumstances, that is a little bit dangerous. By their nature, such definitions cannot be exhaustive and we could leave ourselves open to challenge. I would be particularly grateful if, in summing up, Rhoda Grant gave the source of that wording. I am minded to support the amendment, but I seek that reassurance.

Robert Brown's amendment 402A is well thought out and was extremely well argued. A thin balance is involved and he has properly identified potential dangers. However, on balance, I am not persuaded, although I recognise the validity of the argument.

The matter is complex and important and the debate has been good.

10:45

Rhoda Grant: I have listened carefully to what committee members and the cabinet secretary have said. On reflection, given the concerns about amendments 399, 400 and 401, I seek leave to withdraw amendment 399 and will not move amendments 400 and 401. I will reflect further on those issues and will perhaps bring back the amendments at stage 3, but I understand that there are genuine concerns around them.

Several concerns were raised about substantive amendment 402. Robert Brown mentioned the proposed defences, which I think are quite robust; it would be for the court to decide whether a behaviour is reasonable. Stalking is by its nature made up of behaviours that are not in themselves illegal and indeed can be quite innocent. A defence of reasonableness would need to be left in for the courts to consider.

The cabinet secretary made clear his view that my amendment and his amendment are the same, but I am equally clear that they are not. They are quite different. It will be difficult for the cabinet secretary to rectify the problems that arise from the Harris v HMA case if he does not deal precisely with stalking. The nature of stalking means that we need a very clear law that makes it an offence.

Bill Aitken mentioned the definition of stalking. Amendment 402 makes clear that the list of behaviours is not exhaustive. If we included an exhaustive list, a stalker would immediately find a way round it. In their evidence to the committee, the police discussed the benefits of having a list of behaviours. Such a list would enable them to identify more easily the type of behaviour that makes up stalking, to begin a prosecution and to help witnesses much earlier.

It is therefore right to have a definition, as is the case in Australia and America. We have heard examples of how the law works better in those places than it does in England and Wales. The list is not exhaustive but merely gives examples of that type of behaviour.

Given that the amendments are so different, I intend to press amendment 402, because it is important. If the Government has concerns about any aspect, it could make small amendments at stage 3, but we need a crime of stalking. The committee needs to send out a clear signal that such behaviour is totally unacceptable, and I ask it to support amendment 402.

The Convener: I should have given the cabinet secretary another bite at the cherry. Do you have anything to say?

Kenny MacAskill: I have listened to the committee's comments, and I think that Stewart Maxwell's suggestion is appropriate. We understand the committee's desire to address the situation, and it appears that there are two matters to be dealt with. The Harris v HMA case requires to be addressed; I say to Robert Brown that, in the view of the Crown and of many legal practitioners, the offence of breach of the peace will remain and the common law will still be in place. Indeed, there may be further High Court matters that relate to the issue.

Rhoda Grant and the various campaigners are right to raise the issue of stalking. The Crown has offered good views on why one law is preferable to two, and we have to work out the concerns that the convener and others have raised. I am happy not to move amendment 378, to discuss those matters with Rhoda Grant and to come back at stage 3 with an amendment to address them. For clarity's sake, so that the law is understandable to all, it should be possible to corral the two issues together in one or two subsections.

I am happy to work with the Crown, which is not represented at today's meeting but which has a vested interest, and with Rhoda Grant, to find out whether we can reach a compromise. The general will of the committee is that we address the loophole created by the Harris v HMA case and that the bill should specifically mention stalking. The Government believes that less law is better, so it would probably be better to have one amendment rather than two.

The Convener: That is a constructive contribution.

Amendment 399, by agreement, withdrawn.

Amendments 400 and 401 not moved.

The Convener: Amendment 5, in the name of Rhoda Grant, is grouped with amendments 6 and 7.

Rhoda Grant: A non-harassment order is an order that gives a victim protection from further abuse. The order comes with powers of arrest, and breach of the order is a criminal offence. The purpose of amendments 5 to 7 is to place it beyond doubt that evidence of a course of conduct is not required before a criminal court can grant a non-harassment order. For a course of conduct to be shown, there must be a conviction, which requires there to have been conduct on at least two occasions that has caused harassment. Currently, a procurator fiscal can apply for a non-harassment order where the accused has been convicted of an offence or offences involving a course of conduct of harassment. However, normally the prosecution focuses on one incident of criminal behaviour, which means that it is unlikely that the conviction will amount to a course of conduct.

In the case of domestic violence, getting evidence of one incident is difficult, because the behaviour tends to occur away from witnesses and is difficult to corroborate. Victims may also try to hide their abuse, as they feel shame and a degree of responsibility for what has happened to them. For that reason, victims seldom make complaints. However, when a victim provides the authorities with proof of their abuse, it is important that protection from future abuse is provided.

The bill seeks to address the issue by proposing that previous convictions may be taken into account to prove the course of conduct that is needed to secure a non-harassment order. The policy memorandum states that the Government's aim is that evidence of a course of a conduct should not be required. However, I fear that that is not made clear in the bill and that a victim may still have to wait until their abuser has been successfully convicted of more than one offence before the prosecutor can seek a protection order on their behalf.

As the purpose of a non-harassment order is to protect a victim against future abuse, one incident should be sufficient for us to consider whether there is a risk of future harm. A victim should not be abused twice before the state steps in to protect them. My amendments make it clear that a non-harassment order should be granted after one conviction for a single offence.

I move amendment 5.

Kenny MacAskill: We fully understand Rhoda Grant's sentiments. However, section 15 already provides that a non-harassment order may be made after a conviction for a single offence. Ms Grant's amendments do not alter the overall effect of the section in any way, so we ask her to withdraw or not move them on the basis that they are not necessary.

The Convener: Amendment 5 is entirely meritorious, but I question its necessity, given the other provisions in the bill.

Rhoda Grant: I seek leave to withdraw amendment 5, as the cabinet secretary has given the reassurance that I sought. He has indicated that evidence of a course of conduct is not required before a non-harassment order may be granted. It is important to have that on the record and to remove any doubt, as the bill is not totally clear on the matter. I am grateful to the cabinet secretary for the reassurance that he has given.

Amendment 5, by agreement, withdrawn.

Amendments 6 and 7 not moved.

Section 15 agreed to.

Section 16 agreed to.

Section 17—Presumption against short period of imprisonment or detention

The Convener: Amendment 100, in the name of Robert Brown, is grouped with amendments 101, 388, 1, 392 and 393.

Robert Brown: Section 17 is one of the most important sections in the bill. I will deal with it at two levels: the principle and the practicalities. In principle, the policy intention of section 17 is not just right, founded solidly on professional evidence and recommended by the McLeish commission and by many other practitioners in the field, but vital if Scotland is to protect victims of crime in the most appropriate way—by reducing the risk of the crime happening in the first place and the risk of recurrence.

It is right that there should be not a bar on, but rather a presumption against, short-term sentences. Despite popular mythology, short-term sentences do not work. In the vast majority of instances, they do not deter criminals. If they do, why are an incredible 91 per cent of inmates at HM YOI Polmont there for a second or subsequent time?

Short-term sentences do not protect the public, except by offering a short period of relief from criminality. I do not underrate the value of that, but, nevertheless, it is limited. The sentences are short and the vast bulk of those who serve them come out more hardened and more likely to reoffend than they were when they went in.

Short-term sentences do not begin to tackle the causes of offending, which are often rooted in bad parenting, neglect, lack of bonding, illiteracy, lack of skills, unemployability, drug or alcohol addiction and, too often, mental health problems. How could such things be tackled in a short period in prison? Instead, short-term sentences put a lot of bad boys—it is mostly boys—together. They separate them from their families, which I admit is not always a bad thing, and render their chances of current or future employment negligible.

Short-term sentences do not provide reparation to the victim in the way that a compensation order or a community payback order can. In short, it is doubtful whether, for most offenders, short-term sentences fulfil any of the classic functions of sentencing. I wonder whether the committee recalls the evidence of Dr Sarah Armstrong of the University of Glasgow that

"short prison stays are not only ineffective but criminogenic."—[*Official Report, Justice Committee*, 2 June 2009; c 2018.]

I had not heard the word "criminogenic" before, but I think that we understand what Dr Armstrong was getting at.

I turn to the practicalities of the Government's proposals. It is an absolute requirement that the reduction in short-term sentences has public confidence. That means that an increased number of timely and effective community sentences must be available, along with the add-on of action on unemployability, addiction and various other problems, which the bill rightly emphasises and which we have supported in previous sections.

My amendment 100 and its consequential amendment 101 would reduce the period in the presumption against short-term sentences from six months to three months. That is for two reasons. The first is that although any period is arbitrary, the spread of crimes that receive sentences of under three months looks pretty much like the spread of crimes that receive other, non-custodial disposals and the spread of crimes that receive three-to-six-month sentences tend to look rather more like the spread of crimes that receive longer sentences. There has been a certain amount of comment about the sort of people who would be affected by the arrangements.

The second reason is that the reduction to three months would make the whole system more manageable and affordable by reducing the number of cases involved. Given the financial pressures and the need to bed in the new arrangements successfully, such a change would be helpful.

Amendment 388 is intended to make central the numbers affected and the linked funding. Public confidence in the system is vital. The Government must demonstrate publicly and specifically, before bringing section 17 into effect, that it has a clear handle on the numbers, that the additional cases requiring community service orders will be funded and that community justice authorities have the capacity to deliver the goods.

I am grateful to the Government for the additional funding that it has provided to improve existing community orders. That funding is manifestly having an effect, but we know that the quality of orders is patchy across the country. We know, too, that reoffending rates will be lower with the most effective interventions and that the additional orders consequential on section 17 will need yet more funding in what we know are stringent financial times. The Government should be clear that the improvement funding cannot be double counted to pay for the increased number of community sentences, too.

Amendments 392 and 393 are consequential on amendment 388.

It follows that I urge the committee to reject Richard Baker's amendment 1, both for the obvious reason that I think that it is wrong in principle and flies in the face of common sense, and because it is clear that it is likely that there will be a parliamentary majority for some form of amended section 17. Among other things it is the committee's job to reflect that reality to ensure that section 17 passes into law in the most effective fashion and after the most detailed of scrutiny.

I move amendment 100.

11:00

Richard Baker (North East Scotland) (Lab): The proposal for a legislative presumption against custodial sentences of six months and under has been a focus for debate. My amendment 1 seeks to give effect to the conclusion in the committee's report that the proposal should not proceed. I am grateful for the convener's support for my amendment; he has previously highlighted some of the key concerns about this ill-judged proposal.

I am confident that our judiciary already seeks to use imprisonment as a last resort and only in cases in which the offence has been serious. For more minor offences, such as fine defaulting, we have already seen great reductions in the number of offenders receiving custodial sentences. The presumption will create an unnecessary bureaucracy by having courts provide reasons for imposing sentences of six months or under, which will delay court processes, but it is not just about that. The policy drive that was first outlined in the Scottish National Party's 2007 manifesto was clear that in all but the most exceptional circumstances such custodial sentences would no longer apply.

Ministers have made it clear that the proposal is an arbitrary measure to reduce the prison population and to make savings on that basis, but the cabinet secretary's officials made it clear to the Finance Committee that the proposal would not produce savings in the prison estate because the infrastructure would need to be maintained. The crucial issue is that the interests of justice must be paramount; therefore, sentences should be based on what is just and appropriate, not simply on prison capacity. To do otherwise is not to serve the victims of crime.

The presumption applies not only to minor but to serious offences. It would apply to 40 per cent of those convicted of indecent assault, to 88 per cent of those convicted of crimes of dishonesty and, particularly seriously in our view, to two thirds of those convicted of knife carrying. In its evidence, Scottish Women's Aid highlighted that the presumption could

"have a negative impact on women, children and young people experiencing domestic abuse."

When I quizzed the First Minister on the matter, he said that serious crimes should receive longer sentences, but that is to seriously misrepresent the presumption. There is no proposal that such

offenders should receive longer sentences; there is a proposal only that there should be a presumption against their serving any custodial sentence. That is what the Government's plans arbitrarily to reduce the prison population are all about.

The argument is made that those who go to jail are more likely to reoffend—Robert Brown made that argument again today—but the unfortunate reality is that by the time that an offender receives a custodial sentence they will normally have received numerous different disposals for other offences. They are, by definition, a repeat offender by the time that they go into prison. Even those who agree with the presumption point out that it must be accompanied by increased investment in more effective community sentences. Instead we have seen cuts in funding to those organisations with expertise in addressing reoffending, the Scottish Government has vetoed the establishment of the community court in Glasgow, and we believe that there is a funding gap of tens of millions of pounds in the Government's plans, which will demand thousands of additional community sentences.

Despite Robert Brown's support for the Scottish Government's general approach, his amendment 388 and related amendments, and his amendment 102 in the next group, highlight the awareness that the extra investment in robust community sentences that is needed to give any logic to the proposal is simply not there. Indeed, it is from information revealed to Robert Brown that we know that only a fraction of community sentences start within the target period of seven days. We also know that, under the current Government, a third of community sentences are being breached. I simply do not recognise the improvement to which Robert Brown referred. The paucity of robust alternatives to custodial sentences under the current Government means that the proposal is not only nonsensical, but detrimental to community safety and certainly to the justice system. The same principles apply to Robert Brown's proposal to change the presumption to one against custodial sentences of three months and under. For example, it would cover 28 per cent of those convicted of indecent assault, over half of those convicted of crimes of dishonesty, and a third of those convicted of knife carrying. We will oppose amendments 100 and 101 and, on the basis that we seek to remove section 17, we will oppose Robert Brown's amendment 102 in the next group.

Angela Constance (Livingston) (SNP): I cannot support the detail of Robert Brown's amendments 100 and 101, but I support in principle his logic in eloquently arguing against short-term sentences. I say with respect that amendments 100 and 101 are somewhat too cautious, although they are preferable to the status quo.

The presumption against short periods of imprisonment or detention is bold and radical, and the matter has provoked considerable debate, but we need to grasp the nettle. Of course, the Government and members of the committee are clear that those who have committed crimes against people should be imprisoned, arguably for much longer than six months, but politicians have a responsibility to show leadership in the debate, which must be progressed in a rational and calm manner, rather than by blatant tabloid politicking. We will make our communities safer only when we have the courage and conviction to implement what actually works.

Members are entitled to focus on finances, but my experience of individuals and organisations working in the field to implement community sentencing is that they say that there has been much improvement in delivery times. I do not think that, on the cabinet secretary's watch, people have waited nine months to have community sentences implemented. Finances are important, and the cabinet secretary will no doubt have something to say about them, but organisations that represent the social work profession seem to be up for the change. I have not heard any substantial organisation that works in the field arguing against the presumption against six-month sentences on the basis that we cannot aspire to deliver something better in terms of community sentencing.

I stress the importance of leadership and having courage. If we want to make communities safer, we must focus first and foremost on what actually works to deliver that.

James Kelly: I support amendment 1 and oppose amendments 100, 101 and 388.

One of the arguments that is used by those who argue for a presumption against short-term sentences relates to the level of reoffending by people who have left prison. I acknowledge that that is an issue that needs to be addressed and that we cannot run away from it, but I do not accept the argument that someone who has reoffended should not be sent to jail, but should be given a community sentence instead. I still think that prison is an adequate punishment in appropriate circumstances. There is a public safety issue. Individuals who have committed indecent assault or domestic abuse crimes or have carried a knife are a threat to the public, and there is a strong case for sending them to prison as opposed to giving them community sentences.

The challenge for the Government and for all political parties is to consider how we can make prison work better. We need to consider

organisations such as the Wise Group, which has done much effective work through life coaches to try to ensure that people who leave prison go into more stable situations and do not reoffend.

There are serious questions to do with the funding of community payback orders. I support the principle of community sentences, which have an appropriate role to play, but the policy of a presumption against short-term sentences will result in an increase in community sentences and the financial memorandum is a little unclear about the extent to which that will happen. I asked officials about that when they gave evidence to the Finance Committee, but they did not seem to have a grasp of the details. Discussions that have taken place since then have not convinced me that officials have an appropriate handle on the issue. The increase in community sentences that would result from the bill could result in increased costs of up to £20 million per year over a three-year period. There is potentially a £60 million black hole.

In all, there is an issue about the policy of a presumption against short-term sentences, and community sentences are not funded appropriately. I support amendment 1 and oppose the other amendments in the group.

Kenny MacAskill: The presumption against custodial sentences of six months or less has been the subject of some debate and attacks by parts of the Opposition. We do not doubt that members' motivation, like that of the Scottish Government, is to make our communities safer, but members have not been clear about why they oppose our proposals and what they would do instead.

Our approach is plain. We will make Scotland safer by making low-level criminals face up to the challenge of turning round their behaviour and repaying their communities for the damage that they have done. That is better than the alternative of a short custodial sentence, for reasons that the Justice Committee set out clearly in its stage 1 report. Custodial sentences of six months or less do not work and do not stop offending behaviour. The figures show that three quarters of people who are released from short sentences go on to reoffend within two years of getting out, whereas, in contrast, three out of five people who are sentenced to community punishment do not go on to reoffend over the same period.

There will be some cases in which a court decides that a short custodial sentence is the only appropriate option. If we were proposing to prevent courts from imposing such sentences in those cases, the Opposition's criticism might be right, but we are not making such a proposal. Courts will still be able to use their discretion, and there will be no statutory bar. The sentence will remain a matter for the presiding sheriff.

Our policy is exactly in line with the unanimous view of the Justice Committee. Short sentences will not make Scotland safer, but in some cases they cannot be avoided. The bill reflects that unanimous view by presuming against use of short sentences but allowing for their use when that is needed. That is why our proposal is the right proposal and the right way to make Scotland safer.

Amendments 100 and 101, in the name of Robert Brown, support the principle of a presumption against short custodial sentences. Indeed, the "Pocket Guide to Scottish Liberal Democrat Policies", which was published last month, acknowledges:

"there is clear evidence that very short prison sentences simply reinforce offending behaviour."

The document goes on to say that the Liberal Democrats in Scotland will

"end the 'revolving door' prison system by replacing very short sentences, which are ineffective and expensive, with tough community penalties where offenders can pay back the communities they have harmed."

The main area on which we appear to differ is the period to be specified in that presumption—although we would not know that from the Scottish Liberal Democrats' policy guide, in which no cut-off point is specified. Robert Brown's amendments would set the cut-off point at three months, but we remain unconvinced of the wisdom of such an approach. The offences for which prisoners receive a sentence of three months or less are not significantly different from the offences that receive sentences of six months or less. Most sentences of six months or less are given for a small group of offences, of which the most common are shoplifting, breach of the peace, breaches of bail or social work orders, common assault and handling of an offensive weapon. Those are also the most common crimes in the list of offences that receive a sentence of three months or less.

11:15

We believe that we can achieve more if we have the courage of our convictions now to create a presumption against sentences of six months or less. The backstop will be the same, irrespective of which option we choose, because judicial discretion will remain intact. Sentencers will still be able to impose a custodial sentence, in either scenario, if they consider that the circumstances of the case leave them no alternative.

If we are to make a difference, we must seize the opportunity before us. We will make Scotland safer by making low-level criminals face up to

what they have done, change their offending behaviour and pay back to their communities for the harm that they have inflicted. That makes far more sense than the alternative of a short custodial sentence, for reasons that the committee set out clearly in its stage 1 report. Custodial sentences of six months or less do not work and do not stop offending behaviour. The evidence does not suggest that changing to a presumption against sentences of three months or less would make the provision any more effective or have any better impact on reoffending.

We do not accept that there is anything to be achieved by delaying the commencement of section 17, as proposed by amendment 388. That amendment seeks to provide that the presumption may not be brought into effect until the Scottish ministers lay before the Parliament a report setting out the expected impact of the presumption in terms of the reduction in the number of prison sentences, the increase in the number of community payback orders, the increase in the costs for local authorities and the additional funding that will be provided to meet the expected pressures on local authorities.

The financial memorandum already sets out in some detail our costings for a range of increases in the number of community payback orders. We have repeatedly made it clear that we expect most of the increase to come from a change in judges' sentencing patterns, with reduced use of short prison sentences offset by an increased use of the community payback order.

We have already said that, in 2010-11, £6 million more will be provided to support improved service delivery of community penalties and to resource the initial increase in community payback orders. We have said that that will be baselined, which will ensure that at least current funding levels for community penalties will be the top priority when decisions are taken for 2011-12. We have said that we will monitor increases in uptake very closely and work with local authorities to assess the need for additional funding. In the absence of clarity about the likely total Scottish budget from 2011-12 onwards, it would be difficult to do more. I urge members to resist amendment 388.

Amendments 392 and 393 would ensure that the Scottish ministers could not commence section 17 using the normal procedure but would need to lay an affirmative order on which the Parliament would be required to vote. If the Parliament agrees to section 17, what would be the point of requiring another vote at the point of commencement? We urge the committee to resist amendments 392 and 393.

I ask the member to withdraw amendment 100.

The Convener: I call Robert Brown to wind up the debate and to press or withdraw amendment 100.

Robert Brown: I am bound to say that there has not exactly been a meeting of minds in the debate. I am somewhat disappointed by the cabinet secretary's response to what were intended to be helpful amendments, around which I think that the Parliament could to some degree coalesce. The debate has perhaps had some of the overtones of debates once seen on abortion, in which there were no doubt good views on either side that never seemed to meet in the middle.

This is an important debate—no one around the table disputes that—and it is important that we get it right, given the need for public confidence in the system that I emphasised earlier. Against that background, it is particularly disappointing that, although the cabinet secretary talked about baselining existing funding to improve the current system, he did not deal with the resourcing of the increased number of community sentence orders, on which the whole of section 17 is postulated. That is a central point on which the SNP Government needs to engage more than it has done so far.

I found it interesting that the cabinet secretary endeavoured to cast doubt on the Liberal Democrat position on the issue, but there has never been any doubt about our position. We support a reduction in the use of short-term sentences, and we have always said that three months is the appropriate period. One good reason why that is a good idea in the context of this debate is that such a policy would, broadly speaking, halve the number of additional community sentences that would be required. Whether or not three months was a lead-in to a longer period or an end position in its own right, the same argument prevails.

On the other side of the argument, Labour members have made very little attempt to engage with the key debate. What works? Does prison work or does it not? If prison works, in what way does it work? No speaker today has demonstrated that prison does the trick other than in the limited terms that I conceded at the outset: removing malefactors from the community for a few weeks, a couple of months or whatever gives people an element of relief.

There is also a degree of contradiction in the argument. On the one hand, there are many platitudes about how community service orders are a good thing that we all support. On the other hand, there is no commitment to say, "Okay, if that is the case, what are the mechanisms that would bring about a greater use of community service orders in an effective fashion without risk to the public, about which people are concerned?" My

amendments in the group were designed to deal with that. Angela Constance made the good point that social workers are up for change in this respect, as are many other professionals.

I concede one point, which is Richard Baker's point on prison numbers. It is clear from all the evidence that the proposed changes to section 17 will not lead to any significant savings in the prison budget. Given the level of overcrowding, that is certainly the case in the short to medium term. Of course, overcrowding is a major reason behind the McLeish commission's recommendation to do something about short-term sentences. Overcrowding impacts not only on those on short-term sentences, but on our ability to resource and deal properly with those on longer sentences who represent a much more serious threat to the public.

I readily accept that this is not entirely a black-and-white issue. That said, as a committee, we ought to proceed—as we have done in the past—on the basis of what the research and other professional evidence has shown to work. The reality is: short-term sentences do not work. We should proceed on the principle that the right approach is to do something better—in this case, community sentences—and then to look at the detail of what takes place. I warn the Government that, if the matter is to be taken forward effectively, it must engage with those who are broadly on its side of the argument. It will have to do that if the proposition that it puts to the Parliament is to command the consent of the chamber. I will press amendment 100.

The Convener: The question is, that amendment 100 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 100 disagreed to.

Amendment 101 not moved.

Amendment 388 moved—[Robert Brown].

The Convener: The question is, that amendment 388 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 388 disagreed to.

Amendment 1 moved—[Richard Baker].

The Convener: The question is, that amendment 1 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.

I use my casting vote in favour of the amendment.

Amendment 1 agreed to.

The Convener: Given the controversial nature of the matter, I will give my reasons for using my casting vote for the amendment. I agree with Robert Brown that the debate is important. Although there was no meeting of minds, the debate was carried out in an appropriate and measured manner.

I support Richard Baker's amendment 1 and oppose the Government stance on amendment 1 for two reasons. First, the Government does not seem to appreciate the existing presumption against such sentences. Richard Baker referred to that. No judge in Scotland, at whatever level, will impose a prison sentence if there is any possible alternative. Depriving someone of their liberty is a terrible thing to do; it is never done readily or easily. Secondly, as we know, the vast majority of

summary cases are disposed of by monetary penalty.

The cases that are likely to be dealt with through custody are fairly serious, for example the drunk driver with four or five convictions who drives while disqualified; the person who has been found guilty of domestic violence, with previous convictions; the person who has been convicted of minor crimes of dishonesty 30 or 40 times; and the small-time drug dealer. To my mind, all those cases deserve appropriate custodial sentences. Although I accept the cabinet secretary's argument that the provisions as they stand would not preclude that, they seek to inhibit it.

If the community payback orders are to work as we all hope that they will—and we will do everything possible to support them—there will require to be a custodial alternative to persuade the offender that, if he does not mend his ways, custody is likely. The bill's proposals, prior to amendment 1 being agreed to, removed that deterrent.

After section 17

The Convener: Amendment 102, in the name of Robert Brown, is in a group on its own.

Robert Brown: I will not dwell on the amendment in detail. It provides a useful requirement on the Government to produce a report on how well sections 14 and 17, on community payback orders and—when the provisions are agreed to—short-term sentences, are working.

Five years is a reasonable time over which to gauge how those important changes are working, where they might be deficient and whether they could go further. The public might regard that as useful further reassurance that we have got these reforms right, and such a requirement is a further exercise in accountability.

Cathie Craigie might recall that we did something similar with the changes to the right to buy when we were on the Social Justice Committee, and those measures provided a useful lever for reconsidering the policy and effects at a later stage, after things had developed.

I move amendment 102.

The Convener: I have often felt that the Parliament, under Governments of either persuasion, has been sadly remiss in not revisiting the effects of our legislation. There are merits to Robert Brown's arguments.

Kenny MacAskill: As Robert Brown said, amendment 102 seeks to introduce a further reporting requirement that, within five years of sections 14 and 17 coming into force,

"The Scottish Ministers must ... lay before the Scottish Parliament and publish a report on the operation of those sections."

Such a report must

"include an assessment of whether and to what extent those sections, individually or collectively, have—

(a) reduced offending,

(b) increased public safety."

Five years is a long time hence. We think that we should instead focus on getting good-quality performance information on the impact of the community payback order in the short term. In responding to amendment 99, on the community payback order, we offered to write to the committee, setting out our programme of work in that regard. We are happy to undertake to continue to keep the committee abreast of developments. We invite the member to withdraw amendment 102.

Robert Brown: The assurances that the cabinet secretary has given are useful, but they do not offset the need and desire for a report. Therefore, I press the amendment.

The Convener: The question is, that amendment 102 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)

Against

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 2, Against 3, Abstentions 3.

Amendment 102 disagreed to.

The Convener: The amendment falls, despite my best efforts.

Section 18 agreed to.

Schedule 2 agreed to.

Sections 19 and 20 agreed to.

After section 20

The Convener: Amendment 103, in the name of Bill Wilson, is in a group on its own. I welcome Bill Wilson to the committee.

Bill Wilson (West of Scotland) (SNP): Amendment 103 allows judges to order independent inquiries into an organisation's finances, following that organisation's conviction. It also provides a sequence of priority for the payment of money to the court. That sequence is: a compensation order—that is, victims' compensation; the repayment of the cost of the report, as it is my intention that the convicted company could be charged for the cost of the report; and the payment of any fine.

11:30

I will clarify one thing before I say anything else. At the start of this parliamentary session I lodged a proposal for a member's bill, which contained one part on equity fines and one part on background reports. I am aware that there is slight confusion about my proposal, which I have split. This amendment is separate from my proposal on equity fines, which is going ahead as part of my member's bill. When I ran the consultation on my original member's bill, which included the two parts, I consulted on both what is now the member's bill and this proposal on background reports. I consulted a wide range of organisations and received responses from academic experts, trade unions, campaigning organisations and the Confederation of British Industry. All the responses that I received either did not mention background reports or expressed unequivocal support for background reports. No organisation expressed any opposition to the idea of background reports.

Moreover, company background inquiry reports were recommended by the Scottish Executive's expert group on corporate homicide in 2005 and by the English Sentencing Advisory Panel in its consultation paper on corporate manslaughter and corporate homicide. There is also a body of academic work that supports the principle of background reports—for example, "Sentencing the corporate offender: Legal and social Issues" by Croall and Ross, 2002, and "Sentencing and Society: International Perspectives" by N Hutton and C Tata, 2002. There is a solid body of evidence in favour of company background reports.

It strikes me as ridiculous that we rely on convicted companies to provide the reports that will influence the level of fine. That is the equivalent of a judge sternly wagging his finger at a convicted housebreaker and saying in a severe, if not downright angry, tone, "You are a terribly naughty fellow. Now, please tell me how big a fine you can afford to pay."

I move amendment 103.

The Convener: Thank you for that amusing presentation. Do any other members want to say anything?

Bill Butler (Glasgow Anniesland) (Lab): Just that I think that the amendment makes good common sense and is worthy of support. It would prevent the ludicrous, albeit exaggerated, situation that Dr Wilson cited in support of this most necessary and timely reform.

Kenny MacAskill: We are grateful to Dr Bill Wilson for lodging amendment 103 and agree with Bill Butler's comments. We are aware that there is a public perception that convicted organisations currently have only minimal fines imposed on them, which are not sufficient to act as an effective deterrent. That perception has, understandably, resulted in calls for further legislative changes to be made to ensure that courts are able to impose appropriate sentences.

The difficulty in practice is that, as Bill Wilson pointed out, courts often do not have sufficiently up-to-date information about the state of an organisation's financial health prior to sentencing. That issue was highlighted by the High Court in 2009, when the Crown appealed the level of a fine in a case that involved the death of a member of the public due to breaches of the Health and Safety at Work Act etc 1974. In its opinion, the High Court made it clear that the information that was provided to the sentencing judge at the original trial and, subsequently, to itself was less than might have been hoped for for sentencing purposes. The expert group on corporate homicide also illustrated the difficulties that courts face in relation to the issue in its 2005 report.

Not only is there a public perception that fines for convicted organisations are not sufficient; the courts and other experts have highlighted the fact that there is an issue that needs to be resolved. We are also pleased that amendment 103 will be, as far as possible, cost neutral to the criminal justice system. We therefore support the amendment.

Amendment 103 agreed to.

Sections 21 to 23 agreed to.

The Convener: As we are approximately halfway through this morning's proceedings, I propose that we take a short break.

11:34

Meeting suspended.

11:43

On resuming—

The Convener: I welcome to the meeting Trish Godman MSP, who has joined us for a discussion on amendments that we will get to later—I hope.

Section 24—Voluntary intoxication by alcohol: effect in sentencing

The Convener: Amendment 104, in the name of Robert Brown, is in a group on its own.

Robert Brown: Amendment 104 simply proposes that section 24 be deleted. In my view, the Government is trying to fiddle about with something that does not need fiddling about with. This provision is highly likely to have unintended consequences or will, at the very least, give enormous scope for legal wrangling over a matter that is already well understood by judges.

I have heard people say that defence lawyers are always claiming that their clients are very sorry but they did what they did under the influence of too much bevvy. In my time, I have been a prosecutor and a defence solicitor and I am pretty clear that, if the aim is to achieve a lesser sentence, such pleas, which are made not least by solicitors struggling to say anything useful about their clients, just will not wash with the magistrate or sheriff. Of course, even though it is not a mitigating factor—the mitigatory element is, I must say, one of the oddities in this whole matter—the fact that something needs to be done about an alcohol problem might well be relevant to the sentence. Certainly such information is vital for community orders or, for that matter, the prison concerned.

As we discussed at stage 1, section 24 might also cause problems with regard, for example, to genuine cases of people getting drunk in the face of bereavement or in other sympathetic circumstances and there is a risk that we might be entangling ourselves in an issue that I really do not think gives courts that much of a problem.

I move amendment 104.

Stewart Maxwell: I oppose amendment 104 on a number of grounds. First, Robert Brown is simply wrong to claim that the defence is not used by solicitors to get their clients off—it is. The amendment sends out entirely the wrong message about the use of alcohol and offences that are committed while under its influence. It is right and proper that we make it crystal clear that such behaviour is unacceptable.

Robert Brown's second point concerned mitigation when someone is bereaved, has taken alcohol and has subsequently been charged with an offence. The mitigation in such cases relates not to alcohol but to the fact that, due to bereavement, the person is suffering severe stress and upset. The member is wrong in fact when he claims that such circumstances could no longer be used as mitigation. The bill in no way prevents defence lawyers from offering them as mitigation or courts from taking them into account. For that reason, I oppose amendment 104.

11:45

Bill Butler: I support amendment 104. Robert Brown has made a good case. The provision that he seeks to remove is unnecessary and superfluous. We do not need it, as everything that is necessary is already in the mix.

The Convener: I have already indicated support for Robert Brown's amendment 104. Stewart Maxwell is correct to say that the fact that the conduct that has been complained about has been committed while under the influence of drink is brought to the court's attention in a number of cases, but it is never seen as a relevant plea in mitigation. As Robert Brown suggested, frequently the issue is brought to the court's attention to guide it—hopefully, from the accused's point of view—down the road of a probation order, with appropriate conditions relating to alcohol treatment. I cannot conceive of a court accepting as a mitigation the fact that an offence was committed under the influence of drink; in most instances, it would be regarded as an aggravation. That addresses the point that the Government makes. In my view, section 24 is unnecessary.

Kenny MacAskill: I agree entirely with Stewart Maxwell. Amendment 104 seeks to leave out section 24. The provision forms part of our comprehensive framework for action to rebalance Scotland's relationship with alcohol. We know that alcohol fuels much criminal offending. There is a strong link between alcohol misuse and offending, especially violent offending. In spite of the courts' understanding, there is evidence that time and time again voluntary intoxication is put before them as a mitigating factor. That happened throughout the 20 years during which I practised law; it has continued to happen during the 11 years since I left the practice of law.

In her evidence to the committee, the Lord Advocate said:

> "Day in, day out, notwithstanding the understanding that it does not mitigate, solicitors continue to put it before the courts in mitigation that their client would not have carried out the crime if sober. That is particularly prevalent as an excuse or as a form of mitigation in domestic abuse cases."—[*Official Report*, *Justice Committee*, 9 June 2009; c 2060.]

We do not accept that the provision in the bill would prevent the court from considering the underlying reason for an offender's intoxication as a mitigating factor—Stewart Maxwell referred to bereavement—although the intoxication itself cannot be a mitigating factor. We also do not accept that the provision implies that the position in respect of other forms of intoxication must be intended to be different. The key issue is the high level of offending that is associated with alcohol.

We invite the member to withdraw amendment 104 and to support the Lord Advocate and those in

our courts who, as she said, day in, day out have put before them the excuse that it was the drink that done it. The time has come to rebalance our relationship with alcohol, in the courts as well as outwith them.

Robert Brown: The cabinet secretary has entirely missed the point. As I indicated, solicitors may well present such information to the court, in mitigation or otherwise. The practice is particularly noticeable among more junior solicitors, when they first appear in court on such matters. That is entirely different from saying that the court takes notice of alcohol as a mitigatory factor. I would be extraordinarily surprised if any sheriff or magistrate in Scotland did that.

As the convener and I have indicated, the fact that someone has an alcohol problem or that there is some background of that sort is relevant and needs to be taken into account when consideration is given to what sentence should be imposed, as it might well be important information in that context. I just do not accept the suggestion that section 24 is part of the Government's broader strategy on alcohol, for which I would imagine that there is unanimous support among committee members.

Apart from any other considerations, it is an odd proposal to make. The provision in section 24 focuses on drink. Most of us know that drug taking is often put forward as a mitigatory factor, but section 24 does not deal with drugs. Why is drink singled out? One could make the case that drink is just one form of drug. It is an odd provision that does nothing to enhance the professional practice of the courts. It might make a difference to what solicitors put forward in court, but that is not the issue. The issue is what the courts do with such information when it is put forward. Section 24 is misconceived, so I will press amendment 104, which seeks to remove it from the bill.

The Convener: The question is, that amendment 104 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 104 agreed to.

After section 24

The Convener: Amendment 105, in the name of the minister, is grouped with amendment 184.

Kenny MacAskill: Amendment 105 provides that the Scottish ministers may, by affirmative order, make provision for the implementation of the European Union framework decision on the mutual recognition of judgments and probation decisions, including the modification of existing legislation, if required.

The framework decision provides for a person who has been sentenced to a community sentence or a suspended custodial sentence, or who has been released from custody on licence, in another EU member state to request a return to his or her home country and for the conditions that are attached to his or her sentence to be supervised in that country. The aims of the decision are improved rehabilitation and public protection. By taking the proposed enabling power, we will be able to make the necessary changes to Scots law to ensure that we can comply with the framework decision by the deadline of 2011.

Amendment 184 provides that any order that is made on the implementation of the EU framework decision must be made by affirmative order.

I move amendment 105.

Amendment 105 agreed to.

The Convener: Amendment 10, in the name of Richard Baker, is grouped with amendment 10A.

Richard Baker: Along with our concern about the proposal for a presumption against custodial sentences of six months or less, our other key concern has been about the absence from the bill of provision for the action that is required to tackle violent crime, in particular knife crime. We seek to remedy that through amendment 10, which would give effect to the proposal for a system of mandatory minimum sentences for knife carrying.

Scotland still suffers from rates of violent crime that are higher than those anywhere else in the United Kingdom, and knife crime remains at persistently high levels. Research by the Institute for Public Policy Research highlighted that violent crime accounted for 30 per cent of crime in Scotland but only 20 per cent of crime in England and Wales. In 2007-08, 8,989 offences of handling an offensive weapon were recorded by police. In 2008-09, there were only nine fewer such offences. Only 29 per cent of those who were convicted of such offences received a custodial sentence. Of course, if a presumption against custodial sentences of six months or less, or three months or less, continues to be pursued, even

fewer of those offenders will receive a custodial sentence. The cabinet secretary referred to the number of such sentences for knife offences when we discussed section 17.

We do not believe that the situation is appropriate. Given the persistently high levels of knife crime, we believe that the sentencing regime for knife carrying must change. That is why I propose a mandatory minimum custodial sentence of six months for knife carrying, except in exceptional circumstances. That would put knife offences on the same footing as firearms offences, which already carry a mandatory minimum sentence of five years' custody. Far more people in Scotland are killed with knives than with firearms. Last year, knives were responsible for 58 per cent of homicides in Scotland, which is the highest percentage ever recorded.

There has been debate about the cost of our proposal due to its impact on prison places. Robert Brown has said that it would cost £23 million. However, that presumes that the policy would have no deterrent effect, which we do not accept, and it needs to be balanced with other factors including the recent estimate that, last year, injuries resulting from knife crimes cost the national health service in Scotland £500 million. Furthermore, we do not accept the counsel of despair on the impact of prison. The argument is made that rehabilitation cannot take place in custody over that period, but we believe that that notion should be challenged and that greater efforts should be made to engage in rehabilitation in prison. Why should we accept the status quo, if that is what it is?

The other key fallacy in the debate has been the argument that those who carry knives legitimately—for example, for their work—would be targeted by amendment 10. They would not, because the 1995 act already makes exemptions for those who have knives for use at work, for religious reasons or as part of a national costume. We do not seek to change the law in that area.

The committee has received a range of evidence on the proposal. Some were concerned about those who carry knives legitimately—I have addressed that point. Others argued that mandatory services do not work, but the empirical evidence that was put forward to support that view was pretty insubstantial. We have mandatory sentences for homicides and firearms offences and we have seen reductions in those. The violence reduction unit has emphasised that other methods of reducing knife crime should be employed, particularly the education of young people. I point out that the vast majority of knife crimes are committed by adult offenders, but it is also important to say that we do not regard the proposed change to the sentencing regime as an isolated measure to tackle knife crime. We believe that it is complementary to the other work, which is often very good, that is continuing in communities to reduce knife crime and divert those who are at risk of becoming involved in it.

I turn to the convener's amendment 10A, with which we have sympathy. Others have accused us of being in a bidding war on the level of sentences, but that is not the case. Our proposal has been for a minimum sentence of six months, and that remains our position today. The convener has made it clear that he does not regard that as adequate and he proposes a minimum of two years. I highlight the fact that our proposal is for a minimum sentence and it would still be open to the court to impose a sentence of up to four years. We believe that the crucial thing is to introduce the principle of a minimum custodial sentence so that those who are convicted of carrying knives can expect to go to jail. I appreciate that the convener has made a different legislative proposal based on a different precedent in the law, and we would be happy to reflect on that before stage 3. We will therefore abstain in any vote on amendment 10A.

We believe that there is a clear difference on the committee between members who have listened to the victims of knife crime and their families who have fought so hard for the proposed change in the law and members who have not. It is crucial that we move to stage 3 with an intact proposal for a mandatory minimum sentence so that, at the very least, the matter can be debated further. To those who question the practicality and cost of the proposal, I simply point to the powerful evidence that the committee heard from John Muir, who eloquently and persistently stated his case and that of other victims. The real question is what the costs will be of not pursuing the change in the law, which is why I move the amendment in my name.

I move amendment 10.

The Convener: I will speak to and move amendment 10A before I open the debate. The matter is divisive, but there will be unanimous agreement that the effects of knife crime are felt by every community in Scotland. It is a matter for profound regret that too many young men, in particular, who go out for a night put a blade in their pocket as readily as they spray on aftershave and deodorant. We all find that deeply depressing.

There is simply no excuse for carrying a knife, and where knives are carried there has to be an assumption that there is an intention and indeed a willingness to use them. Even in what we would have hoped was a more enlightened and civilised age, we can see the effects of knife crime as we walk through the streets of some of our cities, where young men's faces show the signs of being slashed with a knife or similar weapon. Many, of course, are not seen because they have been

stabbed to death, with all the heartbreak and loss of expectations that families feel.

12:00

The wording of the existing law makes it clear that no one can be picked up for carrying a weapon if the weapon can have a conventional and law-abiding use. Richard Baker was correct to underline that fact. In seeking to incorporate my proposed approach into the bill, I have unashamedly plagiarised the Road Traffic Offenders Act 1988, which permits a sentencer to find special reasons for not disqualifying a person from driving or endorsing a licence. I have adapted the approach in amendment 10A, which would enable a sheriff or judge to find special reasons for not imposing the two-year jail sentence.

We are not in a bidding war on the matter, but I respectfully suggest to Richard Baker that a sentence of six months, as is proposed in amendment 10, is not likely to be a sufficient deterrent to people who are prepared to carry knives. The fact is that, as the law currently operates, a person who is sentenced to less than six months will spend a maximum of three months in a prison or young offenders institution. I do not think that people regard such a sentence as a sufficient deterrent.

I acknowledge that the approaches that are proposed in amendments 10 and 10A would carry a cost. Nevertheless, we must take on board the cost in human lives and human misery that has been inflicted by people who carry and frequently use knives. I am convinced that a sentence of two years would act as a sufficient deterrent and would lead to a dramatic reduction in knife carrying and consequently to a dramatic reduction in homicides and assaults to severe injury. That is what we should be seeking to achieve.

I move amendment 10A.

Robert Brown: Nobody doubts that knife crime has been and continues to be a curse on Scotland, and has far too often led to tragedy. That is particularly the case in the west of Scotland; in a conversation with police officers in the east I was struck to discover that they do not regard knife crime as anything like the same problem as it is for their colleagues in the west.

There is no single, totemic answer to the problem. However, the way forward is clear. It lies in the work of the violence reduction unit in breaking down territorialism between gangs. It lies in the increasingly effective targeted stop-and-search mission of the police, who are conducting more searches and finding fewer weapons. It lies in the Cardiff model of using information from accident and emergency departments on violent injuries, which are often unreported to the police—the issue is the subject of an amendment in my name, which we will consider. It lies in the work that is done by operation reclaim and the Inverclyde initiative, in which Mr John Muir is so successfully involved, and in the work of organisations such as Includem.

I think that colleagues in Glasgow received the March performance update from Strathclyde Police's Glasgow central and west division, which covers the city centre. The update indicates that not only has there been a substantial drop in violent crime in the division but the number of cases involving offensive weapons has dropped by 28.4 per cent and the number of incidents involving knives has fallen by 20.2 per cent. Those are significant reductions, which have been achieved by effective policing.

It is through effective policing that the deterrent effect is brought to bear, rather than through sentences and what I regard as highly populist amendments, which seem to have more to do with garnering votes for the Labour and Conservative parties than with a serious attempt to tackle the problem. The proposal for a so-called mandatory prison sentence for carrying a knife is a distraction from the real issue.

It is often the case that a person who is found in possession of a knife will face a prison sentence. People who carry knives should know that they face the real potential of such a sentence. However, we know that many offenders are men of full age, and a man of 25 or 30 who might have previous convictions for violence and undoubtedly knows the score is in a manifestly different position from an immature youth of 16—amendment 10 would apply to offenders aged 16 and over—who is caught up on the margins of a gang and thinks that carrying a knife makes him a hard man. Sheriffs know the difference and sentence accordingly.

Research carried out by the Liberal Democrats has demonstrated that if amendments 10 and 10A were agreed to, 1,345 extra offenders would require to be sent to prison—I accept that the figure might be too precise. It would be necessary to build at least one new Barlinnie prison to house those prisoners, with running costs to the Scottish Prison Service of between £21 million and £84 million, depending on whether both amendments were agreed to—that is to say nothing of the capital costs per annum.

It is fair to say that you cannot entirely predict the effects of any particular measure against a moving background of various other things. However, the issue is not the cost of not passing the amendments, as Richard Baker suggested, but the mechanisms for dealing more effectively with knife crime. I make it clear that if a policy of increased sentences or mandatory sentences

stopped people carrying knives, I would be happy to look at it, but the reality is that it does not—prison does not deter most people. Effective policing, early intervention and targeted youth justice work reduce criminality.

In their evidence to the committee, Professor Neil Hutton and Professor Fergus McNeill pointed out that there was no evidence to support the view that criminal sentences have a deterrent effect generally and that there was much experience, from America in particular, to demonstrate the lack of any significant impact on criminal behaviour of changes in sanctions. It is interesting that both the Scottish Police Federation and the violence reduction unit oppose mandatory sentences because they are unworkable and ineffective. The Scottish Justices Association and Chief Constable Stephen House of Strathclyde Police have expressed similar views. I suggest to the committee that it is just possible that those guys know something about the issue.

Ninety-four per cent of those who are currently in prison for carrying offensive weapons have been in prison before. That is hardly an endorsement of the deterrent effect of prison. Indeed, 60 per cent of them have been sent there for the same blooming offence.

There are other objections to the amendments. Mandatory sentences lead to perverse results. If Richard Baker's amendment were agreed to, a person convicted of carrying but not brandishing a knife would have to get six months, in the absence of mitigating circumstances. Ten minutes later in the same court, somebody else who had threatened to batter people with a lump of iron or wood that was not bladed or pointed might well get a lesser sentence for what is clearly a more serious crime.

Mandatory sentences move power from the sentencing judge to the prosecutor, who can decide whether and in what form to bring charges. The prosecution decision effectively becomes the sentencing decision, too. Prosecution decisions are inevitably less open and less challengeable than judicial decisions. A study carried out by the United States Sentencing Commission found that the prosecutor circumvented mandatory minima by bringing different charges, to avoid potentially unjust or unworkable consequences. In its experience, charges were filed under the mandatory provisions in only about a quarter of eligible cases. I readily accept that the legal background in the United States is different. Ironically, for the reasons found in that study, the USA is retreating from mandatory sentences.

If amendment 10A were agreed to, all cases would have to be tried by a jury, which would involve considerable expense and delay. I wonder whether that is really a sensible way forward.

We have recently agreed to set up an advisory sentencing council. It would be a reasonable way forward to have the sentencing council look at the background material on this issue and make sensible, professional and research-based proposals on how to deal with knife crime. I leave the committee with that thought on this highly contentious issue. I urge the committee to reject Richard Baker's amendment 10 and the convener's amendment 10A.

Stewart Maxwell: I agree 100 per cent with Robert Brown's comments on the amendments. I, too, completely oppose amendments 10 and 10A.

I will begin where Robert Brown left off, on deterrence. There is no evidence whatever to support the idea that a mandatory sentence for knife crime, or indeed for any other crime, would act as a deterrent. If it did, we would not have any murders. Look at other jurisdictions—the USA has been mentioned. If mandatory sentences were effective deterrents, the USA would be crime free. The USA has had mandatory sentences for a number of crimes for years, but they have made not one iota of difference.

The committee often prides itself on ensuring that it looks at the evidence that is submitted to it before it comes to a logical and reasoned conclusion. In this case, not one single professional working in the field agrees with either the Labour amendment or the Conservative amendment, because there is no evidence to support their positions.

I will quote what Bill Butler said at stage 1 when he was questioning—cross-questioning might be a better description—Henry McLeish. On evidence, he said:

> "Will you outline those sources and back up your assertion that there is sufficient evidence?"—[*Official Report*, *Justice Committee*, 19 May 2009; c 1817.]

I ask the same question of the Labour and Conservative members around the table—and Richard Baker in particular, who has moved amendment 10. Will you back up your assertion that there is evidence to support your amendment? Frankly, there is none, and you have so far failed to provide any.

Chief Constable David Strang told this committee that the fear of a prison sentence, irrespective of its length, does not in any way enter into the equation when criminals carry knives, use knives or take part in any other kind of criminal activity. What makes the difference, he said, was the fear of getting caught. That goes back to the point that Robert Brown made about effective policing and early intervention.

Effective policing, early intervention and the fear of getting caught stop people carrying out the offences that we all condemn; the fear of receiving

one prison sentence as opposed to another prison sentence has no effect whatsoever, as it is not in the minds of any of the people, young or old, who walk out of their house carrying a knife. The amendments will do nothing apart from cause money to be spent that could better be spent on ensuring that the justice system tackles the problem properly.

James Kelly: I support amendment 10. As you said, convener, the effects of knife crime are felt throughout communities in Scotland. It is with that in mind that amendments 10 and 10A have been lodged.

In examining the validity of an amendment, we need to consider the policy effect of its implementation. We heard a lot of evidence that suggests that far too many young men carry knives when they go out on a Friday or Saturday night. Some do it because it is simply seen as something that people do, although evidence suggests that, somewhere down the line, those people will use those knives to detrimental effect.

I submit that it is absolutely logical that if such young men are aware that they will face a jail sentence for carrying a knife, they will be less inclined to carry such instruments, and there will be a reduction in knife incidents throughout Scotland.

I refute Robert Brown's points about cost. I accept that, initially, there would be an increase in prisoner numbers. However, as the policy took effect it would act as a deterrent, and in the longer term reduce prisoner numbers. Richard Baker made a valid point about costs to the NHS. Last year, the NHS treated 1,170 knife victims, at a cost of £500 million. If the proposals result in even 5 per cent fewer people being treated—which would be just under 60 people—that could save the NHS £50 million, which is far in excess of the figure of £23 million that Robert Brown mentioned.

We must also consider the human effect of knife crime, which we have seen in some of the written submissions and the powerful oral evidence that we received from John Muir.

The convener's amendment 10A takes a different position from Labour's amendment 10. I reject Robert Brown's assertion that the amendments are inspired by some sort of chase for votes. Both the individuals and the parties behind the amendments are making a serious contribution to the attempts to counter the effects of knife crime throughout Scotland.

I reiterate my support for amendment 10. In the long term, it would reduce the impact of knife crime, save lives and contribute significantly to making Scottish communities safer.

12:15

Angela Constance: Richard Baker and Bill Aitken almost took the words out of my mouth when they used the phrase "a bidding war". I am somewhat surprised by our convener, who normally has a great focus on good law and good justice. My concern is that mandatory sentences can lead to injustice. Irrespective of our emotional desires, singling out one offence involves a false logic. Many hideous offences afflict victims the length and breadth of Scotland.

Notwithstanding that, while the human cost of knife crime is of course severe, we cannot separate discussions about blades from discussions about booze. We will tackle knife crime seriously only when we consider seriously Scotland's relationship with alcohol.

The length of sentences for knife crime has increased in the past decade, so that blows out of the water any arguments about deterrence. I listened with interest to the evidence session that we held before the recess and I was somewhat struck by the evidence from the police—who are not known for their extreme liberal tendencies—that they take a pragmatic approach. In Mr John Muir's evidence, I was struck by his level of knowledge about the good preventive work that is taking place in Inverclyde. We would do better by our communities if we strove to roll out the good practice that is being followed there.

I have a former colleague—a friend—who is a social worker at Barlinnie. She always jokes about the perception that Barlinnie has elastic walls. To the best of my knowledge, the reality is that neither Barlinnie nor any other penal establishment has elastic walls. Robert Brown raised a legitimate point about the consequences of increasing the number of young men who are incarcerated, as a result of the proposed policy. To his credit, Mr Kelly has a somewhat anorak fixation on financial memorandums, so I am somewhat surprised that he has not applied that rigour about financial consequences to the proposed policy. The reality is that mandatory sentences would not deter knife crime and that the cost and burden on our penal establishments would increase.

Nigel Don: As usual, I have no wish to repeat what has been said, but I will follow up one point that Robert Brown made towards the end of his comments. Regardless of the offence or the subject that we are talking about, it is entirely clear that, if we remove discretion from the bench, we push it further down the prosecution and investigation chain. It will be obvious to the Crown that some people who carry knives should not carry knives, but that sending them to prison is not the right answer. The Crown will find ways of using

whatever discretion it has not to bring those people to court on such charges.

Equally, policemen will recognise a range of offences and will—for good human reasons—find it convenient not to pick up on the carrying of a knife, because doing so would finish up propagating the wrong solution. I say with respect that that is what those who use their professional discretion will do.

Apart from any other questions, we need to address the question whether we want discretion to rest with the police and the Crown—and possibly even those who report the incident—or with the bench. In principle, we want it to be with the bench and we want everything to be properly investigated. We need to leave the discretion with those who give the sentence, so any mandatory sentence should probably be resisted.

Bill Butler: On emotive issues such as this, good sense sometimes goes out the window. As best we can, we need to be rational in our approach, but that is not to say that we will not have different approaches. I do not impugn anyone's integrity for taking a different view.

I agree that there is a place for preventive work. As Angela Constance said, John Muir himself illustrated that point. Such preventive work and diversionary approaches were rightly initiated by the previous Executive and supported by all parties.

As I recall, an amendment to a previous bill to increase the maximum sentence for carrying a knife from two years to four years was, I think, moved by Stewart Maxwell. That was also right because, where circumstances dictate and in appropriate cases, such condign sentences are obviously correct.

We need to try to strike a balance here. Time and again, it has been said that there is no evidence that mandatory sentences deter. However, we have not as yet tried what is being proposed, so perhaps that is why little evidence is available. It may be that such an approach works only if it is included in a range of approaches that can be applied to different individuals.

I finish by pointing out that, although Nigel Don does not often nod off—though even Homer nods, as we know from the poet—he inadvertently said something that is becoming common coinage, but which is nevertheless incorrect. New subsection 5B that amendment 10, in the name of Richard Baker, would insert into the 1995 act states:

"Where this subsection applies, the court must impose a sentence of imprisonment of at least 6 months (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify not doing so."

If I may say so, that does not provide a mandatory sentence. It would still leave discretion, quite rightly, in the hands of the sentencer—

Stewart Maxwell: Is it not mandatory, then?

Bill Butler: I am just reading what amendment 10 says. Given Stewart Maxwell's point that we should look at the evidence as it is, we should also look at amendments as they are written. It is reasonable to do that. I am simply stating what the amendment says.

I think that amendment 10 provides a presumption of a mandatory minimum, but it would not tie the sentencer's hands absolutely. It would leave discretion.

This is a difficult and controversial issue on which there are no easy answers. Amendment 10 at least attempts to provide another approach where circumstances dictate that such an approach might have a positive effect. For that reason, I will support amendment 10.

Kenny MacAskill: I say, following Bill Butler's remarks, that if Labour's position is now that it is not moving for a mandatory sentence, I am very open to discussing matters with Mr Butler, Mr Baker or whomever. However, Mr Baker may wish to clarify that point.

Clearly, amendments 10 and 10A reflect on-going public concerns about the booze and blades culture on our streets and, in particular, about the number of young people who choose to carry knives. However, the Government is doing more than ever to tackle knife crime, with tougher sentences and tough police action to take weapons off our streets. That goes hand in hand with ground-breaking initiatives to educate young people about the dangers of knives.

The results of that work are demonstrated in the statistics, which show that recorded crime last year was at its lowest level in nearly 30 years, with violent crime at its lowest level since 1986. Our courts are handing down tougher sentences for carrying knives: the average custodial sentence for knife carriers has increased from 116 days in 2003-04 to 217 days in 2007-08.

Mandatory minimum custodial sentences for knife carriers—a one-size-fits-all approach—are not the solution, and we are not the only ones who make that point: the chief constable of Strathclyde Police, Stephen House, has stated that mandatory minimum sentences are not the answer. The head of the national violence reduction unit, John Carnochan, gave to the committee evidence in which he stated:

"Jail doesn't work, we need early intervention, restricting access to alcohol and knives."

We should listen to those who are at the front line in the fight against knife crime.

John Muir and Chief Constable David Strang provided evidence to the committee on 23 March. In spite of their divergent views, a clear message about the importance of education and prevention emerged from that session. We need to pursue a twin approach of education and enforcement, give our courts the discretion to consider the circumstances of each case that comes before them, and give our judges sufficient discretion to sentence individuals, not offences. We believe—Robert Brown referred to this—that it would be more appropriate for the proposed Scottish sentencing council to consider the appropriate disposals for persons who have been found carrying knives or other offensive weapons in public and to produce guidelines on that.

The Government does not support amendments 10 and 10A.

Richard Baker: I agree with the convener's comments on the aim of the proposal in principle being that those who carry knives as a matter of routine should think again. We want them to think again and to leave their knives at home. Too often, that still does not happen in Scotland.

We do not believe that the cabinet secretary is taking sufficient action. His proposal is that two thirds fewer knife criminals will go to jail, but we think that that sends out the wrong message entirely, which is why we propose mandatory minimum sentences, except in exceptional circumstances, as Bill Butler made clear. Such a framework for firearms offences has existed for some time, but we think it remarkable that we have that framework for firearms offences when fewer people are killed by firearms than by knives in this country.

Mr Butler made it clear that not all judicial discretion would be removed. However, we want to change the situation significantly through our proposal for mandatory minimum sentences. That is clear from amendment 10, as members will appreciate if they have read the amendment properly.

I agree with Robert Brown that no single measure will solve the problems of knife crime; rather, a range of measures will be required, as he and Bill Butler have said. However, we believe that what we have proposed will be a powerful tool. We and the Conservative party have not made the proposal simply as a matter of politics, but because victims of knife crime and their families, whom we have listened to, have put it forward.

It should be pointed out that the figures show that the incidence of knife crime in the east of Scotland is far from insubstantial.

Angela Constance referred to costs and James Kelly made a point about the impact on NHS costs of injuries that result from knife crime.

On the evidence on the impact of mandatory minimum sentences on crime, such sentences are in place for homicide and firearms offences in this country, and we have seen reductions in those offences. Lord Carmont was given credit for helping to reduce knife crime in Glasgow 50 years ago through imposing longer sentences on knife criminals.

It is clear that we are not making enough progress through use of the current measures, however successful some of them have been. We certainly do not wish to detract from those measures or to say that they should not continue, because they should. However, it is also important that we do not dismiss the evidence from John Muir and others. I do not see why the committee should give their evidence lower status than is given to evidence from others. They have carefully considered the issue and have been gravely affected by it, so the committee should listen carefully to what they say.

I take on board the convener's view on six-month sentences, but I believe that agreement to amendment 10 and the bringing in of a mandatory minimum custodial sentence will move us forward and have an impact on people who might carry knives. I would be happy to debate the detail of the proposal further at stage 3 or in advance of that, although I hope that we adopt the fundamental principle of mandatory minimum sentences today, and that that will be the context of future debates.

12:30

The Convener: A number of points with which I agree in some measure have been made in opposition to amendments 10 and 10A. There must be a comprehensive package to combat knife crime—Robert Brown, Angela Constance and Nigel Don raised that issue. There is merit in the arguments and I accept them. However, I part company with the members on a number of issues. Robert Brown described a situation in which someone could be charged with brandishing a piece of wood or a similar object that might present a more immediate threat than would possession of a knife. I do not accept that, because the statistics demonstrate the fatal consequences of carrying knives—consequences than can be much more severe than in cases of makeshift would-be weapons.

The firearms legislation, which has been in force for a number of years and has been accepted without demur, makes an automatic five-year sentence apposite and applicable in cases in

which an individual is in possession of a firearm. That is a much more draconian approach than that which is being recommended by me and Richard Baker. There does not appear to have been any reaction against that. We must also bear in mind that even these days, when there is an unacceptable level of use of firearms, the number of incidents of the use of firearms in homicides pales into insignificance compared with the number of cases involving knives.

The aspect of my amendment 10A that I would especially like to stress is the provision for special reasons, which would enable the sentencer to take into consideration the special circumstances that are apposite to the offence and to the accused person. The offence is self-evident. There can frequently be perfectly appropriate defences for carrying a knife, the obvious ones being for tradesmen and butchers. Such a defence is a reasonable excuse, and such a case should not be prosecuted. Were it prosecuted, it is a defence that would almost invariably succeed. However, what cannot be allowed to continue is the carrying of knives on social occasions, or people hanging about with their chums, as kids do, carrying knives. That frequently results in tragedy. It is on that basis that I press amendment 10A.

The question is that amendment 10A be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)

Against

Brown, Robert (Glasgow) (LD)
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 10A disagreed to.

The Convener: The question is that amendment 10 be agreed to. Are we all 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.

For the reasons that I have outlined—the deterrent effect of a custodial sentence and the fact that levels of knife crime are unacceptably high—I use my casting vote in favour of the amendment.

Amendment 10 agreed to.

Section 25—Involvement in serious organised crime

The Convener: Amendment 344, in the name of the minister, is grouped with amendments 345 to 351 and 358. I draw the attention of members to the pre-emption information on the groupings list.

Kenny MacAskill: Amendments 344, 346, 347, 349 to 351 and 358 will introduce changes to the detail of the provisions on serious organised crime in part 2 of the bill. Although we understand the reason behind amendments 345 and 348, we do not think that they are appropriate or necessary.

Amendment 344 sets out in more detail the circumstances in which somebody agrees to be involved in serious organised crime. The amendment is needed to help to target those who facilitate or enable serious organised crime groups, without themselves committing indictable offences. The amendment therefore makes it clear that a person agrees to become involved in serious organised crime when he agrees to do anything—criminal or otherwise—while knowing or suspecting that doing that thing will enable or further the commission of serious organised crime.

The offence, therefore, will remain broadly drawn but will, through amendment 344, be more clearly defined. That approach is necessary because we need to capture all forms of serious organised crime in order to get at its heart, and to do so requires flexibility. The activity around serious organised crime is wide ranging and we need a wide-ranging offence to tackle those who are involved in serious organised crime. That includes both those who commit the criminal act and those who supply and support the criminals. For example, someone may allow the use of their property while knowing or suspecting that the accommodation is being used to house people who are being trafficked for sexual exploitation, or they may allow their vehicle to be used for the transportation of drugs. Those activities may not, in themselves, be criminal acts, but the main purpose of the activity is to further the criminal purpose of a serious offence as defined in section

25, and thereby to support serious organised crime. We realise that the offence is already widely drawn; however, it needs to be if we are to tackle the scourge of organised crime. The amendment is required if we are to capture all forms of activity that enable or further serious organised crime.

Robert Brown's amendment 345 suggests additional criteria that will need to be satisfied to establish that crime amounts to serious organised crime. In particular, the amendment would provide that serious organised crime means crime involving two or more people committing or conspiring to commit serious offences

"that would reasonably be regarded as being both serious and organised".

However, it is not entirely clear what that is intended to achieve. We already have a definition of "serious offence" in the bill: it is an indictable offence that is

"committed with the intention of securing a material benefit",

or an indictable threat or act of violence that is intended to obtain

"such a benefit in the future".

I presume that Robert Brown intends that only serious offences within that technical meaning, which are also objectively serious and sufficiently organised, should constitute serious organised crime. Nevertheless, there is obviously a question as to what a court would make of such broad terminology. What do "serious" and "organised" mean in that context?

The more compelling argument against amendment 345 is that it would stifle the practical benefits of the provision. We know that serious organised crime is flexible and that it covers all levels of criminality and activity. Activities that are apparently minor or trivial in themselves often form part of a more insidious picture. The amendment would potentially miss significant elements of activity that contribute to the business interests of a serious crime network. If, for example, a group of people undertook shoplifting excursions with the purpose of generating profits to fund drug deals, would their shoplifting

"reasonably be regarded as being both serious and organised"?

It may perhaps satisfy the latter test, but it is doubtful that it would be considered to be "serious", particularly without further legislative guidance.

Although they will make the definition broad, the Government's amendments make it sufficiently clear to capture the range of activity that constitutes involvement in serious organised crime. We accept that there is a valid concern that the provisions should not be used to punish offending that is genuinely minor and which is not, relatively speaking, organised. However, the best way in which to deal with that concern while retaining the flexibility that is required to tackle the diversity and innovation that are inherent in serious organised crime is to rely on the discretion of the police and the prosecution authorities to report and prosecute such offending appropriately.

Amendments 346, 350 and 358 are simple technical amendments that have the sole purpose of making the terminology in relation to obtaining "a material benefit" more consistent throughout the provisions on serious organised crime.

Amendments 347 and 349 will change the definition of "serious offence", which forms an integral part of the definition of serious organised crime. Threats and violence are part of the armoury that is used by serious organised crime groups to protect their interests. They believe that they are in total control and thrive on the fact that people may not report their actions because of fear of retribution. Clearly, that is unacceptable. In recognition of that aspect of serious organised criminal activity, amendment 347 will modify the definition of serious offence to include indictable offences that are constituted by any act of violence, when the intention behind the commission of the act is to obtain a material benefit either directly or at some point in the future. That removes the prior qualification that only a "serious" act of violence could be a "serious offence" for these purposes.

We agree with the principle behind amendment 348. The technical definition of a "serious offence" that is committed to secure a future benefit should not be restricted to "serious" violence. The Scottish Government's amendment 347 already seeks to cover that point, and the use of the term "threat" will cover instances of intimidation, which are themselves indictable offences. We think that the use of the term "threat" rather than the term "intimidation", which is drawn from the common-law crime of threats, will be more easily understood by the courts.

Amendment 349 is also an adjustment of the definition of serious offence. It is required to ensure that a threat may be sufficient to establish the commission of serious organised crime when it is carried out by two or more people with the intention of securing a material benefit. It is important to note that, in that context, a threat will be a "serious offence" only if the threat is itself an indictable offence and the underlying intention is to secure a material benefit. We consider that it is necessary to deal specifically with threats because a threat of violence might, for example, engender fear that would prevent people from reporting a serious organised criminal or might prevent

witnesses from giving evidence at a trial. Equally, threats and intimidation are commonly used by serious organised criminals to secure territorial advantages or to enhance their ability to conduct their criminal business.

Amendment 351 provides a definition of the term "material benefit" where it appears in sections 25 to 28. We are aware that the committee has a concern that the definition of "material benefit" as set out in the introduction could be extended to capture trivial forms of benefit. The amendment that we have made is designed to ensure that only an intended benefit in the form of heritable or moveable property will allow a court or jury to find that a person has agreed to become involved in serious organised crime or has directed somebody else to commit a serious offence.

Similarly, only a benefit in the form of property received in consequence of the commission of serious organised crime will suffice to trigger the duty to report serious organised crime in the context of close personal relationships. Although that definition is still technically wide enough to cover many forms of small-scale proprietary benefit, it makes it clear to courts and juries that we are not targeting those who seek or obtain intangible benefits other than in the form of incorporeal property. We would expect the Crown to exercise its discretion appropriately in deciding how to charge those who are accused of working together to achieve minor or trivial benefits.

I move amendment 344.

Robert Brown: There is broad agreement in committee on the need for weapons to tackle the Mr Bigs of serious organised crime, but there is also genuine anxiety about the scope of some of the offences that will be introduced by sections 25 to 28. I am bound to say that I have found the area difficult and complex—I am sure that other committee members have, too. My amendments in this group and the succeeding groups are designed to try to deal with some of those difficulties.

Amendment 345 relates to section 25. The committee will recall the evidence that a person could be prosecuted under the section if he got involved with someone else to steal a meat pie. Although I appreciate that the prosecutor would probably not use the section in that extreme way, we have to get the "serious and organised" bit into the definition of the crime for which, after all, one could go to jail for 10 years.

My proposed wording would contribute something without losing the targeted intention of the section. At the top of page 39 of the bill, a serious offence is defined as, among other things, an "indictable offence" of certain kinds. In principle, an indictable offence is a theft, a robbery, an assault, a sexual assault and even a breach of the peace, unless I am mistaken. The term covers a lot of offences that range from the very serious at one end, right down to the meat-pie theft at the other, which does not obviously have anything to do with Mr Big. We must have some form of words that narrows down that definition, which goes too far in terms of the areas that it is designed to pick up. Law has to mean something and people need at least an idea of what they are prevented from doing by the country's criminal legislation. I am not sure that the bill quite gets that right at the moment.

Amendment 348 goes the other way. It is clear from evidence that the committee received that serious and organised crime could manifest itself as relatively minor violence and threats. Providing that an offence is part of serious and organised crime, as I hope a previous amendment of mine will redefine, it should be caught by section 25. However, I concede that the Government has dealt with the point in its amendments 347 and 349, so I will not press amendment 348.

Stewart Maxwell: Although I understand the reasons why Robert Brown has lodged his amendments and the concern about the breadth of the proposed offences that he expressed during discussions of the stage 1 report, I remind the committee of the evidence that both the Lord Advocate and the Solicitor General gave us about the reasons why it is so necessary to have a broad definition of such offences; namely, the ability of the Mr Bigs—to use Robert Brown's expression—to get round the law if the definition is too constrained. I will not go over all the evidence that we all heard and used in our stage 1 report when we considered this part of the bill, but I thought that it was both compelling and detailed about why it is necessary to keep in the bill the offences as currently drafted. Therefore, I do not support Robert Brown's amendments to section 25, although I understand why he lodged them and the concerns that he has expressed. We must allow the law to be as flexible as possible so that it can deal with the fast-moving and ever-changing world of serious organised crime.

12:45

The Convener: If there are no other comments, I will make some of my own. All the amendments to section 25 are predicated on concerns about definitions. The general view has been that, as it stands, the bill has the capacity to catch with its provisions people whose involvement in serious organised crime is peripheral and which, in certain situations, could be accidental. It is clear that members and the Government have understood that and have sought to apply the appropriate remedies. It worth putting on the record, yet again,

that the Parliament has a unanimous and firm commitment to combating such crime, but any legislation in that respect must be workable and proportionate. Robert Brown and the Government genuinely recognise that—it is the thinking that lies behind their amendments.

Mr MacAskill's amendment 344 seeks to change one of the definitions, as does Robert Brown's amendment 345. Although Mr Brown's amendment is well thought out, makes a case that is entirely arguable and has merit, I think that the Government amendment is probably tidier and I will support it. Mr MacAskill's amendment 346 seeks to deal with the committee's concern about the material benefit provision. I think that it fits the bill and I will support it.

I ask Robert Brown to—I am sorry; it has been a long morning. It is for the minister to wind up.

Kenny MacAskill: In view of the time, I am happy just to press amendment 344.

The Convener: That is fine—I am obliged to you.

Amendment 344 agreed to.

The Convener: I invite Robert Brown to move or not to move amendment 345.

Robert Brown: I wonder whether I would be entitled not to move amendment 345 but, while not moving it, to make to the minister the point that some further examination, particularly of the "serious offence" definition, might be helpful. I would like to engage with him on that, if he would be prepared to do it.

The Convener: I take it that, having driven a horse and cart through standing orders—albeit that you were making a relevant point—you will not move amendment 345.

Robert Brown: Indeed.

Amendment 345 not moved.

Amendment 346 moved—[Kenny MacAskill]—and agreed to.

The Convener: I point out that if amendment 347 is agreed to, I will not be able to call amendment 348 on the ground of pre-emption.

Amendment 347 moved—[Kenny MacAskill]—and agreed to.

Amendments 349 to 351 moved—[Kenny MacAskill]—and agreed to.

Section 25, as amended, agreed to.

Section 26—Offences aggravated by connection with serious organised crime

The Convener: We move on to section 26, which is as far as we will get at today's meeting.

Incidentally, I should earlier have welcomed Johann Lamont MSP, who has joined us. I doubt whether she will get any of the action, but she is welcome nonetheless.

Amendment 352, in the name of Robert Brown, is in a group on its own.

Robert Brown: Amendment 352 relates to the new aggravation issue in section 26 and is intended to restore the requirement for corroboration in the class of cases that is covered—those in which an ordinary offence of perhaps theft, assault, stalking or breach of the peace is said to be aggravated by a connection with serious organised crime. That situation is different from an aggravation for a racial or sectarian motive, when the nature of the crime has not really changed but an aspect requires a particular extra sanction.

Under section 26, the aggravation wholly alters the nature of the crime. For example, when a motor car is stolen to facilitate the operation of a major drugs or people-trafficking operation, that puts the crime into a new category with a new level of sentence. It appears that the aggravation could even apply to a motoring offence such as driving without insurance. We must take that into account. In such circumstances, surely the aggravation—which will dwarf the principal crime in many instances—should be corroborated, as it would have to be under section 25 as it has been amended today.

The point is important and is not just technical. The issue is not just about facilitating prosecution of serious criminals—the provision must be got right. If we are to land people with serious prison sentences as a consequence of the provision, the major element of the offence with which they are charged should be the subject of proper proof in the normal way.

I move amendment 352.

The Convener: The argument is interesting. I accept what Robert Brown says about the precedent from the various aggravations for sectarian, racial or homophobic motives, but I am instinctively drawn to a requirement for corroboration. I will listen with interest to the cabinet secretary.

Kenny MacAskill: I will try to clarify matters. We understand the reason behind amendment 352, but it is not appropriate or necessary. Notwithstanding our recent letter to the Justice Committee, we still think that there is some confusion about section 26(4). We are not removing the normal rules of corroboration—they will still apply in proving the underlying offence that incurs a statutory aggravation.

Only the essential elements of an offence—as opposed to, for example, an aggravation—must be proved by corroborated evidence in Scotland. Subsection (4) makes it clear that the approach of requiring only a single source of evidence to establish the aggravation, which has common law and statutory precedent, applies here.

If amendment 352 were agreed to, the position on proving the aggravation might be unclear. Courts might nonetheless resort to the common-law approach, which does not require corroboration of aggravating circumstances. In such an event, the amendment would be meaningless. On the other hand, the lack of any provision at all might produce uncertainty. I invite Robert Brown to withdraw amendment 352 and I hope that I have clarified the underlying aspects.

Robert Brown: I am bound to say that I am not sure whether the cabinet secretary listened to what I said. Neither I nor any other committee member is confused about what the provision is intended to do. I did not suggest any difficulty about the need to corroborate the principal offence; I said that the principal offence could easily be dwarfed by the aggravation. A person might be fined or whatever for the principal offence, but they could go to jail for a long time for the aggravation. That does not at all parallel the normal position of other aggravations, which we have heard about before.

There would be no doubt about the court's position. It would be pretty obvious from the debate and from the *Official Report*, which can be taken into account in interpretation, why section 26(4) had been removed; it would be easy for judicial interpretation to make that conclusion.

I am not totally fixed on the issue—I raise it seriously, for the reasons that I have given. To be frank, I have heard no reason from the cabinet secretary for why I should not press amendment 352 to a vote. Given the circumstances, I will do so, but against the background of being happy to continue discussion, if the cabinet secretary can come back with anything more substantial.

The Convener: The question is, that amendment 352 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)

Against

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 2, Against 6, Abstentions 0.

Amendment 352 disagreed to.

Section 26 agreed to.

The Convener: That takes us to section 27, which is not politically controversial but could take a little time. In the circumstances, we will end proceedings now. I thank members, the cabinet secretary and his officials for their attendance.

I remind committee members that we have a couple of administrative items to deal with.

12:55

Meeting continued in private until 13:01.

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