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Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 27 April 2010

Session 3

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JUSTICE COMMITTEE
14th 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)
Fergus Ewing (Minister for Community Safety)
David McLetchie (Edinburgh Pentlands) (Con)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 27 April 2010

[The Convener *opened the meeting at 10:04*]

Subordinate Legislation

Stipendiary Magistrates (Scotland) Order 2010 (SSI 2010/142)

The Convener (Bill Aitken): Good morning, ladies and gentlemen. No apologies have been received and we have a full turnout of the committee. I remind everyone that mobile phones should be switched off.

Today's meeting will continue into the afternoon. The morning session will finish at about 12.30 pm and we will resume at 2 pm, to continue until about 4 pm.

I welcome non-committee members Margaret Curran and Richard Baker. Ms Curran is here to move an amendment to the Criminal Justice and Licensing (Scotland) Bill to which we shall come presently.

We have one negative statutory instrument to deal with—the Stipendiary Magistrates (Scotland) Order 2010. I draw members' attention to the order and the cover note, which form paper 1. The Subordinate Legislation Committee drew no matters to the Parliament's attention in relation to the order. Do members have any comments, or are they content simply to note the order? I take it from the silence that members are content simply to note it.

Members *indicated agreement.*

Criminal Justice and Licensing (Scotland) Bill: Stage 2

10:05

The Convener: Agenda item 2 is the principal business of the day—the fifth day of stage 2 proceedings on the Criminal Justice and Licensing (Scotland) Bill. The committee will not proceed beyond the end of part 5 today. I welcome the Minister for Community Safety, Fergus Ewing MSP, who is accompanied by some familiar faces among the Scottish Government officials. Members should have their copies of the bill, the fifth marshalled list and the fifth list of groupings of amendments.

Section 38—Prosecution of children

The Convener: Amendment 379, in the name of Robert Brown, is grouped with amendments 126, 127, 389 and 549. If amendment 379 is agreed to, amendments 126 and 127 will be pre-empted.

Robert Brown (Glasgow) (LD): Scotland has—notoriously—the lowest age of criminal responsibility in Europe. The idea of prosecuting a child of eight—or, indeed, of 11—is abhorrent and ridiculous. Of course, the possibility of such prosecution will cease even if section 38 is unamended.

It might be said that the difference between raising the age of criminal responsibility and raising the minimum age at which a child can be prosecuted is technical. It is true that, either way, a small number of children will be affected. Few prosecutions take place of young people who are aged between 12 and 14; the graph of prosecutions for offences shows a sharp rise only from the age of 15.

In the background is the welfare-based children's hearings system, which focuses on meeting a child's needs and which all parties broadly support. One stimulus for reform was the criticism from the United Nations Committee on the Rights of the Child in its concluding observations on the three most recent United Kingdom state party reports. Section 38 as it stands does not meet Scotland's obligation under the UN Convention on the Rights of the Child. Children who are aged between eight and 11 will continue to be referred to a children's panel on offence grounds, and in practice, if not in theory, the result will be to all intents and purposes a criminal record. Such information can be routinely disclosed through Disclosure Scotland checks, regardless of the gravity of the offending.

There is persuasive evidence that criminalising children in that way is damaging. As Dr Jonathan Sher of Children in Scotland said:

"If we call them criminals, we can pretty much count on their adopting that identity and living down to it."—[*Official Report, Justice Committee*, 26 May 2009; c 1948.]

Children in Scotland's letter says:

"overwhelming international evidence"

exists

"that labelling and punishing children as criminals does not improve their behaviour"

or

"keep communities safer, but does increase the likelihood of these children becoming ... career criminals."

The Lord Advocate said:

"as the prosecutor, I consider the age of criminal competence of eight in Scotland to be extremely low."—[*Official Report, Justice Committee*, 25 November 2008; c 1427.]

In general, the reform in the bill is worth while, but it is arguable that it is the minimum that is appropriate and that we should do the task properly by raising the age of criminal responsibility. Nobody suggests that that means a reign of terror by lawless children. It is appropriate for the system to have powers to tackle, detain if necessary and deal with children who cause trouble. Most such children can be dealt with on other welfare grounds, but the Children's Hearings (Scotland) Bill should provide for a non-criminal offence ground for referring children to a hearing, to protect the public and in children's interests. Amendment 549 in my name would ensure that section 38—as amended, I hope—was brought into effect only after the Children's Hearings (Scotland) Bill had provided for such a situation.

I am not very keen on the convener's amendments 126 and 127—in fact, I am not keen on them at all. They seem to be designed to restore the status quo, which is undesirable.

If it is thought that there is some deficiency in the powers of hearings to tackle lawless children under 12, by all means let us look at the issue, but let us do so in the context that hearings are the appropriate forum in which to deal with it.

Amendment 389, in the name of Richard Baker, is the sort of amendment that I have proposed in some circumstances, but in this instance it seems to be overkill and unnecessary. Children under 12 who are currently prosecuted can be numbered on the fingers of two hands; we do not need a formal reporting mechanism to do that.

I may have slightly understated matters. In the last year for which statistics are available—2007-08—the figures were nothing at the ages of nine, 10 and 11; five at the age of 12; five at the age of 13; 21 at the age of 14; and 157 at the age of 15. That provides some context to the issue.

I move amendment 379.

The Convener: I concede that this is a complex and difficult matter. All the amendments in the group deal with the age of criminal responsibility or the age at which children may be prosecuted. I have some difficulties on the issue, especially with amendment 379. Robert Brown is right to argue that Scotland seems to be out of sync with most other jurisdictions, but I am not relaxed about changing the law radically in this respect.

The matter first came to the committee's attention when the Lord Advocate, in giving evidence on a somewhat unrelated matter, raised the issue of child prosecutions. I must confess that I was a little perplexed by her intervention under that heading, but it was worthy of note. Her evidence related to the fact that only a handful of children between the ages of eight and 12 have been prosecuted in recent years. It seems that the Crown Office is adopting a sensitive approach to the matter. That being the case, I am not persuaded that it is appropriate for us to agree that there should be no prosecutions until the age of 12, as Robert Brown proposes in amendment 379.

My submission in amendments 126 and 127 is that children under the age of 12 should not normally be prosecuted. Basically, the amendments would put down in statute the reality of the situation. As we stated in our stage 1 report, sometimes children of quite tender years can do terrible things. I do not want us to be in the position of not having an appropriate sanction in place to deal with the case of an 11-year-old who stabs two children in a school playground, for example. It is common knowledge that, when children of that age commit acts of serious criminality, the victims are usually other young children. We must be sensitive in that respect.

I do not suggest for one moment that such cases are everyday occurrences—they are not. Recently, the Bulger case was revisited in somewhat odd circumstances, but there was also the case of the two young boys in Doncaster who committed quite horrendous acts of violence. There are exceptions with which the law must be equipped to deal. I am not content that the law will be so equipped if amendment 379 is agreed to.

Amendment 389, in the name of Richard Baker, has some merit, in that he seeks a report back from the Scottish Government. I would be minded to support the amendment but for the fact that it seems to accept an increase to 12 in the age of prosecution. This is a difficult and sensitive matter. I agree that there are dangers in dealing with it through prosecutions, but there are also real dangers in dealing with it through a blanket

prohibition of prosecutions. On balance, that is even more dangerous.

Richard Baker (North East Scotland) (Lab): As this is my final amendment at stage 2, I thank the clerks for all their assistance during the process.

The convener has alluded to the fact that the issues around the age of prosecution and the age of criminal responsibility are sensitive and difficult. We know that, unfortunately, even children can commit terrible offences. The question is, how can our justice system and our children's hearings system deal most effectively with those situations? I do not demur for a second from Robert Brown's point that such situations are highly unusual.

The argument has been well established that nothing can be gained from having children as young as eight tried in adult courts and that that is inappropriate. However, there may be some concern that changing the age of prosecution to 12 means that it will not be possible to deal effectively with the cases—however rare—of children who commit very serious offences. As a result, there may be concerns about public safety. We should be able to be confident that, regardless of whether those children are dealt with by the court or by the children's hearings system, the outcome is likely to be the same or very similar, rendering a trial in an adult court unnecessary.

10:15

Given that that means that we may hand more serious cases to the children's hearings system and that Parliament is yet to consider the Children's Hearings (Scotland) Bill, I have lodged amendment 389, which seeks to establish how cases that would otherwise have been prosecuted have been disposed of through the children's hearings system, and the costs and resources involved. That would be done through a report, published annually, for three years.

The purpose of the measure is to establish that cases that would previously have been prosecuted can be dealt with effectively through the children's hearings system, that the system has access to appropriate disposals, after the Children's Hearings (Scotland) Bill has been passed, and that panels are adequately resourced to deal with the most serious cases. I understand that that will create some work, but I have changed my amendment from the original proposal so that it involves only those cases that would otherwise have been prosecuted. As Robert Brown said, we know that very few cases should be involved. For that reason, I hope that the measure is eminently achievable.

When deciding whether to move the amendment, I will listen to the debate, but it is vital that the Scottish Government is ready to provide such information to Parliament and the committee, if the change is to go ahead. I seek the minister's view on what the Scottish Government will be prepared to do in that regard.

I have sympathy for amendments 126 and 127, in the name of Bill Aitken, because of the unusual nature of cases in which serious offences are committed. I considered lodging an amendment in those terms, but I was persuaded that that would result, in effect, in the law not being changed at all. As the convener said, amendments 126 and 127 place the current situation in statute. Like other colleagues, I have accepted that there should be change in the area.

I also have sympathy for amendment 379, in the name of Robert Brown. When the bill was introduced, it might have been better for it to have included a proposal on the age of criminal responsibility, so that that could be properly debated. However, the committee did not discuss such a proposal, although it was referred to in the debate on the age of prosecution.

I know from amendment 549 that Robert Brown is enabling the change in the age of criminal responsibility from eight to be delayed until appropriate measures to accommodate that can be taken, but at this stage that is putting the cart before the horse. A note from the Scottish Parliament information centre points out that one consequence of changing the age of criminal responsibility to 12 would be that children under the age of 12 could not be referred to children's hearings on offence grounds. The committee referred to the suggestion of creating a new non-offence ground, covering situations in which a child has behaved in a way that could be treated as criminal, if they were older. Such a proposal is not before us today.

Given where we are, we should not support a change in the age of criminal responsibility now, but we should change the age of prosecution to 12. That is the crucial issue now and the right way forward. I accept that there should be further consideration of the age of criminal responsibility. I do not believe that Parliament should wait too long to engage in such consideration, which should lead to change, but I am inclined to believe that that requires new, detailed proposals and fuller debate.

Stewart Maxwell (West of Scotland) (SNP): I will start where Richard Baker left off. I agree with his closing comments, in which he made some valid points about the age of criminal responsibility. All of us have struggled with the issue. Through the evidence and our stage 1 report, we struggled to strike the appropriate balance when dealing with the very rare cases in which young children have taken another's life.

Great moral difficulties are associated with changing the law in that area.

At the same time, great moral difficulties are associated with not changing the law in the area. As other members have said, the ages of criminal responsibility and criminal prosecution in Scotland are among the lowest—if not actually the lowest—in the developed world. That weighs heavily on a number of us.

I understand the process that Richard Baker is trying to put in place in amendment 389 and the reasons for that, but I agree with Robert Brown that it is overly onerous, given the exceptionally small number of cases to which it relates. Robert Brown noted that the number of children under 12 who are prosecuted is zero.

I do not think that Richard Baker's proposal adds anything except a rather bureaucratic and unnecessary process. Given the number of children, small though it is, who are already going through the children's hearings system at that age, for those odd cases that might have been prosecuted—we can never say whether a case would or would not have been prosecuted, which is a difficulty with the amendment—but which go to the children's hearings system in the future, I think that the children's hearings system is well placed to ensure that it does its job appropriately. Therefore, I do not think that there is a problem in that respect.

I agree that the age of prosecution in this country is too low. It should be raised to 12; therefore, I support the current provisions in the bill. However, I also support the idea that the age of criminal responsibility should remain what it is, although it may seem strange to keep those things separate. Valid arguments have been made that many children over the age of eight can understand the difference between right and wrong and can be seen to be responsible for their actions. At the same time, there is no doubt that children aged nine, 10 and 11 who commit criminal acts—heinous criminal acts, in some cases—are the responsibility of the adults who have failed to care for them and raise them properly, and I honestly think that the acts that those children have committed are more a welfare issue than a case for criminal sanction. Although I accept that the age of prosecution should be raised because of that argument, I think that there is an issue about responsibility for their actions. Therefore, I do not accept Robert Brown's amendments, nor do I support the convener's amendments.

Angela Constance (Livingston) (SNP): It will come as no surprise to anybody on the committee that I have considerable sympathy for Robert Brown's amendment 379. Although the children's hearings system is not perfect in today's world, it is nonetheless an exemplar. Like Stewart Maxwell, I make the point that, when children commit extreme acts of desperate violence against other children, they are themselves the victims of heinous violence, abuse and neglect by their parents and by the wider systems in society that are meant to look after children who are vulnerable and who do not have parents who will give them the best start in life.

My fundamental instinct is that children who offend should go through the children's hearings system, which should be equipped, in terms of resources and disposals, to deal with children who offend. Nonetheless, I will listen to what the minister says with interest. In the Government's defence, I accept that what the bill proposes is a prudent step forward, although instinctively I would rather that it were a bigger step forward. I wonder whether we should have considered the issue as part of the Children's Hearings (Scotland) Bill. The Criminal Justice and Licensing (Scotland) Bill is a huge bill, and I would have preferred a far more dedicated focus on children who are in need and who offend. Perhaps, following the committee's scrutiny of the issue, the Children's Hearings (Scotland) Bill will be able to take things further.

The Convener: There being no further comments from members, I ask the minister to defend himself to Ms Constance.

The Minister for Community Safety (Fergus Ewing): I am happy to take up that kind invitation, convener. I welcome all members' contributions to the debate. This is a difficult and sensitive issue, as members have said. Before I proceed to the scripted remarks that I want to place on record, I will respond to some of the points that have been made.

In its stage 1 report, the committee opined:

"We recognise that children under 12 can sometimes do terrible things, and if there is to be a statutory ban on criminal prosecution in all such cases, it would be useful to have an assurance from the Cabinet Secretary that there is a sufficient range of disposals available within the children's hearings system."

In his response, the cabinet secretary rightly referred to the disposals that are available to the children's hearings system. It will come as no surprise to committee members that those include

"placing children in secure care up to their 18th birthday if that is required."

The response continues:

"A Panel can also place a child on intensive support which can include an electronic tag. The Panel decides on the most appropriate intervention based on the needs of the child, the support required to change their behaviour and the measures needed to protect the public."

I thought it important to mention that, as Richard Baker rightly sought an assurance about the

sufficiency of the disposals that are available to the children's hearings system. Angela Constance also referred to the fact that we are seeking to legislate on and improve further the excellent system of which we are rightly proud in Scotland. That will take place shortly, under a different bill.

We all have confidence in the good work that is done, particularly in the secure estate. It is a serious step to place a child into the secure estate, and those of us who have visited secure accommodation throughout Scotland will know that it is not a soft option for those children but a severe measure that effectively deprives them of their liberty. The ultimate disposals are available to the children's hearings system. I thought it prudent to start by emphasising the fact that the sanctions are serious, irrespective of the age that is set for consent and prosecution. That said, it should be remembered that only one child under the age of 12 has been prosecuted in the past six years. I will come to that later.

The changes that are in section 38 will lead to the following system operating. First, children under the age of eight will continue to be conclusively presumed to be not guilty of an offence. Secondly, children under the age of 12 but aged eight or over who offend will be dealt with only through the children's hearings system. Thirdly, children under 16 who are aged 12 or over will be prosecuted if the offence is sufficiently serious to be dealt with on indictment; otherwise, they will be dealt with by the children's hearings system. Finally, children aged 16 or 17 who remain on supervision through the children's hearings system will either continue to be managed in that system or be prosecuted. Raising the minimum age of prosecution from eight to 12 is an important move that will—as has been said, initially by Robert Brown—bring us into line with most of mainland Europe and strengthen our commitment to the UN Convention on the Rights of the Child. I make it clear from the outset that we believe that our approach strikes the right balance between protecting the public and protecting the rights of children.

I fully understand the intention behind amendments 126 and 127. However, given the fact that only one child under the age of 12 has been prosecuted in the past six years, the normal situation is for there to be no prosecutions. That is what we are seeking to establish as the legal situation—the de facto situation is that prosecutions are so rare that they hardly ever occur. Amendments 126 and 127 would have the effect of neutralising section 38. They would create uncertainty as to the circumstances in which prosecution of a child under the age of 12 was either possible or appropriate. For those reasons, I would not recommend support for amendments 126 and 127.

I turn to amendment 379. Raising the age of criminal responsibility, as set out in section 41 of the Criminal Procedure (Scotland) Act 1995, was an option that the Scottish Law Commission considered carefully when it looked at the issue in 2002. In relation to the UN Convention on the Rights of the Child, the view of the Scottish Law Commission was that

"the Convention's purposes are secured as much, if not more, by the provisions relating to immunity from criminal prosecution and punishment as by provisions on criminal capacity".

Accordingly, the commission recommended that there should be an amendment to the 1995 act by providing that a child under 12 years of age cannot be prosecuted. That is what is contained in section 38 of the bill.

10:30

The Scottish Government is committed to supporting children's rights as a key strand that underpins our activity to improve outcomes for all Scotland's children and young people. We believe that section 38 of the bill, as it stands, achieves that objective and is in line with Scotland's commitments under the UN Convention on the Rights of the Child.

We have addressed key concerns about the very young age at which children in Scotland can end up in the criminal justice system, ensuring that the principle is set that the children's hearings system is the most appropriate forum for a child's broader needs and welfare to be addressed alongside their behaviour.

It is important that we can support young people who continue to pose a high risk when they leave the children's hearings system. Although the overwhelming majority of children and young people are well behaved and contribute positively to their communities, there is a small number in relation to whom safeguards are necessary. As I said earlier, we seek to strike the right balance between protecting the public and protecting the rights of children. Furthermore, although children under 12 can still be referred to the reporter on offence grounds for minor offences, our Children's Hearings (Scotland) Bill, which was recently introduced to Parliament, will introduce a new ground of referral in situations in which a child's conduct has had, or is likely to have, a serious effect on the health, safety or development of the child or another person. That includes behaviour that could be considered criminal. Our expectation is that that new ground, rather than the existing offence ground, will be used for more minor offending behaviour. For those reasons, amendment 379 is unnecessary.

We appreciate the reasons behind amendment 389. It would require Scottish ministers to report annually on the disposal of cases involving children who, but for the new prohibition of the prosecution of under-12s, would have been prosecuted. The Lord Advocate's guidelines set out when a child can be prosecuted for an offence. However, there are no set criteria or offences that lead to prosecution. Currently, there is discretion within the guidelines, and it is the responsibility of the procurator fiscal to decide whether it is in the public interest to prosecute. When section 38 is implemented, all cases will be referred to the reporter and, therefore, no mechanism will exist to consider whether a case meets the public interest test. As I said, it should be remembered that only one child aged under the age of 12 has been prosecuted in the past six years, so there appears to be little merit in the reporting that Mr Baker calls for, as was pointed out by Mr Maxwell. For that reason, amendment 389 is undesirable. I state again, however, that I understand the policy intent that Richard Baker has clearly explained.

Amendment 549 would require the order commencing section 38 to be made by affirmative procedure. That would be a unique requirement. As members will be aware, commencement orders are invariably subject to no parliamentary procedure, and there is good reason for that. If the Parliament agrees to section 38, what would be the point of another debate and vote at the point of commencement? Furthermore, in the children's hearings system, we already have a robust process in place to deal with those young people. Although the Children's Hearings (Scotland) Bill might introduce improvements to the process, there is no reason for any delay.

I urge the committee to resist amendment 549 and all the amendments in the group.

Finally, I would like to address the issue of the retention and disclosure of records, which Robert Brown raised, as I thought that he might. I am aware of the issue around the retention and disclosure of information about children and young people who are referred to a hearing on offence grounds. In the interests of public safety, we believe that there is still a strong case for recording certain information. However, we recognise that the information that is made available under disclosure checks needs to be proportionate, and we are, therefore, seeking to include provisions in the Children's Hearings (Scotland) Bill that will ensure that information about children and young people who are referred to a hearing on offence grounds is retained and disclosed only where necessary. I wanted to put that on the record to provide some assurance to Mr Brown and other members.

Robert Brown: I am particularly reassured by the minister's final comment.

We are, perhaps, all left a little bit perplexed about the difference between raising the age of criminal prosecution and raising the age of criminal responsibility. We seem to be heading towards a sort of mish-mash situation with three different levels: up to the age of eight, there is no criminal responsibility; from eight to 12, there is a kind of in-between situation; and over the age of 12, there is a slightly different ball game again. That seems to me to be a bit unsatisfactory, in principle, and I am unpersuaded about the reasons why the Government and the Law Commission have gone down that route.

A number of people, including Richard Baker and the convener, touched on the fact that children can do terrible things—indeed, I touched on that myself. However, I was not entirely sure about the implications that we should take from that. We seem to be talking purely about the procedures that apply to the children in that context rather than what is done with them after that. The minister gave us some reassurance about the powers that exist in the children's hearings system to deal with children, from relatively low down the offending level right to the top. If that is accepted, the argument comes down to whether, as the convener suggests, cases should go before the court in certain limited instances, or whether they should all be dealt with by the children's hearings system. I did not hear any convincing arguments for the merits of putting children of nine, 10 or 11 years of age before the court.

Three cases involving children have been prosecuted since the Scottish Parliament was established. One, involving a child of 11, was listed as a crime of dishonesty; one, again involving a child of 11, was listed under "miscellaneous offences"; and one, involving a child of nine, was listed under "motor vehicle offences". In none of those cases can I see any obvious or overwhelming reason why there should have been a prosecution.

I was attracted by Angela Constance's suggestion that the matter could be considered afresh in the Children's Hearings (Scotland) Bill, and the minister made the point that the grounds are being tweaked somewhat to allow wider welfare issues to be considered, along with minor offending issues. That is probably a useful context in which to consider the matter. I hope that the minister will consider that suggestion, regardless of the outcome of today's debate, as I think that we have been left with a slightly mismatched position.

Stewart Maxwell said that children over eight can understand the difference between right and

wrong. That might be the case, but—with great respect—I found his arguments a little confusing. I was not sure where he took that argument, because he seemed to relate it to the responsibility of the parents, which is off to side wicket, as it were. None of that indicates that there should not be a raising of the age of criminal responsibility to 12. Let us do the thing properly.

I will press amendment 379. I continue to oppose the convener's amendments—I do not think that there is much support in the committee for them. I hope that Richard Baker will not move his amendment, in the context of the number of cases involved. Are we to have a report on an issue that has arisen three times in the past 10 years? Notwithstanding the reasons that he set out, that seems a bit of an overkill.

My amendment 549 is designed to link the changes in the Children's Hearings (Scotland) Bill to the issue that we are discussing. Having made the point in that regard, I think that I will probably not move that amendment.

Convener, thank you for allowing me quite a bit of time to respond.

The Convener: It is an important issue and it is appropriate that it be debated as thoroughly as possible.

The question is, that amendment 379 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 379 disagreed to.

Amendment 126 moved—[Bill Aitken].

The Convener: The question is, that amendment 126 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)

Against

Brown, Robert (Glasgow) (LD)
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 126 disagreed to.

Amendment 127 not moved.

Richard Baker: Given what has been said about the maths, and in light of the reassurances that have been given, I will not move amendment 389.

Amendment 389 not moved.

Section 38 agreed to.

Section 39—Offences: liability of partners

The Convener: Amendment 128, in the name of Kenny MacAskill, is grouped with amendment 129.

Fergus Ewing: Many statutes provide that when a body corporate is guilty of an offence, and it is proved that the offence was committed with the consent or connivance of a director, or was attributable to his neglect, that director is also guilty. Section 39 aims to put partners of partnerships in the same position as directors of bodies corporate in relation to such offences. Amendment 129 will ensure that that applies to those who purport to be partners as well as to those who are partners. That is already the position for offences that apply to bodies corporate, in relation to which those who purport to be directors are covered. It avoids the risk of a person avoiding criminal liability simply because of a defect, for example in the formation of the partnership.

Amendment 128 is a technical amendment to make it clear that the reference in section 39(1)(b) to the "corporate offence" is a reference to the corporate offence as committed by the partnership. There is no change to the effect of the provisions.

I move amendment 128.

The Convener: As other members have no comments, I will make some of my own. The amendments in this group are predicated on the need to plug a loophole that seems to exist in the present law, which resulted in an inability to prosecute in the case of the Uddingston fire that resulted in the tragic death of a number of elderly people. I make no comment on that specific case, but it is important that when there is culpability, the

Crown is able to proceed. Amendments 128 and 129 are therefore worthy of support.

Amendment 128 agreed to.

Amendment 129 moved—[Fergus Ewing]—and agreed to.

Section 39, as amended, agreed to.

Section 40—Witness statements

The Convener: Amendment 130, in the name of Kenny MacAskill, is grouped with amendment 131.

Fergus Ewing: Amendment 130 is a minor technical amendment, the purpose of which is to change the current reference to "all reasonable hours" in section 40(2)(b) to "a reasonable time and in a reasonable place", to ensure consistency with section 97(3).

Amendment 131 seeks to remove section 40 from the bill. We are aware of the concerns that were expressed during stage 1 about the provisions on witness statements, which may have given rise to amendment 131. It is useful to have a debate on those issues.

We understand the desire that has been expressed to preserve the tradition of oral evidence in Scotland. The provisions on witness statements will not put an end to that. Witnesses will still appear in court, give evidence from the witness box and be examined and cross-examined. That is not changing. It is important that the accused has a proper opportunity to test that oral evidence. The provisions on witness statements will not lead to a move towards trial by statement.

We respectfully remind the committee that Lord Coulsfield considered that provision was necessary after his thorough and detailed consideration of the law in this area as a whole. Members will remember that when the Solicitor General for Scotland spoke in support of the provisions during his evidence at stage 1, he said:

"Many trials are really a memory test for witnesses. For example, in a cold case, witnesses who gave evidence in 1991 might be called to give evidence in 2009 and be questioned on the detail of their statement. If they cannot remember precisely what they said or if they say something slightly different, they will be accused of being inconsistent. It seems unfair that the only person in a prosecution who cannot see the statement before the trial is the witness who gave the statement in the first place."—[*Official Report, Justice Committee*, 9 June 2009; c 2070.]

Concern about the accuracy of statements appears to lie at the heart of the issue. We acknowledge the concerns of defence practitioners about the quality of statements but, like Lord Coulsfield, we believe that rigour in the way that statements are taken, which he recommended, should reduce the risk of problems arising. It should be remembered that Lord Coulsfield pointed to the fact that elsewhere in the United Kingdom, the practice of giving witnesses copies of their statement is accepted and uncontroversial.

10:45

Section 40 will help to ensure greater accuracy by allowing witnesses to review and identify any inaccuracies in their statement before trial. Removing section 40 from the bill would lead to the anomaly that witnesses would not be able to see their statement in advance of giving evidence, yet under section 62 they would be able to refer to their statement at trial. That could mean that the first time that any inaccuracies came to light would be during the trial.

As the Solicitor General said when he gave evidence to the committee at stage 1:

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

He went on to say:

"I mentioned the accuracy of statements, which we hope the proposed change will help to improve. I see no problem with the proposals."—[*Official Report, Justice Committee*, 9 June 2009; c 2071.]

The Law Society of Scotland and the judiciary expressed concern about the accuracy of witness statements and therefore the dangers of relying on them. Indeed, much of the debate thus far has focused on the dangers of relying on statements that may not have been noted in the witness's own words. I have a tremendous amount of sympathy with that concern. I understand that it has not been uncommon—perhaps because of the circumstances in which statements are obtained—for the person who notes the statement to take notes that summarise the witness's position and to note a full statement thereafter. Against that background, it is not surprising that concerns have been expressed about the accuracy of statements and whether they are noted in the witness's own words.

In future, I understand that that is to be addressed by a change in procedure that is to be set out in the code of practice. The police officer will note a full statement from the witness in the witness's own words. The normal practice will be for the witness to be given the opportunity to sign it. If circumstances prevent a full statement being taken at the time, notes will be taken, which will

remain as notes, without being expanded on by the officer. Again, the witness will have the opportunity to sign them. It is vital that statements are accurately noted, as far as possible, in the witness's own words and that they are signed by the witness. That is what Lord Coulsfield recommended, which I support.

I understand that the Lord Advocate intends to address the issue in the code of practice on disclosure, to ensure that information is accurately recorded and, in particular, that any witness statement that is obtained or generated during an investigation accurately and comprehensively reflects the evidence that is provided by the witness. I understand that it is also intended that the code of practice will provide, as far as possible, that the witness statement must contain the witness's actual words, and that the witness must be given an opportunity to sign it and to make any amendments that he wishes to make. That is to be supplemented by guidance and training for police officers, which is already under way and is due to finish at the end of May.

I remind members that under section 114 of the bill, the police, other investigating agencies and prosecutors are bound to have regard to the terms of the code of practice.

The Sheriffs Association indicated that if the law is to be changed, that should be done in primary legislation. Lord Coulsfield's recommendation is that witness statements be signed by witnesses. I respectfully suggest that that is a procedural step. We do not agree that the bill is the place for such procedural matters to be dealt with. We think that it is entirely appropriate for such a matter of practice and procedure to be dealt with in the code of practice. That is what the Lord Advocate intends to do.

The issue is one of fairness to witnesses, who could be presented with their statement for the first time in court, which could inadvertently have a detrimental effect on their ability to give evidence. In addition, witnesses are now commonly the only participants in a trial who have not seen their statement prior to trial, and we do not think that that is appropriate.

We absolutely accept that proper testing of witnesses is valid and important, but a witness's evidence should not be reduced to a one-sided memory test, in which every minor discrepancy is put under the microscope. Section 40 is designed to help to reduce the amount of time that is spent examining irrelevant minutiae and thereby allow the court to focus on the real issues at trial.

Without section 40, witnesses would still be able to refer to their statements during a trial, under section 62, without inaccuracies being addressed in advance. That would risk delay and disruption to proceedings, and it could sometimes appear as though it was the witness, rather than the accused, who was on trial. We believe that it is unreasonable to expect witnesses to recall every detail of events from many months or even years prior to their giving evidence. It is fairer to everyone, including the accused, if witnesses are allowed to refresh their memories and if decisions are reached on the best evidence that is available.

We do not share the concerns that were expressed by the Faculty of Advocates in its stage 1 evidence. It is not clear to us why the provision would exacerbate a difference of treatment between prosecution and defence witness statements. Section 40 applies to all witnesses who have given a statement, whether they are witnesses for the defence or for the prosecution. Indeed, in many cases, at the point at which the statement is noted, it might not be clear for whom the witness will give evidence. We trust Scotland's judges to manage such situations appropriately and to exercise their discretion in a way that enables the giving of good, clear, accurate evidence without risk to the tradition of oral evidence. I remind members that the judges of the High Court of Justiciary themselves said in evidence at stage 1:

"We recognise that there may be value in allowing a witness to read a prior statement before giving evidence in court."

I have gone on at some length out of respect for those who have made strong submissions on these matters and I have sought to respond explicitly, at greater length than I would normally, to those august bodies and persons who have given evidence.

We will resist amendment 131. I move amendment 130.

The Convener: The purpose of amendment 131 was to probe exactly how this was going to pan out at the end of the day. I was seeking to avoid evidence in court being valued on the basis of who had rehearsed it best. I am not entirely satisfied on that point as yet, but I have listened with considerable interest to what Mr Ewing has said about the way in which statements will be formulated in the future. From painful experience, I can tell members that there are occasions on which, under examination by the fiscal or the defence, a witness is perplexed, has little recollection of what was said at the time and is of the view that they did not make a statement along the lines that the prosecutor suggests. However, on the basis of what Mr Ewing has said about the improved procedures that are likely to be in place, I am minded not to move amendment 131.

Robert Brown: This is a difficult area—there are no two ways about it. One must be cautious about making significant changes in procedures

that have applied for a long time, with all the usual arguments about them. A trial is a search for truth and it broadly fulfils that purpose reasonably well. My view is that the basic evidence should be that of the witness—how he or she remembers things—with all its limitations. Oddities will often emerge from that, but they can be explained away without any particular damage being done. That is and ought to be the core evidence.

There is an exception for police witnesses, who can be allowed to refer to their notebooks and notes that they made at the time. I think that I am right in saying that that rule applies to other witnesses, although most of us are not organised enough to take notes at the time. Nevertheless, the so-called level playing field argument is spurious in some respects. While the police witness is giving their own statement in their own way, the so-called statements that are given by other witnesses are not statements but precognitions that are taken by somebody else. Although it is reassuring to hear of the changes that are being made to improve the accuracy of such statements, these things always fall down at the level of the weakest, not at the level of the strongest, and there will always be situations in which the procedure, however well intentioned, is not carried through to what goes on at the bottom.

We should be cautious about disrupting procedures that have been established for some time. There is a risk that doing so would divert the trial away from a search after truth and into a rather sterile dispute about whether the written precognition was what the witness said in the first place. The minister referred to best evidence. The real issue is what the best evidence is in this context. Is it rehearsed evidence or is it evidence that comes out at the time—with all its limitations—and has to be gone through in further detail?

I am a little concerned about the suggestion that inaccuracies can be addressed in advance of the trial, which has a sort of sanitised feel about it. The place to address such oddities is at the trial, when the evidence can be taken in all its glory, one way or the other. There are difficulties with the provisions, but like the convener I am not prepared to push my view against that of the minister, with his officials and his greater resource for considering the issue. However, I remain concerned about some aspects of the matter and hope that it will be kept under close scrutiny as the bill progresses, and as the matter is put into practice in due course.

James Kelly (Glasgow Rutherglen) (Lab): I support the amendment in the name of the Cabinet Secretary for Justice and the sentiments that the minister expressed in his contribution. Being required to give evidence in a trial can be quite an intimidating experience for witnesses. For many of them, it can be their first experience of appearing before a court. To stand there and be questioned by prosecution and defence can be difficult, and to try to recall events that may have taken place months or years previously can be challenging, to say the least.

In implementing justice and in prosecuting cases we want to ensure that we have an accurate record of what happened. From that point of view, it is right to allow witnesses access to their statements so that they can correct any inaccuracies. It means that witnesses can stand up in court and submit accurate evidence. Section 40 would also correct an imbalance, in that, at present, police officers are allowed to refer to their notes whereas, as the minister said, witnesses are the only people who appear at a trial who do not have access to the statements that they made previously. The provision will improve the implementation of justice and ensure that there is a more accurate record of what is being considered in a case. I support what is proposed.

Amendment 130 agreed to.

Amendment 131 not moved.

Section 40, as amended, agreed to.

After section 40

The Convener: Amendment 403, in the name of Margaret Curran, is in a group on its own. I apologise to Margaret for the fact that she came to last week's meeting but was unable to speak to her amendment.

Margaret Curran (Glasgow Baillieston) (Lab): It has been most illuminating to be here. I thank the clerks for their assistance in drafting amendment 403.

The amendment is simple but significant. It represents a stage in our move to enhance the rights of victims. The issue emerged from my work with a constituent and their family yet it has a wider resonance for Scotland.

The Parole Board for Scotland makes important decisions, whose consequences have a real impact on victims, their families and wider society. Essentially, amendment 403 would equip the Parole Board with a better means to make decisions and would give it a fuller appreciation of the impact of those decisions.

The key principle behind the amendment is that, although written representations can be very effective, it is important to add another dimension. We know that, although some victims can make their views known through written representations, a number find it difficult to do so and would find it easier to articulate their views if they were present at the parole hearing. Given the gravity of the

decisions that the Parole Board makes, it is proper that we provide all possible means to ensure that it has full information. The amendment would provide the opportunity for victims to give their own testimony, which would be a very simple step forward.

11:00

Victims have the right to be heard. The Parole Board has the right to hear their representations to ensure that it understands the full impact of its decisions. Providing for direct representation—the right to say what has happened and to set out the consequences of the board's decision—would empower victims and, ultimately, would empower the board itself.

My amendment suggests a simple step forward. I very much hope that the committee will support it.

I move amendment 403.

Robert Brown: Margaret Curran has raised a very interesting issue. The Criminal Justice (Scotland) Act 2003, which a previous Government introduced, brought in victim statements at the sentencing stage and gave victims the right to make written representations to the Parole Board when it is considering releasing someone on licence. That is entirely right and I think that it helps to put victims' concerns at the heart of the process, which was often seen previously as something that did not really concern them.

I have no doctrinal view on the right to be heard by the Parole Board. I do not think that we have had any particular evidence on that one way or the other. The questions that occur to me are whether it would create any considerable cost or bureaucracy in the system and whether it would provide any advantage to most victims. Manifestly, the question of release cannot depend on the victim of one criminal believing that the offender should be detained for ever, while the victim of another offender is in a rather more forgiving camp. However, evidence that the offender would be liberated to an address two doors away from the victim or that the victim is still suffering physical or psychological trauma as a result of the crime would be highly relevant. I am not sure whether the presence of the victim at the hearing would be required or whether most victims would regard such an opportunity as a good thing. Another issue is the extension of advice facilities for people to allow them to make effective written representation.

Having said that, I know that victims have been allowed to attend parole hearings in England and that the process has subsequently been formalised—a number of people have taken advantage of that opportunity. The Parole Board for England and Wales recognised that the right to be heard was significant for some victims. It said that the process was inclusive but could be

"emotionally difficult for victims and offenders alike."

It also made the point strongly that it is absolutely necessary that victims understand the context of and the limitations to the right to be heard.

In short, there is a case for such a change, but I want to be reassured by the Government that amendment 403 gets it right. I want to hear the minister's view before I decide my approach.

Angela Constance: I cannot imagine that anybody round the table would be unsympathetic to the need to create more opportunities for victims to be heard at various points in the criminal justice system. A number of years ago, I had the opportunity to observe a meeting of the Parole Board. My recollection is that members of the board had a large number of cases to deal with at any one sitting and all the evidence before them was written. None of the professionals was there. The offender and his brief were certainly not there. Perhaps the minister could comment on current practice in such meetings. My concern would be that, if you allowed a victim in, you would have to open up the hearing to offenders and their legal team, which would change the nature of what the board does; it looks at all the evidence of all the parties but takes a step back from it.

My other concern is that the amendment deals with the Parole Board but does not deal with life prisoner tribunals. If the amendment is agreed to, we could end up with a situation where victims would have the right of representation at Parole Board hearings, which involve offenders who are serving determinate sentences of four years or more, but they would not have the parallel right to make representation to life prisoner tribunals, which does not seem right.

My understanding is that more can always be done to scrutinise the needs of victims. A core part of considering release plans must be consideration of the impact on victims. As Robert Brown said, offenders cannot be released from prison to addresses that are two doors down from their victim. Therefore, it is imperative that criminal justice social work has a role in all assessments.

I understand the desires behind amendment 403, but I am cautious about it. I wonder whether it would have unintended consequences and whether offenders would pitch up to the Parole Board with their legal teams.

James Kelly: Margaret Curran has lodged an important amendment, which I support.

I would like to address a specific issue that is not the same as the one that Margaret Curran

addressed. When the committee was considering the Megrahi case, one thing that I was concerned about was that there was no proper basis on which the victims' views on compassionate release could be taken into account in the Parole Board hearing. There would at least have been more information for the Parole Board to consider if victims' views had been taken into account. It is right that we give a proper platform to victims who have suffered as a result of crimes and that we properly consider their views.

Amendment 403 is important. It would give people the opportunity to give verbal evidence. As committee members, we hear verbal evidence on many subjects that is often much stronger and that often carries much greater weight than the written evidence that we receive. The amendment seeks to let witnesses give appropriate views in the process. It is powerful, and I support it.

Stewart Maxwell: I have listened to the comments that have been made, and I think that we have never taken any evidence in the area before. I do not have detailed knowledge of the Parole Board and its daily workings. There is a danger of agreeing to amendments at this stage without having wider knowledge, but we should consider Angela Constance's comments on the Parole Board meeting that she attended, although that was some time ago. If what she saw is the norm, I share her concern that, if the process is opened up on one side, it will inevitably have to be opened up on all sides. I think that that would lead to the danger of there being almost a second trial in which people try to examine the case rather than the parole argument. It is completely understandable that victims will inevitably focus on the original incident, whereas the Parole Board's job is much wider than that. There is a danger that everybody would end up attending Parole Board meetings and focusing on the wrong things. Many complex issues are involved, and I am not minded to support the amendment without receiving further detailed evidence.

Nigel Don (North East Scotland) (SNP): I would like to continue from where James Kelly left off. He made the extremely important point that, by and large, we attribute more weight to verbal pieces of information. We naturally take more notice of a person who is in front of us than we do of the written word. I also take the point that Margaret Curran made that some victims will feel that the amendment would empower them and help them to move forward. I accept that, but I am also aware that some victims need to disengage. I merely put this forward as a possibility but, if it is perceived that one is more likely to get the right answer from the Parole Board if one engages with it, that will stop people disengaging and moving on in their life. There is a bit of personal experience behind what I am saying. I think that there would be several unintended consequences. However, I have no intention of repeating what other people have said. These things are all about balance and I do not have the right answer. I merely make the point that there is a substantial risk of unintended consequences. I am a little hesitant to suggest that we should agree to something on which we have not heard balanced evidence. We can see the point of amendment 403, and we understand why Margaret Curran lodged it. I see that she is shaking her head. I point her to the other side of the argument—I am concerned that her amendment might end up having unintended consequences.

The Convener: As no other members have comments, I will make some of my own. The case for amendment 403 is distinctly arguable. I can quite see the logic of it but, at this stage, I am not persuaded under a number of headings, the first of which is workability. No application for parole can be made prior to the convicted person having spent four years in custody. In practice, many hearings relate to cases in which the offender has spent considerably longer than that in custody. It might well be the case that the victim has moved house on several occasions since the original court case when the sentence was imposed. There would be practical difficulties involved in contacting the victim, which it might or might not be possible to overcome. That is a consideration.

Secondly, the nature of the representations that would be made is an issue that concerns me. Robert Brown was right to describe a situation that could quite easily arise, whereby the result of a hearing could be determined by the nature of the victim or the victim's representative. That could give rise to difficulty because some people are more forgiving than others, whereas others may have a degree of vindictiveness. In any event, we could end up in a situation in which, in the charged atmosphere that might well pertain at the hearing, the interests of justice might not be best served.

Questions were raised about the terms of release, which I did not think were particularly apposite, because social work departments should be able to manage that, so I have no difficulty in that regard.

My other concern is that, in many cases in which an application is made for parole, the crime to which the application relates is murder or culpable homicide. There could obviously be no representations by the victim in such cases, and it is not quite clear whether Margaret Curran believes that the right to make representations would pass to a surviving relative, for example. Perhaps she could address that issue at the appropriate juncture.

There is merit in amendment 403 but, as I said, I am not yet totally persuaded. I will make a

determination after listening to the final arguments of the minister and Margaret Curran.

Fergus Ewing: First, I thank Margaret Curran for lodging amendment 403, which has enabled us to have a useful debate on an important area. She is correct to raise the issue and allow it to be debated.

As representatives of constituents, all of us will, on occasion, have received requests to assist those who have been the victims of the most serious crimes and will have had discussions with those victims in our surgeries. I have had many such discussions, including with females who have been the victims of rape in many different circumstances, none of which I can go into. Suffice it to say that the feelings that are held in those cases are obviously extremely strong. We recognise that the plight of the victim is of huge importance. Many of the individuals concerned—especially vulnerable young females—will have been scarred for life by the experiences that they have undergone. Therefore, the matters that we are considering are extremely important. I just wanted to preface my remarks on the amendment with that reflection as a constituency MSP.

11:15

We have already taken steps to improve the victim notification scheme, for example by extending it to victims of offenders who are sentenced to 18 months or more in prison. With the convener's permission, I would like to go into a bit more detail, which I think might be of some assistance. The 2003 act formalised the victim notification scheme, which had been an administrative arrangement since 1997. The VNS gives victims of prescribed offences, primarily offences against the person such as rape, or, in cases when the victim has died, an eligible family member, the right to receive certain information about an offender who has been sentenced to 18 months or more in prison. The VNS also gives victims the right to receive information regarding Parole Board for Scotland review hearings and to make written representations to Scottish ministers prior to a decision being made on the release of and on the licence conditions to be applied to a prisoner.

Offenders sentenced to four years or more are considered by the PBS for release on licence from the halfway point of sentence and automatically released on licence at the two-thirds point. The board usually has no involvement in the decision to release offenders sentenced to under four years. Those offenders are currently released automatically and unconditionally at the halfway point of their sentence—an exception being certain short-term sex offenders, where there is scope for them to be released on licence. Those comments might help to put matters in context.

It is vital that victims are aware of the role of the Parole Board and of the limits of its decision making to avoid disappointment and the possibility of the victim emerging fearful or traumatised as a result of reliving the crime at a Parole Board hearing. That is why we are currently overhauling the information provided to victims about the Parole Board and about how to make representations, to ensure that the guidance is as clear and accessible as possible.

Giving victims the choice whether or not to be heard at a Parole Board hearing is an important development in enhancing victims' participation in the criminal justice system. However, a number of practicalities need to be addressed, to cover the workability factor to which the convener alluded. There are almost 500 oral or tribunal hearings a year at which the offender is present and a further almost 1,200 casework meetings a year at which the offender is not present. An effective system would need to be put in place to ensure that victims could be present at appropriate hearings. As I have said, there is a very large number of such hearings.

In addition, as well as ensuring that victims have a clear understanding of the role of the Parole Board and are properly supported throughout the process, decisions need to be made on a number of issues, including, first, what constitutes "being heard"? Secondly, should victims be heard at all Parole Board hearings, even ones where the offender is not present or represented? Thirdly, if a sex offender is involved, should the victim and offender be in the same room, or can alternative arrangements be put in place, such as victims giving a statement by videolink, for pretty obvious reasons? Finally, what about the families of victims who have died?

Those issues all need to be resolved before a robust mechanism can be put in place that allows victims to have an effective voice at Parole Board hearings. To resolve the issues, we would take into account the views of victims organisations and the Parole Board.

We are concerned that there are also difficulties with the amendment. For example, new subsection (1A) of section 17 of the 2003 act would provide that representations under section 17(1) may include a request by the victim to be heard at the relevant hearing of the Parole Board. As I have said, as section 17 stands, representations are made to the Scottish ministers rather than to the Parole Board, for a reason that I will come on to. If the amendment were accepted, victims would be recording with Scottish ministers a desire to appear before the Parole Board, but it would be entirely inappropriate for Scottish

ministers to decide whether a person can appear at a Parole Board hearing. At present, representations are made to Scottish ministers so that they can redact sensitive information and give the representations a wider context. That procedure is designed to protect victims from inadvertently disclosing sensitive information to their assailants. It is not intended to remove the victim's voice; it is intended to protect the victim in some circumstances. If the amendment were to be agreed to, it would place this duty, and others, on the Parole Board in respect of representations that it does not itself directly receive. We question whether it is appropriate to place such duties on the Parole Board in those circumstances.

In addition, if victims were able both to make written representations to Scottish ministers and to be heard at the Parole Board, what would happen if there were contradictions between the two sources? Also, there is no definition of what constitutes a victim's "immediate family" or what constitutes a "friend".

Margaret Curran will recognise that those are lawyerly objections that have been carefully considered by the officials who are ably assisting me this morning. That said, we concur with the thrust of the amendment and undertake that the Scottish Government will put together proposals that will enable victims to be heard at appropriate Parole Board hearings.

For some of the complex reasons that many members, not least Angela Constance, Stewart Maxwell, Nigel Don and the convener, have mentioned, we will be unable to complete the work in time for the passage of the bill, but the Scottish Government will bring proposals to the Parliament as soon as possible. Allowing oral representations at a Parole Board hearing might not require primary legislation but might be possible to deliver through amendments to the Parole Board rules, so it might be effected quite quickly once the practicalities are addressed. That piece of information might be of particular value to members in their consideration of how to proceed this morning. In other words, we might not necessarily have to wait for another bill to come along before taking action.

In the meantime, given the difficulties with the amendment as drafted and our commitment to work further on the issue, including a commitment that firm proposals to allow victims to make oral statements at appropriate Parole Board hearings will be brought before the Parliament, I respectfully invite the member to withdraw amendment 403.

The Convener: Thank you, Mr Ewing. That was a helpful contribution.

Margaret Curran: I thank the minister for his helpful response to my amendment. I was a bit disappointed earlier because I thought that I was meeting a wall of resistance, but I am pleased with what the minister said.

I will focus on some of the practicalities before moving on to some of the principles. I accept the importance of workability, and I have no desire to undermine the Parole Board's hearings in any way. I have tried, in the intervening week, to address some of the minister's points. He will note that I have made some amendments to my original amendment that have been accepted. For example, it picks up the point about a "relevant hearing" and tries to say what "being heard" means. I am happy to talk to the Government about that if it is not clear enough but, with the clerks' advice, I thought that those practicalities had been addressed.

I am sure that we could consider alternative arrangements when there is a particular need for privacy; that could easily be addressed. I will also take advice from the lawyers in this room and I am sure that we can find a workable definition of "family" or "relative". I cannot believe that that will be beyond our abilities, especially given the experience that we in Scotland have of such things.

I was disappointed by some of the criticisms of amendment 403. Some of the principled criticisms of the proposal could apply to written statements as much as to verbal statements. If we have conceded that victims have the right to make written representations, it is a simple step forward to say that they have the right to make verbal representations. I agreed very strongly with the minister's introduction and I think that he shares my motive because many people believe passionately that the Parole Board makes decisions without fully comprehending the victim's experience and its impact.

That is not meant in any way to undermine the Parole Board's decision-making authority. It is merely a matter of giving the Parole Board the information to inform the process. Some people were beginning to confuse that. I am not talking about a substitute for a court or a rerun of the trial but about a Parole Board making a decision. With respect, that is entirely different, and all parties understand that it is entirely different.

The one principle that I appeal to you on relates to the fact that many victims find making written statements very difficult; they do not capture the victim's experience or allow them to fully articulate what they want the Parole Board to take into account. As has been said, it can be about how the victim lives afterwards. I do not think that the process would be driven by vengeful victims or by people who want to be heard inappropriately or to misuse the system. It is about the principle of victims having the right to be heard and ensuring

that, when the systems in Scotland make decisions, they fully appreciate the victim's experience. Ultimately, the decision lies with the Parole Board, and I do not think that amendment 403 undermines that in any way. I appreciate what the minister said, and I recognise the motives behind it.

If allowing oral representations at parole hearings might not require later primary legislation, I am inclined to press amendment 403. It seems to me that we have the opportunity now to make the proposal work in this bill. I would be a bit nervous about leaving it and, if I press it and lose, it does not stop the Government doing it anyway, so I am in a win-win situation.

The Convener: I comment in passing that it is unusual for you to display a degree of nervousness.

The question is, that amendment 403 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

Aitken, Bill (Glasgow) (Con)
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 3, Against 5, Abstentions 0.

Amendment 403 disagreed to.

The Convener: The amendment falls but, on the basis of what has been said, I think that Margaret Curran can retire having achieved a result.

11:25

Meeting suspended.

11:35

On resuming—

Section 41—Breach of undertaking

The Convener: Amendment 518, in the name of the cabinet secretary, is grouped with amendments 519 to 522 and 540.

Fergus Ewing: Amendments 518 to 522 and 540 will implement the European Union framework decision on taking account of convictions in member states of the European Union in the course of new criminal proceedings. The framework decision requires to be implemented by 15 August 2010. Amendments 518 to 520 and 522 seek to amend primary legislation to ensure that Scottish courts will be able to consider previous convictions in other EU countries. Amendment 521 provides an order-making power for Scottish ministers to make further amendments to legislation to ensure that the framework decision is fully implemented. Amendment 540 requires that any such order be made using the affirmative procedure.

The framework decision is based on the principle of mutual respect for the justice systems in each member state. It seeks to assist courts across the EU in administering justice, in passing sentences and in upholding the integrity of the rule of law.

I move amendment 518.

The Convener: As no one else wishes to speak to the amendments, and as the issue is fairly straightforward, does the minister feel the need to wind up?

Fergus Ewing: No.

Amendment 518 agreed to.

Section 41, as amended, agreed to.

After section 41

The Convener: Amendment 420, in the name of the cabinet secretary, is in a group on its own.

Fergus Ewing: Amendment 420 will clarify the jurisdiction of a sheriff or justice of the peace to grant a warrant for execution by a police member of the Scottish Crime and Drug Enforcement Agency, or by a constable who is not a constable of a police force for a police area that lies within the sheriff's or JP's jurisdiction. Amendment 420 is necessary because there is, following a recent court judgment, some uncertainty about the power of a sheriff to grant a warrant in this regard. The uncertainty applies both to constables of police forces and to SCDEA police members. Amendment 420 will address that uncertainty by inserting a new section that will make it clear that a sheriff is not prevented from granting a warrant for execution by a constable or a police member of the SCDEA simply because that constable or police member is not a constable of a force that lies within the sheriff's sheriffdom.

Amendment 420 will allow a sheriff to issue a warrant to an officer from outwith his sheriffdom who is investigating an offence that potentially falls within his sheriffdom. For example, Lothian and Borders Police might be investigating a housebreaking in Edinburgh and want to search premises in Glasgow as part of that investigation. The amendment puts it beyond doubt that, in such situations, the sheriff in Glasgow will not be

prevented from granting a search warrant for execution by an officer from Lothian and Borders Police. Equally, amendment 420 clarifies that a sheriff will not be prevented from granting a warrant to any police member of SCDEA simply because that police member is not a constable of the local force.

Amendment 420 will not affect any other grounds that would affect a sheriff's ability to issue a warrant.

I move amendment 420.

Amendment 420 agreed to.

Sections 42 and 43 agreed to.

After section 43

The Convener: Amendment 132, in the name of the cabinet secretary, is grouped with amendment 197.

Fergus Ewing: Amendment 132 will repeal sections 24A to 24E of the Criminal Procedure (Scotland) Act 1995, which provide for an electronically monitored movement restriction requirement to be imposed as a condition of bail in some cases.

Electronically monitored movement restriction conditions of bail were piloted in four courts, from April 2005 to December 2007. Such conditions could be imposed only in limited circumstances, where the court had already refused to grant bail and a subsequent application was made by the accused for bail with a movement restriction condition. The evaluation into the pilots highlighted low use of the provisions by the courts, high breach rates and high cost and disproportionate burdens being placed on enforcement agencies.

The previous Administration agreed that the pilots should end, so the regulations that empowered the pilot courts to impose movement restriction conditions were revoked. Repealing sections 24A to 24E of the 1995 act will remove any concerns to the effect that the Scottish Government intends now, or in the future, to resurrect them. Amendment 197 is consequential on agreement to amendment 132.

I move amendment 132.

Bill Butler (Glasgow Anniesland) (Lab): I believe that the courts should retain the right to impose, where it is deemed appropriate to do so, an electronic tag on people who are granted bail. However, I am unclear as to what the effect of amendment 132 will be. I will be grateful to be wrong, but it suggests to me that the Government's intent is that the power to impose an electronic tag as a condition of bail be removed. Closer inspection of the amendment suggests that under existing provisions of the Criminal Procedure (Scotland) Act 1995, a court is able to impose further conditions that it considers necessary to ensure that the conditions of an offender's bail are observed. Can we have clarity from the minister that the further conditions that are referred to will still include electronic tagging, where it is appropriate?

The Convener: While the minister seeks advice from his officials, I underline that this could be a matter of concern. There is a history of significant breaches and we wish to ensure that the law is adequate for the wider protection of society. Minister, are you now in a position to sum up?

Fergus Ewing: Yes. I make it clear that if amendment 132 is agreed to, it will entirely remove tagging for bail because of the results of the evaluation of the pilots, which were undertaken as I described and were found to demonstrate that electronic tagging does not work.

The Convener: The question is, that amendment 132 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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 5, Against 3, Abstentions 0.

Amendment 132 agreed to.

Section 44—Prosecution on indictment: Scottish Law Officers

The Convener: Amendment 421, in the name of the cabinet secretary, is grouped with amendments 422 to 427 and 451.

Fergus Ewing: Amendments 421 to 427 and 451 are technical amendments. Section 44 of the bill will remove the requirement for indictments to be libelled in the personal name of the Lord Advocate or—as the case may be—of the Solicitor General. It will amend the existing framework, which is in place through the Criminal Procedure (Scotland) Act 1995, regarding the raising of solemn cases where there is a vacancy, or vacancies, in the office, or offices, of the Scottish law officers. It also makes provision concerning the continuing effect of such proceedings. The amendments are designed to provide additional

transitional arrangements for the raising of indictments in those circumstances, and to make provision for their continued effect, both of which are considered to be necessary.

I move amendment 421.

The Convener: The amendments could remove a situation that had the potential to cause some excitement.

Amendment 421 agreed to.

Amendments 422 to 427 moved—[Fergus Ewing]—and agreed to.

Section 44, as amended, agreed to.

Sections 45 and 46 agreed to.

After section 46

11:45

The Convener: Amendment 428, in the name of the cabinet secretary, is in a group on its own.

Fergus Ewing: Amendment 428 will insert into the Criminal Procedure (Scotland) Act 1995 two new sections on prosecution of sexual offences.

Proposed new section 288BA of the 1995 act will provide a statutory basis for use of a docket attached to an indictment, or to a complaint by the Crown, to inform the defence of the Crown's intention to lead evidence of an offence that has not been charged. That approach might be used when a complainer alleges that a more serious sexual offence than that which has been charged was committed against her, but there is sufficient corroborative evidence to support only a less serious charge. For example, a complainer might allege that she was raped, but there might be corroborated evidence to support only a charge of attempted rape or sexual assault.

In the past, in order to enable the complainer to give a full and honest account of what happened to them, the Crown followed the practice of attaching a docket to the case to inform the defence of the Crown's intent to lead evidence of an offence that had not been charged. However, there is no statutory authority for the use of such dockets, and recent decisions have cast doubt on their use, in view of which the Crown has discontinued them. Amendment 428 will provide a statutory authority for their use.

The use of a docket to lead evidence of an offence that has not been charged is restricted to circumstances in which the act or omission in the docket relates to the same event as the offence that has been charged, or a series of events of which that offence is a part. Therefore, a docket cannot be used to lead evidence of an alleged offence that is unrelated to that which has been charged.

Proposed new section 288BB of the 1995 act is a technical addition. It will provide that it is competent for the Crown to libel more than one statutory sexual offence, or a combination of statutory sexual offences and common-law offences, in a single charge. It is competent to libel more than one common-law offence in a single charge, but it is not clear that it is competent to libel more than one statutory offence or a statutory offence and a common-law offence in a single charge.

At present, it is common practice for the Crown to libel physical and sexual aspects of an assault as part of a single charge in circumstances where, for example, it is alleged that the accused assaulted and raped the complainer. That benefits the prosecution because of the ruling in Campbell v Vannet that only the essential facts of a crime require to be corroborated, and not every single element of a charge. By providing a statutory basis for mixed libelling of common-law and statutory sexual offences, we will ensure that the move to a statutory framework for sexual offences under the Sexual Offences (Scotland) Act 2009 does not inadvertently make sexual offences more difficult to prosecute.

I move amendment 428.

The Convener: As I see it, amendment 428 just puts into statute what has been the practice of the courts for a lengthy period and it aims simply to overcome the problems that were caused by the Campbell case. It should be supported.

Amendment 428 agreed to.

Section 47—Remand and committal of children and young persons

The Convener: Amendment 541, in the name of Robert Brown, is in a group on its own.

Robert Brown: Amendment 541 is a probing amendment that seeks clarity. The Scottish Government has rightly set out the policy intent to end detention of children under 16 in adult establishments and young offenders institutions for young people aged 16 to 21. That intention, which is backed by all parties, is the purpose of section 47. However, it has been suggested that, although section 47 deals with section 51 of the Criminal Procedure (Scotland) Act 1995, it does not deal with section 44 of that act.

I am told that, in a recent case in Dundee, a sheriff sent a 15-year-old to Polmont YOI, allegedly under section 44 of the 1995 act. I sought to clarify the issue by way of a parliamentary question and the answer said that there had been no such occurrences under

section 44 of the Criminal Procedure (Scotland) Act 1995. However, I understand that the case has been made known to the minister and I hope that it has been possible for him to check it out.

The difficulty might arise from the phrasing of section 44 of the Criminal Procedure (Scotland) Act 1995, which applies to children, who are—I presume—designated as "persons under 18", and which says that the sheriff may, but presumably does not require to, send a child who is convicted of an offence to residential accommodation that is provided by a council. Amendment 541 would restrict the relevance of that to children of 16 and 17, which would, I hope, resolve the ambiguity. There is a technical issue about whether the Government's clear intentions have been effectively put into the bill. My intention as regards the amendment will obviously depend on what the minister can say to me in reply.

I move amendment 541.

Fergus Ewing: Amendment 541 would remove a sheriff's power to place a young person in residential accommodation following conviction for an offence for which an adult could be imprisoned. We believe that it is sometimes appropriate for a sheriff to place a young person in residential accommodation, which is defined as an establishment that provides residential accommodation for children. For example, a sheriff may wish to place a young person in secure care, where their needs and risk can be best managed in the controlled care setting of secure accommodation.

When considering the abolition of unruly certificates in 2008, we consulted a number of relevant organisations on the impact of that change, including Scotland's Commissioner for Children and Young People, who supported the abolition and said that

"this welcome change in legislation will go some way to keeping children out of prison."

It should be noted that there has been no such consultation on the impact of amendment 541, which would remove the power of sheriffs to place young persons in residential accommodation. I can tell Robert Brown that I understand that in practice, before the detention of a child under section 44 of the Criminal Procedure (Scotland) Act 1995, a sheriff will usually seek the advice of the principal reporter before sentencing and is obliged to do so where a child is subject to a supervision requirement under section 49 of the 1995 act.

Robert Brown mentioned a particular case. I say simply that I am aware of the case and that we have written to Dundee sheriff court for clarification of how that case was dealt with. It would not be appropriate for me to comment further at this stage.

Robert Brown: I have listened to the minister. My intention with amendment 541 was not to change the arrangements with regard to residential accommodation, but to focus on whether section 44 of the 1995 act did funny things that had not been got rid of. However, in the light of the minister's comments, although the matter has not been entirely bottomed out, I will not press amendment 541 at this time. Perhaps the minister can keep me advised of the outcome of his inquiries on the issue.

Amendment 541, by agreement, withdrawn.

Section 47 agreed to.

Sections 48 to 51 agreed to.

After section 51

The Convener: Amendment 429, in the name of the cabinet secretary, is grouped with amendments 454 to 456, 458 and 459.

Fergus Ewing: Amendment 429 will extend the application of sections 288C, 288E and 288F of the Criminal Procedure (Scotland) Act 1995, which prohibit an accused person from conducting their own defence in certain cases involving sexual offences, or in cases involving child witnesses or other vulnerable witnesses. Currently, the prohibition applies specifically to preliminary hearings, trials and victim statement proofs. The amendments will extend the prohibition to "any relevant hearing", which means a hearing at which, or for the purposes of which, a witness is to give evidence.

It is important that the amendments be agreed to. The prohibitions will apply in cases in which the alleged victim or a witness might be particularly intimidated or otherwise inhibited from giving their evidence. Such cases include those that involve certain sexual offences and child witnesses under the age of 12, or other vulnerable witnesses. Our intention is to ensure that victims and witnesses are not to be cross-examined by the alleged perpetrator in any relevant hearings relating to such cases. The law as it stands does not cover all the types of hearing at which it is possible for a witness to give evidence, which is why we seek to make the amendments. The accused will, of course, still be legally represented, and will be notified that they cannot conduct their own defence. However, the provisions take account of the interests of vulnerable witnesses in cases where there would be considerable potential for intimidation if the accused was to conduct their own defence.

Amendments 454 to 456 and amendment 458 will, if amendment 429 is agreed to, make a

number of consequential amendments to the 1995 act. They will replace references to specific hearings with the general term "any relevant hearing". Amendment 459 will make a consequential amendment to the Criminal Procedure (Amendment) (Scotland) Act 2004. It should be noted that paragraph (b) of amendment 459 is consequential on agreement to amendment 132.

I move amendment 429.

The Convener: When the issue was looked at in connection with earlier legislation, it was revealed that the situation to which the minister referred had happened only once in the past 50 years. Nevertheless, it is clearly undesirable that an accused person should conduct his own defence and have the opportunity of confronting or cross-examining the alleged victim. Amendment 429 simply seeks to extend that established principle, and to my mind it is worthy of support. I take it that there is no need to wind up, minister.

Fergus Ewing: There is no wind-up.

Amendment 429 agreed to.

Section 52—Disclosure of convictions and non-court disposals

Amendments 519 and 520 moved—[Fergus Ewing]—and agreed to.

Section 52, as amended, agreed to.

After section 52

Amendment 521 moved—[Fergus Ewing]—and agreed to.

After schedule 2

Amendment 522 moved—[Fergus Ewing]—and agreed to.

Section 53 agreed to.

Section 54—Submissions as to sufficiency of evidence

The Convener: Amendment 462, in the name of the cabinet secretary, is grouped with amendments 463 to 477 and 514.

Fergus Ewing: The amendments make a number of changes to the bill, creating a new Crown right of appeal against certain judicial decisions that can end a trial.

Amendments 462 and 463 make technical changes to the new statutory submission that the defence may make on the sufficiency of evidence in a case. That submission may be that the evidence is insufficient in law to justify the accused being convicted of the indicted offence or that there is no evidence to support part of the circumstances in the indictment. If successful, it will result either in the judge acquitting the accused of the indicted offence or an amendment to the indictment. The amendments ensure that the submission may be made only once, either at the close of all evidence in the case or at the conclusion of the prosecutor's address to the jury.

Amendments 464 to 467 are technical and will ensure that the Crown appeals provisions better reflect existing criminal court practice.

Amendment 468 clarifies that it will not be possible for the defence to make a common-law submission that, on the entire evidence that has been led in the case, no reasonable jury, properly directed, could convict. That reflects the policy intention on the introduction of the bill. However, the Sheriffs Association suggested in its written evidence to the committee that the provisions in the bill would not prohibit that type of submission. Amendment 468 will make certain that that type of submission cannot be made.

Amendments 469 and 477 make provision for time limits when a prosecutor wishes to exercise the new Crown right of appeal that is created by section 55. The appeals concerned are against two types of judicial decision: first, a ruling that there is no case to answer; secondly, a direction that the Crown case is insufficient for the jury to convict on a particular charge or to support some part of the charge. The existing provisions do not currently set out time limits for the Crown to indicate that it intends to appeal. That might cause some difficulties in practice and unfairness to accused persons if it were to result in extended delay. The amendments therefore ensure that there will be an overall deadline of seven days from the making of the decision being appealed for the lodging of a note of appeal. The prosecutor will have to intimate an intention to appeal either immediately after the judicial decision or after seeking an adjournment of up to two days in order to consider whether to make an appeal. No new time limits are proposed for any appeal against a ruling during a trial that an important item of prosecution evidence is inadmissible, as that mode of appeal is subject to the leave of the court.

Amendment 470 will require the suspension of the effect of the acquittal. That will allow the court to grant bail without there appearing to be two contradictory orders in operation.

Amendment 474 makes a minor, clarifying amendment to new section 107D of the 1995 act.

Amendments 471, 472 and 514 deal with bail and remand decisions when a Crown appeal is made against an acquittal under section 55. Although the person will have been acquitted, it will be necessary for the court to decide whether they should be bailed or remanded during the

period between the acquittal and the deciding of the appeal. The amendments regulate that decision.

12:00

Section 55 already covers that situation through new section 107A(2) of the 1995 act. It reflects the Scottish Law Commission's recommendation that decisions to remand an acquitted person subject to a Crown appeal should occur only in exceptional circumstances. However, the existing provision is unsatisfactory, as it suggests that the exceptional requirement would apply to both the possible options—not just to remand but to bail. We have given detailed thought to the Scottish Law Commission's reasons for recommending that a remand decision should occur only in exceptional cases. The person concerned will of course have been acquitted, and there are strong arguments of fairness against placing such a person in custody. On the other hand, courts are well versed in making bail decisions, and the normal framework allows them to look at all the circumstances before taking their decision.

The Crown appeals provisions will allow challenge to an acquittal caused by an error by a trial judge. The cases that the Crown will decide to appeal under the new provisions are likely to be at the most serious end of the spectrum and those in which the public interest is most likely to be affected by the outcome. Those appeals will be rare. The Crown anticipates that only three or four will be made in any year. An example of an appeal could be in a murder trial where the judge has ruled that there is no case to answer and that decision is closely contested by the Crown.

The Scottish Law Commission recognised that there may be cases in which it would be justified to remand someone subject to a Crown appeal. There is a clear public interest in ensuring that especially dangerous persons are not released in the period between an incorrect decision and a ruling by the appeal court to correct that mistake and quash the acquittal. The person might reoffend or seek to flee justice, and it seems vital to us that the courts should not be bound by an unreasonably high test before the safety and security of the public can be safeguarded.

After consulting the Crown Office, we have concluded that the exceptional test is not needed for remand decisions. Amendment 471 will therefore remove the word "exceptionally", which means that the normal test that courts are used to applying in making bail and remand decisions will apply. It involves a presumption in favour of bail, which can be overturned where there is a good reason for refusing it.

Amendment 472 will provide an additional safeguard by ensuring that detention can occur only where there are arguable grounds of appeal.

Amendment 514 is a consequential amendment, which will add a Crown appeal to the instances in which bail can be granted under the Criminal Procedure (Scotland) Act 1995.

Amendments 473 and 475 are technical amendments that will remove two unnecessary provisions.

Amendment 476 will allow a prosecutor to desert a case for the time being, pending the result of a Crown appeal. That should save court time and prevent a trial continuing in relation to several minor charges where there is an outstanding Crown appeal on the main charge in the indictment. Desertion will permit the prosecutor to reassess the case in its entirety, following the result of the Crown appeal.

I move amendment 462.

The Convener: This is a fairly important issue. I invite other contributions.

Robert Brown: I have a brief comment to make on amendment 471, which will remove the words "exceptionally and" with regard to the detention of the person. If that amendment were agreed to, the remnants of new section 107A(2)(b) of the 1995 act would read:

"after giving the parties an opportunity of being heard"

the court may

"order the detention of the person in custody or admit him to bail."

It is fair to say that no guidance is given to the court as to the circumstances, which the minister outlined carefully. Is there an issue about whether the court should have guidance from Parliament about the circumstances in which detention and custody—in these unusual situations—would be appropriate?

Fergus Ewing: Given the potential controversy of amendment 471, I sought to cover the issues involved at some length and to go through them in greater length than I did those of the other—not unimportant—amendments in the group.

By removing the phrase "exceptionally and", amendment 471 will in effect apply the normal test, so that the normal rules of considering whether to grant bail will apply. We make that change in the expectation—indeed, the certainty—that judges are very familiar with the application of that test and are therefore well aware of how it should be applied. For that reason, we do not think it necessary to specify that further guidance should be issued, as we can be confident in our expectation that those who are

required to make decisions about bail are very well experienced in such decisions.

The Convener: I suspect that the amendments are predicated on the failure of the prosecution in the World's End murder case and seek to protect the Crown's position where a no-case-to-answer submission under section 97 of the 1995 act is granted by the trial judge. As the law stands at present, the only remedy for such a decision would be for the matter to be taken to the appeal court on the Lord Advocate's reference. On that basis, the prosecution would have already failed and the accused could not be subject to reindictment.

It is worth recording that instances where a no-case-to-answer submission has been successful are very few in number, as the minister has said. Amendment 469 would allow the Crown to seek to appeal such a decision by allowing for the adjournment of the trial diet while the appeal is determined. Personally, I have no difficulty with the proposed time factor, as I think that the two-day limit is appropriate. I also have no difficulty with the proposal that the accused be remanded in custody rather than be granted bail.

I am minded to support the amendments.

Does the minister wish to wind up the debate?

Fergus Ewing: Let me say briefly that the amendments reflect the recommendations of the Scottish Law Commission's "Report on Crown Appeals".

Amendment 462 agreed to.

Amendments 463 to 468 moved—[Fergus Ewing]—and agreed to.

Section 54, as amended, agreed to.

Section 55—Prosecutor's right of appeal

Amendments 469 to 476 moved—[Fergus Ewing]—and agreed to.

Section 55, as amended, agreed to.

Section 56 agreed to.

Section 57—Further amendment of 1995 Act

Amendment 477 moved—[Fergus Ewing]—and agreed to.

Section 57, as amended, agreed to.

Section 58—Retention of samples etc

The Convener: Amendment 478, in the name of the cabinet secretary, is grouped with amendments 404, 405, 479, 406, 480, 407, 481, 482, 408, 494, 499, 502 to 504, 512 and 513. I point out that if amendment 478 is agreed to, I cannot call amendment 404, because of pre-emption.

Fergus Ewing: Amendment 478 will make a number of changes to section 18 of the Criminal Procedure (Scotland) Act 1995. The amendment will apply the provisions on destruction of samples to the new sections 18B and 18C that will be inserted by section 59 of the bill and it will make consequential changes to cross-references. Amendment 478 will also insert new subsection (7AA) into section 18, which will remove the requirement that devices that are used to collect forensic data from the external skin of a person outside Scotland can only be those that are approved by the Scottish ministers. That power is considered unnecessary and bureaucratic, and we have no evidence that it has been used.

James Kelly's amendments 404 to 408 introduce significantly more stringent powers for the retention of data from people who are prosecuted for but not convicted of an offence. The aim appears to be to bring our legislation closer to the Crime and Security Act 2010, which was recently passed for England and Wales. It is worth remembering that, in the case of S and Marper v the United Kingdom, the judgment found the retention regime in England and Wales to be incompatible with article 8 of the European convention on human rights. That regime provided that forensic data on those who were not subsequently convicted of an offence could be retained for an indefinite period of time. The UK Government's Crime and Security Act 2010 amended the regime.

However, it is also worth noting what the House of Lords and House of Commons Joint Committee on Human Rights said about the provisions in the 2010 act in its 15th report of the 2009-10 session, which was published in March:

"in our view, the proposal to continue to retain the DNA profiles of innocent people and children for up to 6 years irrespective of the seriousness of the offence concerned and without any provision for independent oversight, is disproportionate and arbitrary and likely to lead to further breaches of the ECHR."

The report concluded that

"even if the Government is able to persuade its colleagues on the Committee of Ministers"—

whose next meeting will be in June 2010—

"to accept its approach, we consider that there is a significant risk that the proposals in the"

2010 act

"would lead to further litigation both at home and at the European Court of Human Rights and a significant risk of further violations of the right to respect for private life by the United Kingdom."

Mr Kelly's amendments seek to introduce a similar retention regime in Scotland, but with

retention triggered following the person's being proceeded against, not arrested, as in England and Wales. That approach would mean that someone who was prosecuted for but acquitted of a minor breach of the peace would have their DNA and fingerprints retained for six years—the same period for which someone who was prosecuted for but not convicted of rape or murder would have their DNA and fingerprints retained. Given that lack of discrimination between minor and serious offences, Mr Kelly is asking us to introduce an approach that would be at greater risk of ECHR challenge. A successful challenge that found the approach to be disproportionate and unlawful may itself lead to justice being undermined. For example, an individual may be able to challenge his conviction on the ground that his DNA was retained unlawfully and therefore was inadmissible as evidence. If the DNA evidence was crucial to the case, a court could declare the DNA evidence to be inadmissible and the person could be acquitted or have his conviction quashed.

The Scottish approach to the retention of DNA that is taken from those who are not subsequently convicted of an offence, as set out in section 18A of the 1995 act, was looked upon favourably by Strasbourg, because it differentiates between the most serious offences and minor offences by providing for retention only when a person is proceeded against for certain sexual and violent offences. It allows a minimum retention period of three years, but it also enables that period to be extended if the courts deem that necessary. In fact, when an unconvicted person is considered to pose a significant risk, DNA can be retained beyond the six-year period that is allowed for in England and Wales.

There are, therefore, two strong features of the Scottish approach that do not apply in England. First, retention under section 18A does not apply to minor offences; it applies only to sexual and violent offences, which provides the differentiation that was sought by the judgment in S and Marper v the United Kingdom. Secondly, the decision on the appropriate period for which to extend the retention of DNA is taken independently by the court, taking into account the evidence that is before it. We do not want to take a backward step in terms of the ECHR by moving away from the current regime, which was considered to be proportionate.

12:15

In its response to our 2008 consultation on the acquisition and retention of forensic data, the Association of Chief Police Officers in Scotland supported the current regime, stating:

"Members are supportive of the current procedures in relation to retention of the DNA of individuals who, having had criminal proceedings initiated against them in respect of a relevant offence, are not convicted. There is also strong support for the widening of these powers to include the retention of the fingerprint records of such persons."

The law officers have indicated that, under their responsibility for prosecuting offences in Scotland, they support Scotland's current approach and would not wish to move to an approach where there was uncertainty about ECHR compliance.

In relation to the evidence presented by the United Kingdom Government to support its new retention periods for unconvicted persons, of course if you retain more DNA you are going to get more hits and solve more crimes. However, the question is not solely about evidence, but about proportionality and finding a balance between what is acceptable to the police in terms of providing evidence to investigate crime, to the courts in terms of compatibility with the ECHR and to the people of Scotland in terms of protecting their civil liberties. We believe that we have the balance correct with the current law, and for that reason we oppose amendments 404 to 408.

Amendment 479 is a technical amendment that amends section 58(3) of the bill in order to recast the adjustment that is being made to section 18A of the Criminal Procedure (Scotland) Act 1995.

Amendment 480 amends section 58(3)(c) of the bill, which amends section 18A of the 1995 act. It substitutes a reference to ensure consistency in terminology across the forensic provisions in the 1995 act and the Criminal Justice (Scotland) Act 2003.

Amendment 481 amends section 58 of the bill to insert new provisions into section 18A of the 1995 act. It amends section 18A by providing the sheriff principal with the power to amend the date of destruction for any forensic data that are held under section 18A, should he or she allow an appeal made by a chief constable against the original decision of a sheriff not to extend the retention period. Where an appeal is successful, the sheriff principal will have the same power as the sheriff to grant an order amending or further amending the destruction date. The order is limited to a period of two years from the previous destruction date.

Amendment 499 clarifies the purposes for which Scottish police forces, the Scottish Police Services Authority or other bodies operating on behalf of the police can use forensic data from outwith Scotland. In accordance with new section 19C(2) of the 1995 act, which is inserted by section 60(1) of the bill, such data can be used for the prevention and detection of crime, the investigation of an offence, the conduct of a prosecution or the identification of a person. Amendment 502 makes provision for the sharing of forensic data by the police within Scotland and

other jurisdictions for use in accordance with section 19C(2) of the 1995 act or for checking against other relevant data. The amendment also enables the police, the Scottish Police Services Authority or a person acting on behalf of a police force to use forensic data provided to them by other jurisdictions to check them against Scottish forensic data held on relevant databases. The amendments are aimed at providing a clear description in statute of the powers of the police to use and provide forensic data to support the investigation, detection and prosecution of crime, including cross-border crime. The terms of section 19C(2) of the 1995 act will ensure sufficient safeguards on the uses of the data.

Amendments 503 and 504 provide for forensic data mentioned in section 19C(1) of the 1995 act to be used for the investigation of a crime or suspected crime and the conduct of a prosecution in a country or territory outside Scotland. The effect of the amendments is that the powers under new section 19C of the 1995 act on the use of samples will be applicable to the investigation of crime or suspected crime or the conduct of a prosecution in England, Wales and Northern Ireland.

Amendment 512 inserts a new paragraph into schedule 5 to the bill, as it makes minor and technical amendments to sections 18(8)(c) and 19 of the 1995 act. It provides consistency with the policy elsewhere in the bill by removing the reference to “impressions” in section 18(8)(c) of the 1995 act. All other references to “impressions” will be removed, as this term is now considered to be obsolete for the purposes of forensic data provisions in the 1995 act. The term “relevant physical data”, as defined in section 18(7A) of the 1995 act, already catches the types of impressions that are required for these provisions. Replacing the term “prints” with “relevant physical data” will ensure that palm prints and other kinds of relevant physical data are also included for the purpose of section 18(8)(c) of the 1995 act, as the current meaning of “prints” is limited to fingerprints.

Amendment 513 repeals section 20 of the 1995 act, as it has become obsolete. That section provides the power to check physical data, prints and samples against other physical data. However, if the amendments are accepted, that will be provided for in new section 19C of the 1995 act, which clarifies the power in more detail, and explains its limits and its cross-border application, so as to render section 20 of the 1995 act unnecessary.

Amendment 482 modifies the definition of a relevant sexual offence in section 18A of the Criminal Procedure (Scotland) Act 1995. Among other things, that section grants the power to retain DNA from individuals who have been prosecuted for but not convicted of certain sexual offences. The amendment provides that public indecency is a relevant sexual offence for the purpose of section 18A only if it is narrated in the criminal proceedings that there was a sexual element to the conduct.

Amendment 494 amends the list of relevant sexual offences in section 19A of the 1995 act to include public indecency, but only where a court has made a finding that there was a sexual element to the behaviour. Following the High Court case of Webster v Dominick in 2005, it was held that the common-law offence of shameless indecency was not a relevant charge in Scots law, therefore the offence that should be prosecuted is public indecency, as it covers conduct of a sexual nature. In response to that judgment, the offence of public indecency where there is a sexual element to the behaviour has been substituted for the now obsolete offence of shameless indecency.

Amendment 494 adds offences under sections 47, 49, 49A and 49C of the Criminal Law (Consolidation) (Scotland) Act 1995 to the relevant violent offences that are listed in section 19A(6) of the Criminal Procedure (Scotland) Act 1995. The amendment has two effects. First, it allows DNA samples, DNA profiles and fingerprints to be retained from individuals who have been proceeded against but not convicted of public indecency, provided that there was a sexual element to the conduct or an offence under section 47, 49, 49A or 49C of the Criminal Law (Consolidation) (Scotland) Act 1995. Those sections concern offences involving the possession in a public place of an offensive weapon or an article with a blade or point. Secondly, the amendment will enable the police to take DNA and fingerprints under section 19A of the Criminal Procedure (Scotland) Act 1995 from any person who has been convicted of such an offence after their conviction. Statistical information shows that those who are convicted of possessing an offensive weapon have an above-average propensity to go on to commit serious violent crime. The amendment will bring that offence into line with violent offences that are already included in the list in relation to which people can have their DNA retained if they are proceeded against but not convicted.

I move amendment 478.

James Kelly: I support amendments 404 to 408, which are all in my name and seek six-year retention of DNA for all those who have been prosecuted but not convicted. I also seek provision for two-year extensions on application.

The amendments are important. The primary objective is to extend the DNA database. It is important to understand that the retention time is limited to six years; unlimited retention is not being

sought. It is also important to recognise that DNA can be used not only in detecting crime but in clearing people who are innocent if it can be proven that their DNA was not at the scene of the crime.

There have always been people who have opposed extensions of the DNA database. Some argue that the DNA of people who have been found guilty of minor crimes should not be held. However, I put forward the case of John Morton, who was found guilty of rape earlier this year. The offence was committed in 2002. He was detected when his DNA was taken after a minor breach of the peace in 2007, and he was brought to court. That shows the power of the DNA database in tracking down those who commit unlawful acts. In addition, I submit that, in England and Wales, there have been 832 successful matches against the database for serious crimes over the past year. One of those matches was in the case of Paul Hutchinson, who murdered a young teenager in 1983. He has now been convicted, 27 years after his awful crime.

There are those, including the minister, who hold up the DNA system in Scotland as a model system, but given that the rape conviction rate, which was announced recently, is at a 25-year low, no one will hold up our record on rape prosecutions as an international model. I submit that the extension of the DNA database would help with tracking down offenders in the 2,000 rape cases in Scotland that remain unsolved. It is one thing to say that we all take the issue seriously, but we must look at provisions that will allow us to make progress and be successful in getting more convictions and bringing more people to trial. I submit that the extension of the DNA database is a prime example of a measure that would do that.

In relation to the minister's points about the ECHR, he noted that the UK Government moved from a position of indefinite retention of DNA data to one of retention for six years so that the legislation would be fit for purpose. Therefore, I dissent from the views that he expressed in his opening remarks.

I oppose amendments 478 and 482 because, essentially, they support the Government's position in the bill, which is that of those who are prosecuted for but not convicted of an offence, only the DNA of those who are prosecuted for but not convicted of serious violent and sexual offences should be retained.

I support amendments 479 and 480, which provide clarification on samples, and amendment 481, which provides clarification on two-year extensions. I support amendment 494, which clarifies the definitions of sexual and violent offences, and amendment 499, which seeks to allow forensic data that are obtained outwith Scotland to be used by the Scottish police. In addition, I support amendment 502 on the sharing of forensic data within Scotland, and amendments 503 and 504, which seek to allow the use of samples for prosecutions in England, Wales and Northern Ireland. Those are sensible amendments. I also support amendments 512 and 513, which are simply tidying-up amendments.

The Convener: As James Kelly said, the debate on this group is an important one. Although I regret having to postpone it, members have other commitments over the lunch hour, which will last literally one hour. I suspend the meeting until 2 o'clock but, as members will be aware, there is a briefing at 1.30.

12:28

Meeting suspended.

14:03

On resuming—

The Convener: We resume the debate on amendments to section 58, on matters pertaining to the retention of DNA samples. We have heard from the minister and James Kelly, but other members wish to contribute.

Robert Brown: I was about to launch into my devastating assault on James Kelly when the meeting was suspended, so I am feeling slightly frustrated.

I am genuinely concerned about James Kelly's amendments 404 to 408, which, if I understand them correctly, are designed greatly to widen the categories of people acquitted after trial or not proceeded against from whom DNA samples can be retained, and to double the normal time of retention from three to six years.

Mr Kelly mentioned 2,000 unsolved rape cases. I cannot believe that identification forms the issue in more than a small proportion of those cases, or that, in cases involving what might be described as violent stranger rape, the question of identification is the issue. As far as I can see, the difficulties in rape cases are almost always to do with cases of acquaintance rape, which often involve the consumption of drugs or alcohol, which complicates the issue and puts the onus on consent. None of that has anything to do with DNA samples.

I am not aware of there being any great evidence to suggest that James Kelly's amendments are good or necessary. As has been said, there is a balance between the rights of the individual—particularly one who has been found not guilty of a crime or who has not been proceeded against—and the interests of public safety.

There is a case—although I do not agree with it—for everyone having their DNA on a giant database. There might be some logic to that, providing that the authorities could be trusted not to load the database on to a memory stick and leave it on a bus. However, if it is accepted that it is not appropriate to store everyone's DNA information, which is the context within which we are operating, there can be only a limited right to retain DNA for serious matters, and for a limited time, where a person has been acquitted or not proceeded against.

I think that I am right in saying that the United Kingdom holds more DNA samples than almost any other country in Europe. James Kelly seems to be copying his amendments from the position in England, but I suggest to him that we should exercise caution in following the English model, given that the previous attempt by the Labour Government to go down that road rightly fell foul of the ECHR.

I have heard nothing to suggest that the Scottish model, which is reasonable and proportionate, causes particular problems. We know that, under section 29(2)(d) of the Scotland Act 1998, any provision that is incompatible with the ECHR is outwith the legislative competence of the Scottish Parliament.

The minister referred to the judgment in S and Marper v the UK. The criticism in that case was of the blanket and indiscriminate nature of DNA retention in England and Wales; it also highlighted the need to distinguish between adults and children in terms of the retention regime. The UK was found to be in violation of the ECHR on that basis, and I think that James Kelly's amendments raise the same issues.

The Council of Europe's Committee of Ministers has discussed the UK Government's response and has expressly stated that the regime in Scotland, which provides for the retention of the DNA of unconvicted adults only in relation to serious offences and only for three years, was in accordance with the ECHR. As the minister mentioned earlier, the highly regarded Joint Committee on Human Rights of the House of Commons and the House of Lords also argued persuasively that a six-year period of retention for unconvicted adults was a disproportionate interference with privacy rights under article 8 of the ECHR.

In short, James Kelly's amendments are not really supported by evidence, they are disproportionate and, much more significantly, they are likely to be the subject of ECHR challenge. The committee ought to reject them.

Nigel Don: I will carry on in the same vein. It is not often that I quote with approval a joint committee of the House of Lords and the House of Commons, but the Joint Committee on Human Rights was openly critical of the UK Government's stance.

Although James Kelly has quite reasonably tried to bring a policy north of the border so that there can be some similarity with what goes on in the south—I endorsed that approach in relation to previous amendments—he has ignored the real dangers, which go further than even those that Robert Brown has suggested. We could be in a position in which someone who was convicted of a heinous crime could be subsequently acquitted and freed on the basis that the DNA evidence on which they were convicted should not have been held. I do not want to take that risk, and I am astonished that anyone would. There is a risk that the entire legislative framework could be overturned by a European judgment, with the consequences that those who were convicted on the basis of stored DNA could be released and that those whose DNA was retained could claim compensation. The proposal opens up a pile of unnecessary problems, which we have already been warned about.

There is some logic in the idea that we should retain everyone's DNA at birth, as that would help to convict a few people. However, as Robert Brown said, if we are not going to do that—we are quite clear that we are not going to do it, and the ECHR is also quite clear on the matter—we need to have a system that is proportionate, as the present one is, and does not run the obvious risk of falling foul of decisions that we already know about. On that basis, I think that it would be absolutely crazy to support the Labour Party's position.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): James Kelly's amendments take account of the decisions that were reached as a result of the ECHR. To quote Nigel Don, if the committee does not accept them, it would be ignoring the very real and dangerous criminals who are out there and who could be caught if we retained their DNA. I fully support James Kelly's amendments, and I think that the argument that they do not comply with the ECHR is exaggerated scaremongering.

Stewart Maxwell: When Cathie Craigie talks about people scaremongering on the issue, she must be referring to the Joint Committee on Human Rights of the House of Commons and the House of Lords, as its members are the people who pointed out the risks that are involved in going down the road that the current, or rather previous, Labour Government suggested and which James Kelly is also suggesting, in terms of a retention period of six years. I do not think that that committee was scaremongering. It was pointing

out the genuine risk that his new rules would breach the ECHR.

James Kelly's amendments completely ignore the valuable and reasoned report by the joint committee and the European ruling on proportionality as regards the retention of DNA. If we agree to the amendments we run the risk of being in breach of the ECHR right away. If the amendments pass into law that is subsequently challenged, rather than catching and keeping more dangerous criminals, we could end up detaining fewer dangerous criminals because people who had been convicted on the basis of DNA that had been retained under legislation that, according to the ECHR, was unlawful would, of course, have their convictions quashed. That is a dangerous road to go down.

I am not surprised that Labour members support that approach because that is what the Labour Party in London has been doing. Frankly, we should not follow the Labour Party in London; we have learned that lesson over many years. We should stick to the proportionate system that we have in Scotland and the recommendations on DNA retention that have been widely accepted and respected by Europe and others. We should reject amendments 404 to 408.

The Convener: The matters under discussion have been debated by the Parliament in the past. I have serious reservations about Mr Kelly's amendments—to my mind, they are simply not arguable in law. I have no issue with the retention of DNA samples that are taken on conviction. It is clear that it will be necessary for the police and other authorities to retain samples during an inquiry or investigation and for some time thereafter. That is recognised in existing law, which gives the police the additional protection of being able to apply for the retention of such samples for a maximum of three years in the case of unconvicted persons who have been charged with violent or sexual offences, with a further extension allowed on application to the sheriff. That appears to be a reasonable position.

Mr Kelly's amendments go much further and would allow the authorities to retain samples from those who have not come before a court or those who, having done so, have been acquitted. Leaving aside the issue of desirability, the amendments fly in the face of established law.

In its December 2008 judgment in the case of S and Marper v the United Kingdom, the European Court of Human Rights took the view that English law breached article 8 of the European convention. An application under article 14 also went to the court. Although they did not make a determination on that application, the indications from the justices were that, had they not disposed of the matter by making a determination under article 8, they would have found that the law was flawed under article 14, too.

In effect, Mr Kelly seeks to make our law identical to English law that has, unfortunately, already failed to clear the European hurdle. It is perhaps significant that in their judgment the European justices referred to the law of Scotland as it stands and commented that the Scottish position is satisfactory. The minister also commented on that. The justices said, albeit in Eurospeak, that England was out on a limb, being the only jurisdiction that followed that line.

I am probably the last person here who would overplay the line of human rights, civil liberties and the European dimension generally, but I feel that what Mr Kelly seeks to do would be undesirable on the one hand and completely contrary to the law as it stands on the other. Were we to change the bill to incorporate his amendments, we would inevitably be subject to challenge and we would not win. I understand Mr Kelly's frustrations, but I can suggest only that the problem was caused by his colleagues in London, who incorporated the European convention into Scots law through the Scotland Act 1998, while assiduously avoiding doing the same to English law.

14:15

Fergus Ewing: I will reply to a couple of arguments that have been made in the debate. First, Mr Kelly referred to the Morton case and demonstrated how careful we need to be about the examples that we use to demonstrate the effectiveness of retention policies.

The Morton case involved DNA that was taken from someone who was accused of a fairly minor crime in 2009. The sample was found to match DNA taken from a rape scene in 2002. All DNA taken from those arrested is checked immediately against crime scene stains for unsolved crimes on the Scottish DNA database. It does not have to be retained for that to happen. In other words, the DNA comes from the crime scene, rather than being retained DNA from a specific individual. The identification was therefore made not because the individual's DNA had been retained but because the crime scene sample had been retained. That is an entirely different matter and, therefore, I respectfully submit, wholly irrelevant to the arguments that Mr Kelly advanced.

In addition, I understand that it has been argued in the press down south that the research on which the move towards a six-year period is based is itself based in part on research from the Jill Dando institute for crime science. The institute said that its research should not have been used as a basis for the proposals, because it was unfinished.

Without repeating the arguments that the convener and other members have made, it seems to me that there is clear proof that the pre-existing regime in the Marper case has already fallen foul of the ECHR. We are not talking about a theoretical future breach of the ECHR—a breach of the ECHR by England and Wales has already been shown. They have already been rapped on the knuckles. They have sought to address the issue by proposing the six-year period, which makes no distinction at all for the gravity of offences. It seems to me that that approach is fraught with risk and, for the reasons that Mr Maxwell and Mr Don have outlined, could confound the very objectives that Mr Kelly and Ms Craigie wish to achieve. We all wish those who are guilty of serious crimes to be brought to justice. However, that objective would be confounded if we do so by using evidence that is then found to be inadmissible because it breaches the ECHR for reasons that are clearly foreseeable. For those reasons, I strongly urge Mr Kelly not to move his amendments.

The Convener: Before I put the question, because there has been a lapse in time since we started this discussion, I remind members that, if amendment 478 is agreed to, I cannot call amendment 404, because of pre-emption.

The question is, that amendment 478 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

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

AGAINST

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 5, Against 3, Abstentions 0.

Amendment 478 agreed to.

Amendment 405 moved—[James Kelly].

The Convener: The question is, that amendment 405 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

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

AGAINST

Aitken, Bill (Glasgow) (Con)
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 3, Against 5, Abstentions 0.

Amendment 405 disagreed to.

Amendment 479 moved—[Fergus Ewing]—and agreed to.

Amendment 406 moved—[James Kelly].

The Convener: The question is, that amendment 406 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

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

AGAINST

Aitken, Bill (Glasgow) (Con)
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 3, Against 5, Abstentions 0.

Amendment 406 disagreed to.

Amendment 480 moved—[Fergus Ewing]—and agreed to.

Amendment 407 moved—[James Kelly].

The Convener: The question is, that amendment 407 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

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

AGAINST

Aitken, Bill (Glasgow) (Con)
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 3, Against 5, Abstentions 0.

Amendment 407 disagreed to.

Amendment 481 moved—[Fergus Ewing]—and agreed to.

Amendment 482 moved—[Fergus Ewing].

The Convener: The question is, that amendment 482 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

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

AGAINST

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 5, Against 3, Abstentions 0.

Amendment 482 agreed to.

Amendment 408 moved—[James Kelly].

The Convener: The question is, that amendment 408 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

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

AGAINST

Aitken, Bill (Glasgow) (Con)
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 3, Against 5, Abstentions 0.

Amendment 408 disagreed to.

Section 58, as amended, agreed to.

After section 58

The Convener: Amendment 418, in the name of Stewart Maxwell, is grouped with amendment 419.

Stewart Maxwell: Amendment 418 inserts new sections 18AA and 18AB into the Criminal Procedure (Scotland) Act 1995.

Proposed new section 18AA provides for the retention of forensic data that are taken from an individual at the time of their arrest or detention, where that person subsequently accepts a fiscal disposal issued under sections 302 to 303ZA of the 1995 act in connection with an offence or offences. Where the fiscal disposal relates only to a relevant sexual or relevant violent offence, as defined by reference to the list of sexual and violent offences set out in section 19A(6) of the 1995 act, the forensic data can be retained for at least three years from the date on which the measure was issued. Where the fiscal disposal relates only to offences that are not relevant sexual or relevant violent offences, the data must be destroyed within two years of the date on which the disposal was issued. That period cannot be extended. A fiscal measure can be issued in relation to a number of offences. Where such a disposal is issued in respect of a mixture of offences—that is, some of the offences are relevant sexual or relevant violent offences and some are not—the forensic data can be retained for at least three years from the date on which the measure was issued.

Proposed new section 18AB provides for the extension of the retention period beyond three years where the fiscal offer was issued and accepted in relation to a relevant sexual or relevant violent offence. The police can apply to a sheriff to have the retention period extended for a further two years on a rolling basis. The decision of a sheriff can be appealed to the sheriff principal by both parties, and the sheriff principal's decision on the application will be final.

Amendment 419 inserts a new section 18AC into the Criminal Procedure (Scotland) Act 1995. It provides that the forensic data that are taken from an individual at the time of their arrest or detention for a fixed-penalty offence, within the meaning of the Antisocial Behaviour etc (Scotland) Act 2004, can be retained if they subsequently accept a fixed-penalty notice that is issued under part 11 of that act. The forensic data must be destroyed no later than two years from the date on which the fixed-penalty notice was issued. There is no provision for an extension of the retention period. If more than one fixed-penalty notice is issued in connection with other fixed-penalty offences arising out of the same incident, the data must be destroyed no later than two years from the date of the later notice.

At present, there is no provision for forensic data to be retained when individuals accept fiscal disposals that are issued under sections 302 to 303ZA of the 1995 act, whether or not they are for sexual and violent offences. Nor is there provision to enable forensic data to be retained when individuals accept fixed-penalty notices that are issued under the 2004 act. That is despite the fact that the behaviour of the person who has been arrested or detained was serious enough, in those cases, to warrant arrest or detention for the offence in question. In fiscal disposal cases in which relevant sexual or relevant violent offences are involved, it is proportionate that the data should be kept for a three-year period with the possibility of extension. That fits in with our current rules. The police need to be able to compare data that are taken from individuals who are involved in

such serious offences for the benefit of society at large.

I understand that a recent Strasbourg case looked favourably on the retention periods in existing section 18A of the 1995 act, which enables forensic data to be retained for at least three years if a person is prosecuted for certain sexual and violent offences but is not subsequently convicted. The three-year period is based on those retention periods.

Retention of the data for a maximum period of two years is appropriate in cases where a fixed-penalty notice under the Antisocial Behaviour etc (Scotland) Act 2004 is accepted or a fiscal disposal is accepted for a non-sexual or non-violent offence. That is because such offences are not as serious as sexual or violent offences, so it makes sense that there should be a lesser period of retention. Again, the individuals might not have been convicted of the offence, but in accepting an offer of a fixed-penalty notice or a fiscal disposal, they accept liability for their actions.

Procedures for the collection and retention of forensic data are already in place, so I believe that the additional costs should be minimal.

I remind colleagues that we examined this issue at stage 1 in our evidence and report. It was clear that the quite correct move to the greater use of non-court disposals has meant that DNA and so on that would have been retained is not being retained because of that administrative change. I believe that the amendments will plug a loophole in the current law.

I move amendment 418.

Robert Brown: I am grateful to Stewart Maxwell for the lengthy explanation of the detail of his amendments 418 and 419. As he rightly said, we discussed these issues at stage 1. The amendments are intended to correct what a number of people saw as an anomaly that had crept in as a result of the wider use of fixed penalties.

At first glance, the amendments look straightforward—indeed, the committee made a recommendation on the subject—but one or two aspects of them make me hesitate and I wonder whether we have considered them carefully enough. They would undoubtedly extend the retention of DNA from the current position, which has to be justified. The issue arises whether what is proposed is proportionate and whether we have really considered the material criteria required for the retention of DNA, such as the gravity of the offence. There is a certain tension between saying that the offences need to be reasonably grave and making provision in relation to offences for which a fixed penalty has been accepted. There might be issues about where we have fixed penalties and where we do not. Those points were made by the Scottish Human Rights Commission, too.

I invite the minister and Stewart Maxwell to respond to that. Putting aside the anomaly argument, which we all accept, what is the case for extending the retention of DNA in such cases? I accept that we are not talking about cases in which people were not found guilty or were not proceeded against. There is a conviction and, therefore, there is less of an argument about proportionality than there would be otherwise. Nevertheless, those issues still come into it. Some of the issues that we discussed with regard to a previous group of amendments, such as ECHR, proportionality and gravity, still have to be considered. The committee report was fairly cautious and urged a balance between consistency and proportionality.

I hasten to say that I am not necessarily against the amendments; I just think that we should put on the record a bit more of a substantial case for extending the retention of DNA.

James Kelly: I speak in support of amendments 418 and 419. I maintain the position that I argued previously—that those who are prosecuted but not convicted should have DNA retained for six years. Amendments 418 and 419 provide for a lesser period than that, but I acknowledge that my amendments were defeated. I also acknowledge that Stewart Maxwell's amendments would close existing loopholes in the law and add to the existing DNA database. I repeat what I said before: the extension of the DNA database is positive and will help us to solve more crimes.

Bill Butler: I believe that amendments 418 and 419 are proportionate, reasonable and balanced and would not have a detrimental effect in terms of ECHR. The extension of the retention of DNA would relate to those who have been convicted, which is appropriate. The amendments would close a loophole in the law. I encourage Robert Brown to see them as balanced and proportionate. If we can get consensus on that round the table, that would be a good thing.

14:30

The Convener: Stewart Maxwell will have to convince me, too. I recognise that there is an anomaly and he is right to bring it to the committee's attention, but I am not yet entirely convinced that the amendments are proportionate. The committee has some unfinished business involving summary justice reforms and the way in which the Procurator Fiscal Service is dealing with them. Although some concerns have arisen, no case has been brought to my attention in which a conditional offer, fiscal fine or fixed penalty has been given in respect of a sexual or serious violent

offence. If that had happened, there would have been considerable concern on the part of all members.

I would have thought that a case in which there is an argument for DNA retention should be a matter for prosecution so that the court can apply a realistic disposal. That might not be a custodial sentence, but it would certainly make some attempt to constrain and restrain the conduct of the accused person.

I am also a little concerned about the wording of proposed new section 18AA(2)(a) of the 1995 act, which amendment 418 would insert. It states, inter alia, that the data or sample must have been taken

"while the person was under arrest or being detained".

The vast majority of these cases do not result in an individual being arrested, and "detention" is a word of variable meaning. Does the wording in the amendment relate to the person being detained at a police office or some other place of custody? Perhaps Stewart Maxwell could address that point in his summing up.

I can see what is being attempted in the amendments, but I am not totally persuaded by them. I will listen to the minister and Mr Maxwell with considerable interest.

Fergus Ewing: Stewart Maxwell's amendments 418 and 419 make a positive addition to the bill as they introduce valuable new powers for the retention of data taken from individuals who have committed acts that are serious enough to culminate in arrest or detention. Although they have not been convicted, the individuals concerned have accepted a fiscal disposal or a fixed-penalty notice issued under the Antisocial Behaviour etc (Scotland) Act 2004, and in doing so they have accepted liability for their actions.

The evidence on reconvictions supports what we see as the key premise behind the amendments—that those who commit offences may well reoffend. We are committed to reducing the number of offenders who are dealt with by the courts and the prison system. Nevertheless, it is important that provision is made in a proportionate way, as the convener said, for the retention of data from those who have offended but who have been dealt with by way of fiscal disposals. The amendments accord with the principles in the S and Marper v UK judgment, in which Strasbourg held that the retention of data from those who had not been convicted has the legitimate aim of preventing and detecting crime.

It is important to note that Strasbourg held that it is incompatible with the European convention on human rights to retain for an indefinite period data from those who have not been convicted of an offence, as we heard in the discussion on the previous group. Nothing in the amendments challenges that. They favour the approach of section 18A of the Criminal Procedure (Scotland) Act 1995, which enables forensic data that are taken from those who are not convicted to be retained for at least three years if the individuals were proceeded against for certain sexual or violent offences.

The approach that is taken in amendments 418 and 419 is fair and proportionate. First, and crucially, the amendments do not allow forensic data to be retained indefinitely. Secondly, the retention periods take account of the seriousness of the offence. Correctly, they are more stringent for those who are responsible for relevant sexual or violent offences than for those who commit less serious offences. Thirdly, the retention periods in the amendments for those who are arrested or detained in relation to a sexual or violent offence replicate the periods in section 18A of the 1995 act, which Strasbourg has already considered to be proportionate.

The measures are important and the Government supports Mr Maxwell's amendments 418 and 419.

Stewart Maxwell: I am glad that members round the table, whether or not they end up supporting amendments 418 and 419, agree that there is an anomaly in the law as it stands. That, of course, leads on to the argument about whether my amendments would introduce an extension of the law. I accept that it would be an extension in the sense that more DNA samples would be retained. However, such samples would always have been retained had the previous method of dealing with individuals carried on so that people would have been charged and would have gone to a court disposal rather than a non-court disposal. The change to that, which was made on perfectly sensible and efficient grounds, has led to what is effectively an anomaly. The proposed extension is not an extension in a different direction from what was previously envisaged for the retention of samples.

Robert Brown raised the issue of the gravity of an offence. I have tried to be proportionate and balanced—Bill Butler referred to that—in my amendments, in that the retention for more serious offences in the category of sexual or violent offences would be for three years, with possible extensions on appeal. However, less serious offences would have a retention period of two years, which would not be extended. As I said, I have tried to be proportionate and balanced in that regard.

On the convener's point about the meaning of the phrase "being detained" in amendment 419, the minister pointed out that that wording reflects the 1995 act's reference to those who are arrested

or detained, so it is the same style of wording. Unless officials or the minister want to correct me, I maintain that being detained does, indeed, mean being detained at a police station or other such place. That was my intention, and it is my view that that is the definition of "being detained". In any case, it means the same as what is in the 1995 act. I am sure that that is well understood by those who operate it.

The Convener: You are taking obvious refuge in that legislation.

Stewart Maxwell: I am indeed. The purpose of my amendments comes down to an attempt to correct an anomaly but stay well within the proportionate system that we have. I think that amendments 418 and 419 do that, and I hope that members will support them.

Amendment 418 agreed to.

Amendment 419 moved—[Stewart Maxwell]—and agreed to.

Section 59—Retention of samples etc from children referred to children's hearings

The Convener: The next group of amendments is on section 59, "Retention of samples etc from children referred to children's hearings". There are a substantial number of amendments. Amendment 409, in the name of James Kelly, is grouped with amendments 410, 380, 483, 484, 545, 381, 485, 486, 411, 546, 487 to 492, 382, 493 and 412. I draw members' attention to the substantial number of pre-emptions that are noted on the groupings list.

James Kelly: I speak in support of amendments 409 to 412. I acknowledge that this is a complex and sensitive area of the law. My amendments seek to achieve the indefinite retention of the DNA of those children found guilty of serious violent or sexual offences and grave offences. This position is in line with the recommendation in the Fraser report, "Acquisition and Retention of DNA and Fingerprint Data in Scotland", that the law for children should be consistent with the law for adults in this area. The Government's proposal to retain DNA for three years does not go far enough. We are all well aware of the Bulger case and the case down in Colchester. When we look at instances like that, it fills us with fear about what might happen in the future with such offenders. Essentially, the issue is one of risk. It is about looking at offenders who have committed the crimes in question and assessing whether there is a risk that they may reoffend. I suggest that there is such a risk and that it is therefore appropriate in such cases to hold DNA indefinitely.

I oppose amendments 380, 381, 485 to 487, 545 and 546 because they support a three-year period of retention, which does not go far enough. As I said, I acknowledge that this is a sensitive area and that a balance must be sought and a risk assessed, but it is correct that, where children commit such serious crimes, DNA should be retained indefinitely.

I move amendment 409.

Robert Brown: This is a complex area. The amendments that are on offer produce a variety of principles and practices in respect of the proper approach to the retention of samples that are taken from children who appear before hearings on offence grounds. The Scottish Government is aware of the issue and wants to categorise certain serious offences as the only ones for which DNA samples would be retained. To do so, it proposes to give itself order-making powers to define the list of offences. In my view, that is an intrinsically wrong approach. When dealing with such a significant matter, we should specify the list of offences in the bill, if it is thought that automatic retention in such circumstances is the right approach.

Amendments 409 and 410, in the name of James Kelly, leave it to the principal reporter to designate an offence as sufficiently grave to warrant the retention of DNA from the child. In a way, that is a more transparent and independent approach, but it puts a new and different responsibility on the reporter that I am not sure he or she is set up to fulfil. Furthermore, it is likely to lead to a high level of inconsistency. The deletions that are proposed by amendment 410 seem to remove the requirement for a limit on how long the child's DNA may be kept. That is not the right approach.

Amendment 380 in my name, to which amendment 381 is consequential, offers a third, more appropriate approach. DNA could be kept only if there were an application by the chief constable to the sheriff, who would have to be satisfied that the child continued to pose a risk to public safety that justified DNA retention. That would occur in only a handful of cases and where there was an objective justification of public safety. It has been argued that the approach places the child in the middle of a legal dispute. However, such cases are likely to have been referred to the sheriff on the facts, and the court is a better place than the hearing to address such strictly legal issues, especially when the matter is important to both public safety and the rights of the child.

It is relevant to mention that, not long ago, I lodged a parliamentary question to find out how many cases were involved. The reply to question S3W-31832 indicated that data on 34 children aged between 12 and 15, 867 children of 16 to 17 and 157,000 people aged over 18 are held on the Scottish DNA database; I suspect that such data may be held in other places. As an interesting side

report, I note that the youngest person on whom data are held is 13 and the oldest is 97.

The Nuffield Council on Bioethics recommended:

"When considering requests for the removal of"

children's DNA profiles and the destruction of their samples

"there should be a presumption in favour of the removal of all records, fingerprints and DNA profiles, and the destruction of samples."

Children 1st took more or less the same position, which was also supported by the Information Commissioner's Office and the Law Society of Scotland. It is important to recall the view of the Scottish Children's Reporter Administration, which thought that

"there should be a judicial process, separate from the Children's Hearings System,"

to determine whether

"there was a clear and justifiable reason for doing so".

Those are cogent and important witnesses on the issue.

As members have said, in some rare cases the risk that a child poses to the safety of others is significant enough to justify the interference with the child's right to privacy that the retention of their DNA represents. Amendment 380 acknowledges that DNA retention should be proportionate, based on relevant criteria, including continuing risk, and subject to appropriate safeguards for children.

Amendment 545 defines the start point from which the right to retain the DNA is calculated as the date of the offence or incident, rather than the slightly confusing welter of later dates in section 59. It also gives greater clarity and comprehension to the arrangements and makes them administratively easier to organise. The period can be extended by application to the court, if necessary.

Amendment 546 raises a different issue. There is no clarity or guidance in the bill that indicates the circumstances or criteria that justify an extension of the time for keeping or destroying DNA samples. There should be. Sheriffs will need to grapple with the issue, and they should know the Parliament's mind on it. Currently, no such criteria are specified in law. It is unclear on what basis chief constables will apply for extension or on what grounds sheriffs will decide. Amendment 546 requires the Scottish ministers to consult stakeholders and to specify such grounds in secondary legislation. That may not be the ideal way of proceeding, but it is appropriate given the current position. To a degree, it echoes the question why DNA should be kept or destroyed in the first place, which we have not really bottomed out.

Quite substantial issues of principle are involved, and we should be clear about where we are going. A number of alternatives are before the committee and I respectfully recommend the rather more restricted approach of my amendments.

14:45

Fergus Ewing: Amendment 409 seeks to establish a way of differentiating between low-level and serious assaults. The aim is to ensure that the powers to retain forensic data from children that are included in new sections 18B and 18C, which section 59 inserts into the 1995 act, are confined to assaults at the more serious end of the scale.

I support the principle behind the amendment—we do not want to retain the DNA of children who are involved in playground scuffles, after all—and we are considering how that can best be achieved. The cabinet secretary wrote to you, convener, on 8 April, setting out progress in developing the list of offences that will trigger retention, and explaining the issues around assault that James Kelly's amendment highlights.

Early discussions of the forensic data working group, which the cabinet secretary set up to take forward proposals arising from the Fraser review, and to make recommendations on the implementation of the DNA provisions in the bill, established that the principal reporter's definition was not the preferred option. There are, however, definitions used by the police and the Crown Office and Procurator Fiscal Service that could be applied. As we are working on the issue in conjunction with relevant stakeholders, I ask James Kelly whether he is prepared to withdraw amendment 409 on the understanding that we will identify a means of addressing the issue separately. I will, of course, keep the committee up to date on developments.

By removing the requirement for the destruction of forensic data after three years, James Kelly's amendments 410 to 412 appear to introduce the indefinite retention of forensic data from children who accept that they have committed a serious sexual or violent offence, or are found to have done so, in the course of a children's hearing. Again, it seems that the amendments seek to bring Scotland into closer alignment with the new retention rules introduced by the Crime and Security Act 2010 in England and Wales. Under those arrangements, the forensic data of children aged 10 and upwards who are convicted of one serious offence or of two minor offences within a specified period can be retained indefinitely. Although Mr Kelly's amendments apply only to the

serious sexual and violent offences that will be covered through the existing bill provisions, I believe that indefinite retention is a step too far. With the right support, a child might not continue to pose a risk of offending throughout their adult life. Although I believe that it is right for children's forensic data to be retained for a limited period in relation to the more serious offences, retention should be extended beyond that period only if the child continues to pose a risk. I do not believe that Mr Kelly's amendments support that principle, and I do not want to undermine Scotland's justice system by introducing measures that are at far greater risk of a successful challenge under the ECHR.

Scotland has a unique approach to dealing with the majority of children who offend, which is through the children's hearings system. In contrast to England and Wales, where all children who have committed offences are taken to court, in Scotland, except in the most serious of cases, we have a system that focuses on supporting the child to change his or her behaviour. Other provisions in the bill seek to ensure that all children under the age of 12 are dealt with in that way and I believe that that is the right approach.

I come now to Robert Brown's amendments 380, 381 and 382. Although I very much doubt that it is Robert Brown's intention, there might be a technical issue with amendment 380 because there is a risk that, as drafted, it could be interpreted to allow for the indefinite retention of the forensic data of children who meet the retention criteria. That is because it removes from the bill the provision that requires forensic data to be destroyed within three years unless the chief constable applies to have that period extended. Amendment 380 gives chief constables discretion about whether to make the application to a sheriff to extend retention. As there is no requirement to make an application to a sheriff under the amendment, if the police decide not to make such an application, it could be argued that any forensic data that have been retained under proposed new section 18B of the 1995 act do not have to be destroyed and can be held indefinitely. I am pretty sure that that is not Robert Brown's intention. I will move on to address what I think that his amendments seek to achieve.

The provisions in proposed new section 18B of the 1995 act allow for automatic retention for an initial period of three years in relation to serious sexual and violent offences. Robert Brown's amendments seek to introduce an approach that requires a sheriff to assess individually each child who has committed a serious sexual or violent offence in order to make a ruling on whether their forensic data should be retained for the initial three-year period.

I can identify with the intentions behind James Kelly's amendments at one end of the scale and Robert Brown's amendments at the other, but I believe that the provisions in the bill steer a balanced middle course between those two sets of amendments. We decided at an early stage to move from the suggestion that there should be indefinite retention to ensuring that there was sufficient differentiation between the retention of data from children who accept that they have offended or are found by a sheriff to have offended and the retention of data from adults who are convicted of an offence.

The provisions of the bill as introduced were developed following careful consideration of the issues arising from Professor Jim Fraser's review and our subsequent consultation. The recommendation in Jim Fraser's report was that there should be indefinite retention of data from children who are found by a children's hearing to have committed a sexual or violent offence. However, having considered the responses to our consultation and the issues that were raised by the S and Marper v the United Kingdom judgment, we took on board the points that were made about the need to consider children's rights carefully in the development of our retention policies. As a result, the provisions seek to retain automatically for an initial period of three years forensic data only from children who are found by a children's hearing to have committed a serious sexual or violent offence. Thereafter, as Robert Brown said, a chief constable must apply to a sheriff for further extensions, which can be up to two years. In response to Mr Brown's query about how those applications would be dealt with, I suggest that it would be for the police to make the submission and for the judge to decide whether to grant the extension. As I said, I imagine that the criteria would include the extent to which a child continued to pose a risk. That is fairly straightforward.

The Cabinet Secretary for Justice wrote to you, convener, setting out the sexual and violent offences to which the provision will apply. I have already addressed issues around assault in relation to James Kelly's amendment 409. The fact that retention will be automatic does not, in my view, make the provisions in proposed new sections 18B and 18C of the 1995 act disproportionate. What is important is that the principles that are applied to the power for automatic retention are proportionate and balanced. That will be achieved by ensuring that the retention is triggered only in relation to serious offences and that it is time limited. I am concerned that, instead of bringing greater fairness, Robert Brown's amendments would involve the child in a court process and place a greater burden on the police and the courts.

Let us not pretend that children who commit serious sexual and violent offences pose no risk to others. Indeed, it is widely accepted that the victims of such offences are often other children. Those children have rights, too—the right to feel safe in the knowledge that their assailant has been identified and that their behaviour is being addressed and the right not to become victims in the first place. Let us also acknowledge that, with the correct support, many children can and will turn their lives around before they become adults. For that to happen, it must first be possible to identify that they committed the offence. Those who no longer pose a risk beyond the initial retention period should no longer have their forensic data retained. If the court decides that a child continues to pose a risk to the public, it will be possible to extend the retention period beyond the initial three years.

We have a strong tradition of protecting children's rights in Scotland, and our children's hearings system is unique in its focus on supporting the child. I believe that the provisions in the bill strike the right balance between the rights of the child and public safety; therefore, I cannot support James Kelly's amendments 410 to 412 or Robert Brown's amendments 380 to 382.

Amendment 545 would amend new section 18B, which section 59 of the bill inserts into the 1995 act. The amendment seeks to adjust the date from which the three-year period of retention starts. At present, the bill provides that the period should be calculated as starting from the date on which the child accepts having committed, or is found to have committed, a relevant offence. Amendment 545 would change the starting point of the three-year period to the date on which the offence was committed. Therefore, the overall time for which the DNA was retained would be shorter, because the starting date would be moved forward to include the time between the commitment of the offence and the point at which it was accepted. However, amendment 545 would be extremely difficult to implement in practice. It is not always possible to confirm the exact date on which offences were committed. It is also unclear how amendment 545 would work if a child was referred to a children's hearing for a historical offence that met the retention criteria but had been committed more than three years before the child's appearance at the hearing. In such a case, it appears that any forensic data taken from the child could not be retained because three years would already have lapsed since the commission of the offence. Furthermore, sexual offences often involve conduct that happens on a number of occasions on different dates. Amendment 545 does not account for what the date of destruction should be in those scenarios. For those reasons, the date when a child accepts having committed, or is found to have committed, a relevant offence is a clearer, more consistent and more reliable trigger point.

Amendment 546 would complicate the process by which a sheriff may grant an application to extend the retention period for forensic data that are taken from, or provided by, children who have been referred to a children's hearing. The amendment provides that, before granting such an application, the sheriff must be satisfied that it meets one of a number of criteria that are to be set out in regulations that are to be made by the Scottish ministers. Subsection (6) of new section 18B, which the bill inserts into the 1995 act, already provides for the Scottish ministers to make an order prescribing relevant sexual or violent offences for the purposes of section 18B. That new section sets the basis for the retention of data and provides that forensic data are to be retained only from those who have committed the most serious offences. When the police apply to a sheriff for an extension to the retention period, the justification behind the application may relate to operational policing matters, which will differ in each application made. It is impracticable to specify a list of criteria that a sheriff should consider that would apply in each case.

For those reasons, it is unnecessary and cumbersome to require the development of regulations that set out criteria that are to be applied when considering the extended retention of forensic data. The police are experienced in assessing risk and presenting such cases to the court, just as courts are experienced in weighing the arguments and facts that are presented to them in coming to a decision. Therefore, we do not support amendments 545 and 546.

Amendment 483 is a minor amendment to subsection (7) of new section 18B. The amendment will correct a cross-reference to new section 18C of the 1995 act, which is also inserted by section 59 of the bill.

Amendment 485 is a technical amendment linked to amendment 486. New section 18B of the 1995 act grants the power to retain data from children who have been referred to a children's hearing on the grounds of a relevant offence. Amendment 486 provides that public indecency can be specified as a relevant sexual offence only if it is clear in the referral to the children's hearing that there was a sexual element to the offence. Although it is unlikely that such an offence would trigger retention of data from children, the proposed change is required because the list of relevant offences applicable to children that is to be made by order of the Scottish ministers is to be drawn from the list of offences in section 19A(6) of the 1995 act.

Amendment 487 will insert new subsections (4A) and (4B) into new section 18C of the 1995 act. Subsections (4A) and (4B) will provide the sheriff principal with the power to make an order to extend retention if the sheriff principal accepts an appeal from a chief constable under section 18C(4) against the sheriff's original decision not to extend retention of forensic data from a child. That will bring the process for extending retention into line with the terms of section 18C(3), which specifies the power for a sheriff to make an order setting a new destruction date. The new destruction date that is set by the sheriff principal must not be more than two years later than the previous destruction date.

Amendments 488 and 489 are technical drafting amendments that will replace the term "expired" with the term "elapsed" in describing the period for bringing appeals under new section 18C of the 1995 act. That is for consistency with existing section 18A of the 1995 act.

15:00

Amendment 491 also ensures consistency with terminology that is used in section 18A of the 1995 act. Amendment 492 is a technical amendment to the definition of "relevant chief constable" in new section 18C(8) of the 1995 act. This is a drafting change that has no effect on the purpose of the provision. Amendment 493 is a tidying-up amendment that removes section 59(2), which is no longer required, in light of amendment 478.

I am nearing the end, convener.

The Convener: I am relieved to hear that.

Fergus Ewing: Amendments 484 and 490 are technical amendments that are designed to achieve consistency in the terminology describing the types of forensic data that are taken and retained.

I hope that that is all clear, and I urge the committee to resist the amendments in the names of James Kelly and Robert Brown.

The Convener: As has been said, many of these amendments highlight quite difficult and sensitive matters and we have to be particularly careful when considering them.

I find some merit in James Kelly's amendments. We are dealing with matters in relation to which the grounds of referral have been admitted or proved following a hearing before a sheriff, which means that we are dealing with cases in which the child has been convicted, if we can use such a term, in relation to the Social Work (Scotland) Act 1968. I also have some sympathy with James Kelly in his attempts to categorise the type of offence in relation to which he is seeking the retention of the data. However, having heard what the minister has said about that, there appears to be on-going work under that heading, and I would not be minded to support the amendments.

Clearly, there are difficulties with this issue and we must be particularly careful. I believe that this matter could do with a more leisurely approach because, inevitably, there will be problems.

I invite the minister to add any comments that he might have, after that fairly comprehensive narration of the circumstances around the amendments.

Fergus Ewing: I appreciate the arguments that you have just made, convener. We welcome the fact that James Kelly has lodged his amendments, which we support in principle. As I have indicated, we are doing further work on the issue and we will come back to the committee before stage 3 with the conclusion of our deliberations, which might involve lodging an amendment or suggesting that the issue be dealt with in secondary legislation. In either event, we will come back to the committee before stage 3, as soon as we have completed our deliberations. I say that in a desire to be helpful to members on an issue in relation to which we are all moving, or seeking to move, in the same or a similar direction.

The Convener: I do not think that there is any great division of opinion on the matter.

James Kelly: Leaving aside the technical amendments, which I support, the remaining amendments fall into two groups. My amendments 410 to 412 involve the indefinite retention of DNA for serious violent and sexual offences, and the remaining amendments consider a variety of ways of implementing the three-year retention.

I support indefinite retention, and I point the minister to his own consultation on the Fraser report, which also went down that route. That is a strong recommendation.

Various contributors to the debate have spoken about the need to be proportionate about the retention of DNA. My main concern is public safety, which is why my amendments seek to extend the DNA database. It is important that the public safety aspect has a higher priority.

I hear what the minister says about amendment 409. I welcome the work that the forensic data working group has done on definitions. Bearing that in mind, and the minister's comments, I am prepared to withdraw amendment 409 in the hope that we can make some progress in the area.

Amendment 409, by agreement, withdrawn.

The Convener: Amendment 410, in the name of James Kelly, has already been debated with amendment 409. If amendment 410 is agreed to, I

will not be able to call amendments 380, 483, 484 or 545 on the ground of pre-emption.

Amendment 410 moved—[James Kelly].

The Convener: The question is, that amendment 410 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

Aitken, Bill (Glasgow) (Con)
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 3, Against 5, Abstentions 0.

Amendment 410 disagreed to.

The Convener: Amendment 380, in the name of Robert Brown, has already been debated with amendment 409. If amendment 380 is agreed to, I will not be able to call amendments 483 or 484 on the ground of pre-emption.

Amendment 380 moved—[Robert Brown].

The Convener: The question is, that amendment 380 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 380 disagreed to.

Amendments 483 and 484 moved—[Fergus Ewing]—and agreed to.

Amendments 545 and 381 not moved.

Amendment 485 moved—[Fergus Ewing].

The Convener: The question is, that amendment 485 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

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

Against

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 5, Against 3, Abstentions 0.

Amendment 485 agreed to.

Amendment 486 moved—[Fergus Ewing].

The Convener: The question is, that amendment 486 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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 5, Against 3, Abstentions 0.

Amendment 486 agreed to.

The Convener: Amendment 411, in the name of James Kelly, has already been debated with amendment 409. If amendment 411 is agreed to, I will not be able to call amendments 546, 487 to 492, or 382 on the ground of pre-emption.

Amendment 411 moved—[James Kelly].

The Convener: The question is, that amendment 411 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

Aitken, Bill (Glasgow) (Con)
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 3, Against 5, Abstentions 0.

Amendment 411 disagreed to.

Amendment 546 moved—[Robert Brown].

The Convener: The question is, that amendment 546 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 546 disagreed to.

Amendments 487 to 491 moved—[Fergus Ewing]—and agreed to.

The Convener: Amendment 492, in the name of the cabinet secretary, has already been debated with amendment 409. If amendment 492 is agreed to, I will not be able to call amendment 382.

Amendment 492 moved—[Fergus Ewing].

The Convener: The question is, that amendment 492 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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 5, Against 3, Abstentions 0.

Amendment 492 agreed to.

The Convener: If amendment 493, in the name of Kenny MacAskill, is agreed to, I cannot call amendment 412.

Amendment 493 moved—[Fergus Ewing].

The Convener: The question is, that amendment 493 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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 5, Against 3, Abstentions 0.

Amendment 493 agreed to.

Section 59, as amended, agreed to.

After section 59

Amendment 494 moved—[Fergus Ewing]—and agreed to.

Section 60—Use of samples etc

The Convener: Amendment 495, in the name of the cabinet secretary, is grouped with amendments 496 to 498, 500, 501 and 505 to 510.

Fergus Ewing: I will be brief.

Amendments 495 to 498, 500, 501 and 505 to 510 amend sections 59 and 60 of the bill, which, in turn, amend the forensic data provisions in the Criminal Procedure (Scotland) Act 1995 and section 56 of the Criminal Justice (Scotland) Act 2003. That is in order to achieve consistency in the terminology describing the types of forensic data that are taken and retained. The amendments are essentially tidying amendments.

I move amendment 495.

The Convener: The amendments seem to be fairly straightforward.

Robert Brown: The Government amendments are unexceptionable. However, is the Government doing any further work on the destruction of samples as opposed to DNA profiles and on the complex issue of the security and lawful usages of DNA profiling information? New section 19C of the 1995 act, which will be introduced by section 60 of the bill, seems to authorise the use of the material for criminal investigations and identification of the

bodies of deceased persons, but I am not sure whether that is the same as forbidding other uses—for example, the use of samples by researchers. I imagine that that ought not to be legitimate. It does not appear to be an offence to use DNA samples for other unauthorised purposes, but perhaps it should be. To whom do the samples ultimately belong? Does an accused person have a right to part of the samples, as they do with blood or urine samples in drink-driving cases?

Section 70 of the bill gives powers for data matching that seem to be innocuous, but they are potentially wide ranging. I would appreciate the minister's view on that. It may be preferable if he wrote to the committee in detail after the meeting rather than dealing with the matter now. Nevertheless, I would be interested in an update on those background issues.

The Convener: The minister could deal with those matters in summing up, as no other member wishes to participate in the discussion.

Fergus Ewing: In my truncated comments, I said that the amendments are technical and that they basically tidy things up. I have two things to say in answer to Robert Brown's questions. First, the working group is considering all the general issues. Secondly, with respect, I think that Mr Brown's remarks relate not to section 60, but to a later section, so we could perhaps consider them later. Of course, if I have misspoken—I think that that is the Americanism—on any matter, I would be more than happy to correct what I have said later on, but I do not think that the points that Mr Brown has made are relevant to the group of amendments that we are considering.

Amendment 495 agreed to.

Amendments 496 to 510 moved—[Fergus Ewing]—and agreed to.

Section 60, as amended, agreed to.

Section 61—Referrals from Scottish Criminal Cases Review Commission: grounds for appeal

15:15

The Convener: Amendment 133, in the name of the cabinet secretary, is grouped with amendments 134 and 135.

Fergus Ewing: Amendments 133 to 135 are minor amendments to section 61, which deals with the grounds for appeal following a reference by the Scottish Criminal Cases Review Commission to the High Court.

As drafted, the proposed new subsection (4A) being inserted into section 194D of the Criminal Procedure (Scotland) Act 1995 would require that the grounds for appeal arising from an SCCRC reference must relate to one or more of the reasons contained in the commission's statement of reasons. However, the statement of reasons produced by the commission will commonly set out not only the reasons why it is making a referral, but the other possible grounds that it has considered and decided not to refer on. One interpretation of proposed new subsection (4A) might be that an appeal founded on something that the commission has said in the statement of reasons is not a reason for referral. The additional words inserted by amendment 133 avoid that.

Amendments 134 and 135 make minor adjustments to the language of proposed new subsections (4B) and (4E) to fit better with the terminology used in the High Court. Rather than referring to additional grounds of appeal being "raised", the provisions are adjusted to refer to the appeal being "founded" on additional grounds. There is no change in the effect of the provisions.

I move amendment 133.

Amendment 133 agreed to.

Amendments 134 and 135 moved—[Fergus Ewing]—and agreed to.

Section 61, as amended, agreed to.

Before section 62

The Convener: Amendment 430, in the name of the cabinet secretary, is in a group on its own.

Fergus Ewing: Amendment 430 clarifies that section 24 of the Vulnerable Witnesses (Scotland) Act 2004, which abolished the competence test in respect of all witnesses, also applies to evidence given by prior statements made before 1 April 2005, when section 24 came into force. Section 24 removed the court's entitlement to ask questions of witnesses to establish whether they could understand the difference between truth and lies, and the general duty of witnesses to tell the truth.

Amendment 430 seeks to address a gap in the current law where the Crown seeks to rely on the evidence of a witness that is contained in a prior statement made before section 24 came into force. In such circumstances, it is necessary, under section 260(2)(c) of the Criminal Procedure (Scotland) Act 1995, for the court to establish whether the witness would, at the time that the statement was made, have been a competent witness in proceedings. In certain cases, particularly those involving sexual abuse where the abuse spans a number of years, the Crown must often seek to rely on such statements. The amendment is intended to ensure that such statements are not prevented from being put before the court simply because they were made

before section 24 came into force. The Scottish Government believes that it is important that all witnesses, particularly the most vulnerable, are given the opportunity to be heard. The court should also have the opportunity to hear all the relevant evidence in a case.

Amendment 430 seeks to ensure that witnesses are treated equally, and to avoid the situation where some witnesses are prevented from giving their evidence on the ground of competence and others are not. The rights of the accused are protected because the judge or jury will still have to decide whether the testimony is reliable and credible.

I move amendment 430.

Amendment 430 agreed to.

Section 62—Witness statements: use during trial

The Convener: Amendment 383, in the name of Robert Brown, is in a group on its own.

Robert Brown: To a degree, amendment 383 follows from the earlier group in which we considered amendments 130 and 131. I do not want to rehearse the arguments again, but the bill more or less gives witnesses a blanket right to refer to a prior statement, which I presume would usually mean a precognition that had been taken by the police or others rather than a verbatim statement. There are issues with that, although I can see occasions on which it would be relevant.

I would not go to the stake on the wording, but I do not believe that there should be an automatic entitlement. The bill states that the court "may" allow the witness to refer to the statement, so it is not quite an automatic entitlement, but it is heading in that direction because no criteria are laid down. In my amendment, I have tried to restrict the entitlement a little. I will be interested to hear the minister's thoughts on the matter against the background of the earlier debate.

I move amendment 383.

Bill Butler: I am not convinced by Robert Brown's amendment. I believe that there should be a uniform right. The amendment seeks to introduce the phrase

"if ... there is good reason to do so",

but how would "good reason" be defined? How would the provision be applied? It is clearer to have a uniform right for all victims. However, perhaps Robert Brown can come back to that and convince me when he sums up.

Fergus Ewing: Section 62 does not require the court to allow the witness to refer to his statement. It leaves it to the court's discretion to decide whether to permit the witness to do that. The main difficulty with amendment 383 is that it explicitly requires the court to exercise its discretion only if there is a good reason, which carries the implication that the court can exercise its discretion in other matters without having a good reason for doing so. That would be quite absurd.

Moreover, we trust the Scottish judiciary properly to exercise their discretion and we think it dangerous to suggest that they might do otherwise in the absence of an express provision, which is tautologous. Lord Coulsfield did not recommend such a test and the Scottish Government does not believe that one is necessary.

For those reasons, we do not support amendment 383.

Robert Brown: I accept most of what the minister says. Nevertheless, we are left in a funny position.

I think that Bill Butler misunderstood what section 62 does, to be honest. It does not quite give an automatic entitlement, although it is difficult to see the grounds on which the court could refuse to exercise its discretion against all the elaborate stuff about statements that is laid out. My concern is that the approach unbalances the thing a little bit. However, I will not press the amendment against the minister's desire. With the committee's agreement, I seek leave to withdraw it.

Amendment 383, by agreement, withdrawn.

Section 62 agreed to.

Sections 63 and 64 agreed to.

After section 64

The Convener: Amendment 384, in the name of the cabinet secretary, is in a group on its own.

Fergus Ewing: Amendment 384 seeks to increase from 16 to 18 the age up to which witnesses are automatically entitled to special measures when giving evidence in human trafficking cases. Young victims of human trafficking offences should be supported as much as possible to give their evidence. In saying that, however, we must also bear in mind the accused's right to a fair trial.

The amendment simply amends the Vulnerable Witnesses (Scotland) Act 2004 to increase the age under which a witness is automatically entitled to special measures in human trafficking cases from 16 to 18. That is consistent with the support that is available to child witnesses elsewhere in the UK and it will ensure future compliance with the European Commission proposal for a framework decision on preventing and combating trafficking in human beings and protecting victims. That proposal has been retabled as a European

directive following the implementation of the Lisbon treaty.

I move amendment 384.

Amendment 384 agreed to.

Section 65 agreed to.

Section 66—Witness anonymity orders

The Convener: Amendment 431, in the name of the cabinet secretary, is grouped with amendments 432 to 441.

Fergus Ewing: Almost all the amendments in the group respond to the committee's request in its stage 1 report that we reconsider drafting and to evidence that was given at stage 1.

Amendments 431 and 432 clarify who in the court should be able to see the identity of a witness who is granted an anonymity order for the purposes of giving their evidence. The amendments limit that to the judge and, if there is one, the jury in order to avoid creating any possible conflict of interest for defence agents. That also removes any worries that an interpreter or supporter might be intimidated or compromised because they can see the identity of an anonymous witness.

Amendments 433 and 435 are technical. By replacing the phrase "relevant material" with "relevant information", they ensure that references to disclosure responsibilities in the context of applications for witness anonymity orders are consistent with other disclosure provisions elsewhere in the bill.

Amendment 434 strengthens the duty that is contained in new section 271P(4) of the 1995 act so that information about an application for a witness anonymity order must be disclosed by the parties in a way that does not lead to the witness's identity being disclosed. Failure to ensure that would cut across the whole point of a witness being granted an anonymity order.

Amendments 436 and 437 have been lodged in response to comments that were made by High Court judges in their evidence to the committee at stage 1. Amendment 436 removes unnecessary words from new section 271R(2)(b) of the 1995 act. Amendment 437 replaces the words

"sole and decisive evidence implicating the accused"

in new section 271R(2)(c) of the 1995 act with

"material evidence implicating the accused".

That better reflects the rules of corroboration in Scotland and the fact that the witness's evidence may or may not be decisive.

Amendment 438 reflects more accurately modern practice whereby judges give "direction" to the jury rather than a "warning". In context, the direction would be that any anonymity order that was made in relation to a witness does not prejudice the accused. The amendment is, again, a response to comments that were made by the High Court judges during their stage 1 evidence.

Amendment 439 removes the requirement to seek the leave of the court of first instance to appeal against a witness anonymity order. It is a matter of balance. On one hand, leave to appeal acts as a safeguard against spurious appeals and delaying tactics; on the other hand, given the serious implications of granting or refusing to grant a witness anonymity order, it could be argued that it should always be possible to appeal such decisions. On balance, we believe that it would be better to remove the requirement to seek leave in that context.

Amendments 440 and 441 amend schedule 3 to remove references to "unsafe conviction", as the safety of a conviction is not a concept that is used in Scots law. Those references will be replaced with more appropriate references to "quashing a conviction".

I move amendment 431.

The Convener: The issues appear to be fairly straightforward.

Amendment 431 agreed to.

Amendments 432 to 439 moved—[Fergus Ewing]—and agreed to.

Section 66, as amended, agreed to.

Schedule 3—Witness anonymity orders: transitional

Amendments 440 and 441 moved—[Fergus Ewing]—and agreed to.

Schedule 3, as amended, agreed to.

Section 67 agreed to.

After section 67

The Convener: Amendment 442, in the name of the cabinet secretary, is grouped with amendment 450.

Fergus Ewing: Amendments 442 and 450 seek to provide an order-making power to facilitate implementation of the EU framework decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. A European evidence warrant may be used to obtain evidence that is held in another member state, which could include objects that were found during a search, financial records and admissions that were made at interviews. In general, the evidence that is covered by a European evidence warrant will

already exist—a warrant is not to be used to conduct interviews, take statements, carry out bodily examinations or intercept communications. We are required to implement the framework decision by 9 January 2011. Amendment 442 grants the power to the Scottish ministers to implement the framework decision by order.

There are several reasons why an order-making power is appropriate here. First, it will permit further time to consult key stakeholders on the detail of the provisions for implementing the framework decision in Scotland. Secondly, it will allow us to produce provisions in discussion with the Home Office, which has yet to take steps to implement the decision in the rest of the UK. Thirdly, we are aware of two EU initiatives that are currently under discussion that may lead to the framework decision being revised and, possibly, replaced. The likelihood of that is not clear, but implementation by order will allow us to respond to those EU developments as and when they occur.

I move amendment 442.

Amendment 442 agreed to.

Before section 68

15:30

The Convener: Amendment 443, in the name of the cabinet secretary, is grouped with amendments 415, 416, 511 and 417.

Fergus Ewing: Amendment 443 will insert before section 68 a new section that will amend the provisions in the Criminal Procedure (Scotland) Act 1995, which sets out how lists of jurors are compiled for trials in the sheriff courts. The change will increase flexibility for sheriff clerks in citing jurors and in allocating them to trials when they attend in response to citations. For that reason, the Scottish Court Service strongly supports the changes.

The first change, in proposed new subsection (2)(b), will enable jurors to be cited to a sheriff court trial not only from the sheriff court district in which that trial is to occur, but from other districts within that sheriffdom. That will obviously increase the pool of potential jurors for any sheriff court trial. It will also result in greater fairness for members of the public who are liable to be cited for jury service. Some sheriff courts in a sheriffdom are, inevitably, busier than others, which results in the potential for eligible members of the public who live in those districts to be summoned more often than those who live elsewhere in the sheriffdom. The change will provide greater equity and was supported by a large majority of respondents to a specific question on the issue in our consultation paper, "The Modern Scottish Jury in Criminal Trials".

The change leaves to the discretion of the sheriff principal the questions whether to summon jurors from a wider area, and in what proportion. Clearly, it is a different matter for someone who lives in Arbroath district to be cited to Dundee than for someone who lives in Lerwick to be cited to Inverness. Such discretion is therefore important.

Sheriff clerks will continue to have their own discretion to excuse potential jurors. Nevertheless, persons from, for example, Campbeltown who are cited to Dumbarton would be able to make a case to the sheriff clerk in the usual way. In those circumstances, we do not expect the advantages of the change to be outweighed by unreasonable burdens being placed on some members of the public.

The change that is set out in proposed new subsection (2)(d) would repeal the 1995 act's provision that restricts the availability of jurors to the trials for which they were originally listed.

Amendment 511 seeks to insert a new section after section 68. That new section will make a number of changes to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 relating to the excusal system for jurors. Two groups of people are exempt from jury service: those who are ineligible for jury service and those who are disqualified from it. There is a further category of people who are excusable as of right from service listed in the 1980 act. The purpose of the proposed new section is to require those who are entitled to be excused by right from jury service to apply for that excusal at the beginning of the citation process. Amendment 511 will not affect the right to ask for discretionary excusal, whereby potential jurors can be excused if they show good reason. A new section is required because the original section in the 1980 act refers to both civil and criminal juries and, as the committee has noted, changes to civil juries are outwith the scope of this bill.

I am removing extraneous material from my notes to foreshorten matters, convener.

The Convener: I am grateful to you, Mr Ewing.

Fergus Ewing: The proposed changes will reduce bureaucracy and improve operational effectiveness.

I move amendment 443.

At this point, I was planning to move on to Mr McLetchie's amendments. I can cover those now or after Mr McLetchie has spoken to them. I am in your hands, convener. I think that this matter was raised with the clerk earlier.

The Convener: It would perhaps be easier if you were to defer your comments until we have heard from Mr McLetchie, who I now welcome to the committee and invite to speak to amendment

415 and to the other amendments in the group, if he is so minded.

David McLetchie (Edinburgh Pentlands) (Con): Indeed I am, convener. Will I have an opportunity to sum up after Mr Ewing has commented?

The Convener: No.

David McLetchie: So, you want it all in a oner.

The Convener: Yes.

David McLetchie: Right you are. Thank you very much.

I have much pleasure in speaking to amendments 415 to 417, which are in my name. As I said in the stage 1 debate, raising the age limit for jurors is an issue on which I have campaigned since July 2005 in response to an inquiry from a then 67-year-old constituent who, on being called to serve, discovered to her disappointment that she was disqualified by reason of her age.

I was particularly pleased when proposals to raise the age limit to 70 were incorporated into the bill, and duly congratulated the minister on bringing the change to Parliament. The measure will increase the potential pool of jurors by 200,000 persons and will bring the age limit in Scotland into line with the age limits that apply in the rest of the United Kingdom. It will also correct a long-standing anomaly, which has existed notwithstanding the fact that both sit in judgment on accused persons, between the age limits for judges and for jurors.

However, as I pointed out during the stage 1 debate, it is possible to have no upper age limit, as is the case in a number of jurisdictions around the world, and to couple that with an automatic right of self-excusal in the case of a person over 70 who is called for service. That system is supported by Age Scotland, the organisation that represents the interests of older people in Scotland following the merger of Age Concern Scotland and Help the Aged in Scotland. Age Scotland asked me to lodge amendments on this important issue of principle for debate and consideration today.

Comparable systems of self-excusal from jury service for the over-70s operate successfully in Ireland and a number of states and provinces in Australia, Canada and the United States. Moreover, nearer to home the Ministry of Justice is canvassing the option, in a consultation on options for increasing the upper age limit for jurors in England and Wales, which is already 70. In other words, having finally caught up with England, we may again fall behind.

In my view, and in that of organisations such as Age Scotland, the merits of amendments 415 to 417 can be summed up as follows. First, they would remove a prominent example of unjustified age discrimination in public life. Secondly, they would allow older people in Scotland who are able and willing to perform their civic duty—and who are, in many cases, enthusiastic about that—the opportunity to do so. Such people include the constituent who first raised the issue with me five years ago. Thirdly, they would allow older people who did not feel up to serving on a jury the opportunity to excuse themselves. Fourthly, they would expand the pool of jurors significantly; at present, there are more than 600,000 people in Scotland aged 70 and over. Finally, they would reduce the cost to the Scottish Government of compensating jurors for lost earnings, given that the juror pool would encompass many more older people who have retired from work.

I call the amendments "the Arlene amendments", after Arlene Phillips. Members will recall that she is the lady whom the BBC unceremoniously dumped from the "Strictly Come Dancing" jury because, at the age of 66, she was considered to be too old to serve. At the time, that caused a storm of protest and raised a lot of interest in issues of age discrimination in our society. Many people thought that Arlene Phillips was more than capable of judging whether John Sergeant had murdered a quickstep, and resented her replacement by a younger model.

Away from the world of television juries, the amendments raise an important issue of principle as to the value that our society places on the wisdom and judgment of our older people. The idea that people are automatically incapable of exercising sound judgment when they are over the age of 65—or 70, for that matter—is manifest nonsense. I submit that it makes sense to move to a system in which there is no formal age limit. That is the essence of amendments 415 to 417.

I have been looking through a list of people who will be ineligible to serve on a jury in Scotland if my amendments are not agreed to. They include three serving members of the Scottish Parliament, one of whom is a Deputy Presiding Officer, and our former Presiding Officer, Sir David Steel. In the wider sphere, the ineligible would include Cardinal Keith Patrick O'Brien, who is apparently wise enough to participate in the election of the Pope but is considered incapable of deciding on the guilt or innocence of a person in Scotland, even after a lifetime spent hearing confessions from people in Scotland. The ranks of the disqualified would also include distinguished Scots such as Moira Anderson, Ronnie Corbett, Winnie Ewing, Alasdair Gray, Edwin Morgan, Sir Jackie Stewart and many more from all walks of life whose work and views are greatly respected and valued by all of us.

I have much pleasure in commending amendments 415 to 417 to the committee and would welcome members' support for them.

Bill Butler: Who would argue with such arguments so wittily put? I certainly would not. Amendments 415 to 417 are worthy of support. Mr McLetchie said that he has campaigned on the issue since July 2005. I suppose that this is the first and last time that I will join him in support of a campaign, but I am more than willing to do so today.

Other jurisdictions, including Canada and Australia, do not consider the lack of an upper age limit for jury service to be a problem; in fact, they consider it to be an advantage and a matter of simple justice. It helps people who wish to perform their civic duty to do so and attacks a rather senseless age discrimination.

Amendments 415 to 417 are worthy of support and include the logical option of self-excusal. They are resilient and cogent.

Robert Brown: I have considerable sympathy with David McLetchie's argument and with what Bill Butler said. The bill's approach is welcome and practical. As a matter of principle, adult citizens should be entitled to carry out certain civic duties. Indeed, if they are retired, they may have more time and convenience to sit on a jury.

However, I have two concerns on which I would be interested to hear the minister's responses. The first is about whether receipt of a jury citation would cause too much anxiety to some older people. There is no doubt that the arrival of official forms can upset some people who are not sure what they should do with them.

The second concern is whether there would be a risk of having jurors who had difficulties in carrying out their duties. An American study, which is mentioned in the English consultation that David McLetchie mentioned, indicated a clear relationship between age and recall of case facts and of the judge's instructions, with the older jurors displaying markedly poorer performance than younger ones.

Certainly, we must consider the rights of older people, but fairness in the trial must be the central and determining consideration. Do we risk having less competent juries, as the American study suggested, and less sound verdicts? I pose the question because I really do not know the answer. If there is such a risk, how significant is it and are there ways of overcoming it? Have there been problems in other countries that have got rid of the age limit?

Apart from that, there are issues of ill health and infirmity among older people. It is a matter of degree and of the individual rather than the category, so one must be careful about how it is put. However, if people have hearing difficulties for example, there could be problems.

I appreciate that one verges on being politically incorrect in making some of those points, but it is important that jury members have the ability to participate effectively in decisions. I merely raise some of those concerns as matters that would have to be dealt with adequately, not only by way of self-excusal from service. The issues are slightly wider than that and thought must be given to some of the other issues in the interest of the central matter of the trial's fairness.

Stewart Maxwell: I agree with the comments from Bill Butler and Robert Brown. There is no problem with agreeing with both of them, because it is right and proper that we remove discrimination from our society. The current age limit of 65 is discriminatory and we all welcome the change to 70, but I share Robert Brown's concerns. He is right to say that it is not a matter of category but of individuals and degree.

There is no doubt that, as some people grow older, they would have more difficulty in being able to deal with jury service for a range of reasons. We have to be careful that, in asserting the rights of one group of individuals, we do not remove or discriminate against the rights of others—the point that Robert Brown made about fair trial. There is a slight difficulty in that respect, although the logic of David McLetchie's arguments for amendments 415 to 417 is impeccable.

I wait to hear what the minister has to say on David McLetchie's amendments. I welcome the move to an upper age limit of 70, but I am not yet 100 per cent convinced of the argument that David McLetchie makes for the complete removal of an upper age limit.

I agree with Robert Brown's initial comment about official forms coming through the doors of some older people if such a change in the law is made. Those forms should be abundantly clear about the right of older people to excuse themselves so that we do not inadvertently cause distress. If the paperwork was to make that clear, it would go some way to dealing with some of the concerns. It would have to be made clear to people that they could excuse themselves and would not be letting anybody down or causing problems and that it was their right to choose, rather than a duty for which they were not putting themselves forward.

15:45

The Convener: Are there any other contributions? Having looked round the table and seen that there is no one with an interest to declare and that cognitive responses appear to be

perfectly satisfactory, I ask the minister to wind up. The issues that you should be addressing are age discrimination legislation and what is happening in other jurisdictions.

Fergus Ewing: The Scottish Government has a great deal of sympathy with amendments 415 to 417 in Mr McLetchie's name. Indeed, the Cabinet Secretary for Justice met David Manion of Age Concern Scotland to discuss the issue on 31 March and to confirm that.

We are aware that groups such as Age Concern Scotland, which represent our older citizens, support older people being given the opportunity to serve in this way. I am also sure that many of those who would not be included by the Government's own proposals to increase the age limit for jury service to 70 years could nevertheless contribute a great deal as jurors, as many members have argued. Our allowing people over the age of 70 to serve would widen the pool of available jurors, which is one of the arguments that Mr McLetchie made. He has made the case for the changes very ably.

I take it as read that we are all opposed to age discrimination; the Government has a great deal of sympathy with the arguments. It is therefore in the interests of discussion and of not pre-judging the issue that I would like to put some counter-arguments, so that the committee, in reaching its decision, can give them whatever weight members think is appropriate.

First, with regard to the fairness of age limits, judges and sheriffs are required to retire from office at 70, although they may be called upon, at the discretion of the senior judiciary, to sit as retired judges or sheriffs up to the age of 75. That may be a relevant consideration when considering the upper age for people who carry out jury service who are, in a sense, also judges: they are judges of the facts.

Secondly, jury service is a civic duty, not a right—I think that that was the thrust of the argument behind Mr Brown's remarks, or perhaps his primary argument. The extent of that duty is serious and onerous and it is a very important duty. As Mr Brown argued, the matter must be seen from the perspective of the accused and their right to a fair trial. For example, having no age limit is likely to lead to an increased number of applications for excusal. According to a paper that was published recently by the Ministry of Justice in England and Wales, people aged 70 and over are, broadly, at least twice as likely as those under 70 to need to be excused or discharged from jury service on medical grounds. In addition, a proportion of people over 70 who are fit to do service may wish to be excused.

I wonder—this is not in the script—whether there is not an additional argument. Some people over 70 who are called on to do jury service might feel a sense of duty to society to fulfil what is expected of them, which is very admirable. In doing their jury duty there might, however, be reasons that are known to them—ill-health or whatever—that would make it difficult for them to complete their jury service. One can understand that there might be reluctance for a person to excuse himself or herself because of a sense that they would, somehow, be letting society down. One can envisage that approach being taken by some individuals over 70 who have perhaps served their country well in many other ways in the past.

Thirdly, there would be additional costs for the Scottish Court Service, although we do not think that those would be astronomical costs. The estimate that I have from the Scottish Court Service is that the change would cost £18,000 per annum, which is not a huge amount of money. I am not sure how the SCS reached that estimate, but that is the figure that it has provided. On the other hand, it might be said that the £18,000 could be outweighed by potential financial savings in reducing the likelihood of costs being incurred for loss of earnings for those who are working and are called on to give jury service. To present a balanced approach, there might be additional costs on the one hand, but the potential for savings on the other. Those are all matters that a full consultation might allow us to get at with greater clarity.

I am aware from our postbag that some people over 70 are keen to serve as jurors. I am also aware that there might be others for whom jury service would be an additional unnecessary burden. In the nature of things, the over-70s are more likely to start trials as jurors but might, for a wide range of reasons—I mean no disrespect to anyone in the category—be unable to complete their service. It appears to me from what was said earlier that the most serious argument against people over 70 serving as jurors is that the possibility of the jury's falling below the 12 members who are needed for it to be quorate could increase the likelihood of the court's being unable to continue the trial. The risk that that might pose to the administration of justice has not yet been quantified. In response to our proposal to increase the age limit to 70, there was comment that greater attention might have to be paid to ensure a balanced age profile. The position would be exacerbated by opening jury service to the over-70s. I am not sure that too much reliance is placed on that argument, but I offer it to the committee.

I acknowledge that placing the onus on older persons to decide whether they are able to carry

out jury service is not uncommon in other jurisdictions. However, it is not an objective practice and carries risks. An American study, to which I think Robert Brown alluded in his remarks, noted a clear relationship between age and recall of case facts and of the judge's instructions, with the oldest jurors displaying markedly poorer recall than younger jurors, although I fully accept that individuals' capacities will vary greatly. Many younger jurors might have a lower capacity than many older jurors, but it might be nonetheless prudent to give further regard to that study and to ascertain whether there are other studies. The convener invited me to refer to other jurisdictions, but I cannot refer to extensive research. It might be possible to do that, were the committee to decide that more work needs to be done in the area. In some respects, our knowledge base might not be as strong as it could be, so there is no doubt that further time and consultation would allow us to increase that knowledge base. In other respects, we might still be uncertain about some matters.

The Ministry of Justice has stated specifically that it

"has not yet reached any decision on whether a change to the present limit should be made or what form any change might take. It first wishes to receive the widest possible range of responses to this paper from the general public and those with a particular interest in criminal justice and age issues".

It is plain that a major consultation on the matter is being carried out down south. By contrast, the increase in the Scottish age limit to 70 years, as set out in section 68, has been widely consulted on and was supported by 90 per cent of those who responded on the issue.

We will be guided by the committee's views on the matter and the committee might wish to take a decision on it now. On the other hand, we would also be happy to keep the issue under review as part of consideration of how our juror changes are implemented. We will be interested in the consultation south of the border, for example, and will consider further action in the future. We are aware that should the committee agree to the amendments there will be an interaction with the Government's amendment 511, which will require people to seek excusal as of right within seven days of receiving their first notice. However, that is simply a detail. I await with interest committee members' views and the decision that they will take.

To reassure Mr McLetchie, I add that although it might appear that were I to suggest that people such as Winnie Ewing should be excluded from serving on a jury, I might get short shrift from her, she is likely to say that there is no way she would want to serve on a jury because she is far too busy electioneering.

Amendment 443 agreed to.

Section 68—Upper age limit for jurors

Amendment 415 moved—[David McLetchie].

The Convener: The question is, that amendment 415 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)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

Against

Don, Nigel (North East Scotland) (SNP)

Abstentions

Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 6, Against 1, Abstentions 1.

Amendment 415 agreed to.

Amendment 416 moved—[David McLetchie].

The Convener: The question is, that amendment 416 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division. [*Interruption*.]

Nigel Don: Sorry, did you count me? I did not vote.

The Convener: Are you abstaining, then?

Nigel Don: No, I am sorry—I am against amendment 416.

The Convener: It has been a long day.

For

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

Against

Don, Nigel (North East Scotland) (SNP)

Abstentions

Maxwell, Stewart (West of Scotland) (SNP)

The Convener: The result of the division is: For 6, Against 1, Abstentions 1.

Amendment 416 agreed to.

Section 68, as amended, agreed to.

Bill Butler: Perhaps it is as well that we are not on a jury. [*Laughter*.]

After section 68

Amendment 511 moved—[Fergus Ewing]—and agreed to.

Section 69—Persons excusable from jury service

Amendment 417 moved—[David McLetchie].

The Convener: The question is, that amendment 417 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)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)

Abstentions

Maxwell, Stewart (West of Scotland) (SNP)

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

Amendment 417 agreed to.

Section 69, as amended, agreed to.

The Convener: In view of the lateness of the hour and the fact that some members are showing signs of fatigue—[*Laughter*]—I conclude today's proceedings and thank members for their considerable and constructive input.

Meeting closed at 15:57.

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