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Official Report

JUSTICE COMMITTEE

Tuesday 4 May 2010

Session 3

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JUSTICE COMMITTEE
15th 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:

Kenny MacAskill (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 4

Scottish Parliament

Justice Committee

Tuesday 4 May 2010

[The Convener *opened the meeting at 10:03*]

Criminal Justice and Licensing (Scotland) Bill: Stage 2

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I ask everyone to ensure that mobile phones are switched off. We have an apology from Bill Butler, who is replaced by the Labour Party committee substitute, Dr Richard Simpson, whom I welcome to the meeting.

There is only one item on the agenda—stage 2 of the Criminal Justice and Licensing (Scotland) Bill, which is in its sixth day. The committee will not proceed beyond section 125 today. I welcome the Cabinet Secretary for Justice, Kenny MacAskill MSP. I welcome, too, the Scottish Government officials who are accompanying the cabinet secretary. Members should have copies of the bill, the sixth marshalled list of amendments and the sixth list of groupings of amendments for consideration today.

Section 70—Data matching for detection of fraud etc

The Convener: Amendment 136, in the name of the minister, is grouped with amendment 137.

The Cabinet Secretary for Justice (Kenny MacAskill): Amendments 136 and 137 are minor and technical amendments to section 70. They will update references to the names of United Kingdom bodies following recent changes.

I move amendment 136.

Amendment 136 agreed to.

Amendment 137 moved—[Kenny MacAskill]—and agreed to.

Section 70, as amended, agreed to.

Section 71 agreed to.

After section 71

The Convener: Amendment 551, in the name of Robert Brown, is in a group on its own.

Robert Brown (Glasgow) (LD): Amendment 551 relates to knife crime and to what is known as the Cardiff model. We all know that an astonishing number of victims of knife crime refuse to report incidents of assault on them to the police. The Cardiff model was introduced by Professor Jonathan Shepherd of Cardiff University, a face and jaw surgeon, who was dismayed by the number of young victims of violent crime whose faces he had to stitch up. Under the Cardiff model, accident and emergency wards collect information about the precise locations and times of violent incidents and share the anonymised information with the police, thus assisting them in implementing prevention action plans to greater effect. That has happened in Cardiff since 2002 and has, reportedly, led to a 40 per cent fall in violent assaults over the first five years, up to 2007. Cardiff moved to being the safest city of the family of 15 comparable cities that were surveyed by the Home Office.

The model has been followed in parts of Scotland: it is being rolled out by Lanarkshire NHS Board, Glasgow royal infirmary Edinburgh royal infirmary, in Fife and in Aberdeen. The purpose of amendment 551 is to empower Scottish ministers to require the use of the programme throughout the country. Too often, we have been mystified by the failure of Government—I hasten to say that this is not a crack at the current Government, but a generality—to replicate apparently successful projects or ideas throughout the country. Here is an idea that has made a significant contribution to cutting violent crime—particularly knife crime—that is far more relevant and far more evidence based than the provisions on mandatory sentences that the committee approved earlier in stage 2, and which will have to be removed at stage 3. It saves lives, cuts crime and facilitates successful crime prevention by the police. It would be criminal if it were not made a feature of joint working between hospitals and police services throughout Scotland. That is why the amendment contains not just a power but—in subsection (2)—a duty on Scottish ministers to get on with the job.

I move amendment 551.

Stewart Maxwell (West of Scotland) (SNP): I am delighted that Robert Brown has seen the light and has been converted to the idea, given that I campaigned for its introduction back in the 2003 to 2007 session of Parliament. Unfortunately, the then justice minister opposed it, as did Labour and the Liberal Democrats. It is nice to see that if you stick at something, eventually your opponents will see that they were wrong and you were right. However, as was stated at the time and since, as far as I am aware, it is totally unnecessary to introduce to the bill regulations that would require health boards to collect and provide information on criminal offences. As Mr Brown said, a number of health boards are already rolling out the programme. It has been piloted in a paper-based exercise, which seems to have proved to be a difficult and complicated way to do it. My understanding, from my discussions with A and E consultants and others, is that the electronic

system that is currently being rolled out is the one that should succeed in allowing the programme to happen. Work is being done on kinks and difficulties with that system.

As far as I can see, the Cardiff model is already being used. I will be delighted when it is rolled out throughout the country. Previous justice ministers did not support the idea, but the current justice ministers have supported the roll-out, and are working closely with the violence reduction unit and others to ensure that it goes ahead. There is no requirement for amendment 551.

Dr Richard Simpson (Mid Scotland and Fife) (Lab): The first thing to say is that an important feature of the system is that the information that it gathers provides the police with a detailed and graphic look at where violence is focused in postcode areas. Secondly, health boards might be required or asked to gather the information, but can that be enforced? Can it be made part of the information technology structure? At the moment, the IT structure does not collect the data in the way in which it should.

The issue also goes beyond the knife crime to which Robert Brown referred. The surgeon whom he mentioned has been dealing with people who are drunk and incapable, or falling-down drunk. How are we going to define criminal injuries? As a doctor, I know that determining what is a criminal injury as opposed to an injury might be easy when it is knife crime, but there are other forms of assault that do not involve a knife or a gun, and it might be difficult to determine whether an injury is a criminal injury. The definition of criminal injury is pretty important, and as it is offered in amendment 551, it is rather light. It simply talks about

"injuries which are, or are suspected of having been, directly attributable to the commission of an offence involving violence".

That is a slightly difficult definition.

From a health point of view, however, I welcome the thrust of what Robert Brown is trying to achieve through amendment 551.

The Convener: As there are no other contributions, I will make one myself. As Stewart Maxwell has already pointed out, and as the good book says, there is no greater joy in heaven than when a sinner repenteth. Some of us who are sitting around this table will hope that Robert Brown will, similarly, repent in his attitude to mandatory sentencing for knife crime.

Amendment 551 is arguable and it has merit. The statistical information that it would require would be of considerable value, as the Cardiff experiment has demonstrated. There does, however, seem to be a contrary argument on the basis that what Robert Brown is seeking is already happening anyway, and it might not be necessary to put it into the bill. I will listen with interest to what the cabinet secretary has to say because Mr Brown's idea has considerable interest.

Kenny MacAskill: We acknowledge the well-intentioned nature of amendment 551. The majority of patient contacts do not raise issues about public safety or the investigation of a crime. However, many health professionals, including in the Scottish Ambulance Service, accident and emergency departments, minor injury clinics and general practitioner surgeries, might have contact with individuals who have been involved in crimes or who have been injured as a consequence of crimes. For that reason, guidance on sharing information between NHS Scotland and the police was developed and issued to NHS Scotland and chief constables in March 2008. NHS boards should, therefore, already be operating policies and procedures that support health professionals who are employed or contracted by them in adopting a consistent approach to sharing information in order to promote public safety and aid in the prevention and detection of crime, while respecting and safeguarding the interests of patients and the public, and the confidentiality of personal information.

We also support work to introduce injury surveillance in Scotland, particularly the pilot that is being undertaken by the national police-led violence reduction unit at NHS Lanarkshire. The pilot addresses three major challenges: the collection of relevant data at accident and emergency departments; matching those data with police data; and using the data in police tasking processes. The more widespread use of injury surveillance would significantly benefit police forces and health boards, but it is necessary to do further work around ensuring that data are collected accurately and consistency, and that they can be made available to police forces in an appropriate format. We expect the evaluation of the pilot and learning from the injury surveillance work that is going on elsewhere in Scotland to inform our understanding of how best to deliver injury surveillance in Scottish hospitals.

We are also unclear about the drafting of amendment 551. On the one hand, it seeks to give Scottish ministers the power to make regulations that would require health boards to collect information on criminal injuries that are treated in or otherwise come to the attention of hospitals, and to provide that information to the relevant chief constables. It would then impose a duty on Scottish ministers to make the regulations within 12 months. We are therefore unclear whether a power or a duty is sought.

In the light of the existing guidance and the current pilot to address the issues that lie behind amendment 551, we do not think that the

amendment is necessary, so we ask the committee to reject it, with the caveat that the Government is committed to supporting the pilot and will, after proper evaluation, seek to disseminate the practice more widely.

10:15

Robert Brown: It was worth lodging amendment 551. The cabinet secretary's final point about whether the amendment seeks a power or a duty is answered by the terms of the amendment itself. I am trying to empower ministers, although it is possible that that is not necessary, and to require them to move forward on the issue.

The one element of disappointment is that the cabinet secretary did not give us much information about the timescale for evaluation of the pilot. Perhaps we can follow that up hereafter.

Richard Simpson and Stewart Maxwell made some useful points about background information. The questions of IT structures and the supporting definitions are important, but they are subsidiary to the principle of what we are trying to do with the bill. If there is the political will to continue working on the issue—the cabinet secretary has assured us that there is—it can, I hope, be sorted out.

Given that the proposed system has been in use in Cardiff since 2002, and given that we are piloting it in Scotland, I hope that any difficulties will not take too long to resolve and that it should be possible to move forward. Against that background, and with a view to checking some details with the cabinet secretary, I seek to withdraw amendment 551, with the committee's permission, while reserving the right to come back to it at stage 3 if I think that that is appropriate.

Amendment 551, by agreement, withdrawn.

Section 72—Closure of premises associated with human exploitation etc

The Convener: Amendment 138, in the name of the minister, is grouped with amendments 139 to 142, 144 and 198.

Kenny MacAskill: When the bill was introduced in March 2009, the Sexual Offences (Scotland) Act 2009 was still in bill form and was passing through the Parliament. Amendments 139 to 142 and 144 are technical amendments that reflect the format of the finalised Sexual Offences (Scotland) Act 2009. Amendments 138 and 198 are also minor technical amendments.

I move amendment 138.

Amendment 138 agreed to.

Amendments 139 to 144 moved—[Kenny MacAskill]—and agreed to.

Section 72, as amended, agreed to.

Section 73 agreed to.

Section 74—Foreign travel orders

The Convener: Amendment 444, in the name of the minister, is grouped with amendments 445 and 446.

Kenny MacAskill: Amendments 444, 445 and 446 will amend section 74, which will amend various sections of the Sexual Offences Act 2003 that deal with foreign travel orders.

One of the principal changes that will be introduced by section 74 is the requirement for sex offenders who are subject to a foreign travel order that prohibits them from travelling to a country outside the UK to surrender their passports to the police. The intention behind the changes to the foreign travel order regime is to strengthen the police's ability to manage sex offenders in the community and to increase the use of foreign travel orders with the aim of preventing child-sex tourism. The changes that we are making to the foreign travel order regime in Scotland will mirror those that have already been introduced in the rest of the UK by the Policing and Crime Act 2009.

Section 74(5) will insert new section 117B into the Sexual Offences Act 2003, and provides that if a Scottish court imposes a foreign travel order on a sex offender that prohibits him or her from travelling to any country outside the UK, that order must require the offender to surrender all their passports at the police station that is specified in the order. Amendment 444 seeks to make a minor but necessary amendment to section 74(5) that will make it clear that if a Scottish court imposes a foreign travel order on a sex offender, the offender can be required to surrender their passports at a police station only in Scotland, and not to a police station anywhere in the UK.

Amendment 445 will make it an offence in Scots law for a sex offender who is subject to a foreign travel order that has been issued by a court in England, Wales or Northern Ireland and which prohibits him or her from travelling to a country outside the UK to fail to surrender their passport, without reasonable excuse, at a police station in England, Wales or Northern Ireland. It will therefore ensure that, in such circumstances, it will be an offence in Scots law to fail to surrender a passport in any part of the UK. Without that change, sex offenders who are based in other parts of the UK would have leeway to travel to airports or ports in Scotland to use their passports to leave the UK.

Amendment 446 makes it clear that the sheriff court will have jurisdiction to deal with the failure to surrender passport offence under section 122(1B) of the Sexual Offences Act 2003.

I move amendment 444.

The Convener: That seems straightforward. As members have no comments, there is no need for the minister to wind up.

Amendment 444 agreed to.

Amendments 445 and 446 moved—[Kenny MacAskill]—and agreed to.

Section 74, as amended, agreed to.

After section 74

The Convener: Amendment 145, in the name of the minister, is in a group on its own.

Kenny MacAskill: Amendment 145 responds to the Justice 2 Sub-Committee's report on child sex offenders and our stated intention to introduce legislative change that will require sex offenders who do not have permanent homes to report more frequently to police stations to verify information that they have previously notified to the police. It will confer on the Scottish ministers a power to make regulations that will prescribe the increased frequency of such reporting. At present, such offenders are required to attend a police station to verify their information only once a year. Homeless sex offenders are recognised as presenting a higher risk to the public because they are harder to monitor because they have no fixed abode. To require a homeless offender to attend a police station in person more frequently to notify the police that he is still living at the place or address of which he last notified them, and that his personal details are correct, will provide greater confidence that the police can effectively manage and monitor homeless sex offenders.

The detail of the regulations, including the optimum level of increased frequency of reporting, is being discussed by justice officials and representatives of the Association of Chief Police Officers in Scotland. Given the importance of the measures and the effect that they will have on the people who will need to comply with them, the regulations will be subject to the Parliament's affirmative resolution procedure.

Failure to comply with the requirements under amendment 145 without reasonable excuse will carry the same maximum penalty as other breaches of the notification regime, namely up to five years' imprisonment. The amendment will bring Scotland into line with the rest of the UK, where parallel amendments were made through the Criminal Justice and Immigration Act 2008.

The proposed changes to section 138 of the Sexual Offences Act 2003 are largely technical in nature and replicate amendments that have been made for the rest of the UK.

I move amendment 145.

The Convener: Again, that is fairly straightforward.

Amendment 145 agreed to.

Section 75 agreed to.

After section 75

The Convener: Amendment 146, in the name of the minister, is in a group on its own.

Kenny MacAskill: Amendment 146 is a minor amendment that will allow spent conviction information to be disclosed in proceedings under the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 for the making, variation, renewal and discharge of, and appeals in relation to, risk of sexual harm orders. Such spent conviction information may be placed before a court in equivalent proceedings in England and Wales, as it can in Scotland in proceedings on sexual offences prevention orders and other orders under the Sexual Offences Act 2003. However, when the 2005 act introduced risk of sexual harm orders in Scotland, the necessary amendment was not made to the Rehabilitation of Offenders Act 1974 to allow a court to consider spent conviction information in proceedings relating to such orders. Amendment 146 addresses that anomaly.

I move amendment 146.

Amendment 146 agreed to.

Section 76 agreed to.

Section 77—Grant of authorisations for directed and intrusive surveillance

The Convener: Amendment 523, in the name of the minister, is grouped with amendments 524 to 528.

Kenny MacAskill: Members will be aware that crime does not respect police force boundaries. We want to ensure that the law supports the police in tackling crime while maintaining relevant safeguards.

Section 77 will amend the Regulation of Investigatory Powers (Scotland) Act 2000 so that directed and intrusive surveillance can be authorised as part of a joint police or joint police and Scottish Crime and Drug Enforcement Agency operation, which will ensure that when the police consider it necessary to use such techniques in a joint operation, there is no need for time-consuming multiple applications and authorisations. Instead, a single force will be identified to take the lead in authorising such activity, which will remove unnecessary bureaucracy while maintaining the existing safeguards.

Continuing consultation with ACPOS has identified the need to extend the original provisions of section 77 to include the use of covert human intelligence sources in joint operations. Without such a provision, we will reduce unnecessary bureaucracy for some, but not all, types of surveillance.

None of the amendments in the group will give extra powers of investigation to the police, nor will any of them add to the list of bodies that can use the investigatory powers in question. Rather, they will ensure that the powers that are already in place can be authorised in the most effective and efficient manner while appropriate checks and safeguards are maintained. Existing safeguards in the application procedure will be maintained, and the independent oversight of surveillance operations that is provided by the Office of Surveillance Commissioners will continue. The OSC inspects all police forces annually to ensure that powers are used appropriately and that the proper processes are followed.

Amendment 523 seeks to remove section 77(2), as the inclusion of provision for the use of covert human intelligence sources in a joint operation allows for a simpler drafting approach to be taken. Amendment 524 will adjust section 77(3)(a) and amendment 528 will adjust section 77(6) as a consequence of that new approach.

Amendment 525 seeks to replace proposed new section 9A of the Regulation of Investigatory Powers (Scotland) Act 2000 with a new section 10A which, in joint operations, will allow the lead force to authorise the use of all forms of surveillance that are covered by the 2000 act, thereby avoiding the need for multiple authorisations.

Amendment 526 will include in section 77 provision to amend section 14(5)(b) of the 2000 act by adding the rank of deputy director general of the Scottish Crime and Drug Enforcement Agency to the definition of

"the most senior relevant person"

to whom a surveillance commissioner must make a report, should he or she decide not to approve an intrusive surveillance authorisation. In removing section 14(7) from the 2000 act, amendment 526 reflects amendments that were made in the Police, Public Order and Criminal Justice (Scotland) Act 2006.

Amendment 527 will include in section 77 provision to amend section 16 of the 2000 act by adding the deputy director general of the SCDEA to the list of the ranks of people who may appeal to the chief surveillance commissioner about a decision by a surveillance commissioner. Provision was included in section 77 to allow the deputy director general to approve authorisations for intrusive surveillance. Amendments 526 and 527 are technical amendments that are required to provide the deputy director general with the same approval rights as the director general.

I move amendment 523.

The Convener: In the past, the process must have been fairly convoluted and could have caused delays, so it is clear that the amendments have value.

Amendment 523 agreed to.

Amendments 524 to 528 moved—[Kenny MacAskill]—and agreed to.

Section 77, as amended, agreed to.

Section 78—Authorisations to interfere with property etc

The Convener: Amendment 529, in the name of the minister, is grouped with amendments 530 to 536.

Kenny MacAskill: Amendments 529, 530 and 532 are technical amendments to section 78 that will update subsection references to take account of changes that UK legislation has made to section 93 of the Police Act 1997 since the introduction of the bill.

Amendment 531 will remove unnecessary wording from section 78(2)(a). Amendment 533 will update section 78(2)(b) to include the rank of deputy director general of the SCDEA in section 93(6)(cc) of the 1997 act, which defines the relevant area for which the deputy director general of the SCDEA will be able to approve authorisations for property interference.

10:30

Amendment 534 is a technical amendment that will alter the position at which the change in section 78(3)(b) is made in section 94 of the Police Act 1997. Amendment 535 will make a minor editing change to section 78(3)(b) that is required as a result of the movement of text by amendment 534.

Section 78(3)(c) will add proposed new section 94(6) to the Police Act 1997 to provide for an urgent single authorisation of property interference in a joint operation. Amendment 536 will improve the wording of section 78(3)(c) to add a corresponding reference to section 94(2)(h) of the 1997 act.

I move amendment 529.

Amendment 529 agreed to.

Amendments 530 to 536 moved—[Kenny MacAskill]—and agreed to.

Section 78, as amended, agreed to.

Section 79—Amendments of Part 5 of Police Act 1997

The Convener: Amendment 537, in the name of the minister, is grouped with amendment 538.

Kenny MacAskill: Amendments 537 and 538 ensure that notification requirements under part 2 of the Sexual Offences Act 2003 will be included on enhanced criminal record certificates, which are commonly referred to as enhanced disclosures. Amendments to the Police Act 1997 that were made by the Protection of Vulnerable Groups (Scotland) Act 2007 were intended to ensure that notification requirements under part 2 of the 2003 act were included on basic, standard and enhanced disclosures. Section 49 of the 2007 act makes similar provision for scheme record disclosures under that act.

As preparations for the implementation of the 2007 act intensified, however, it came to light that the amendments did not have the intended policy effect. Including the information on the other disclosures but not on enhanced disclosures would be inconsistent. Amendments 537 and 538 correct the oversight in the existing provisions and bring the arrangements for disclosure of notification requirements under part 2 of the 2003 act into line.

I move amendment 537.

The Convener: Again, the amendments are clearly of value.

Amendment 537 agreed to.

Amendment 538 moved—[Kenny MacAskill]—and agreed to.

Section 79, as amended, agreed to.

After section 79

The Convener: Amendment 447, in the name of the minister, is grouped with amendments 452 and 453.

Kenny MacAskill: Amendment 447 inserts after section 79 a new section that amends provisions in the Rehabilitation of Offenders Act 1974. At present, there is an anomaly under the 1974 act. In Scotland, individuals who have a spent conviction are treated as if they have not committed an offence, whereas people who accepted an alternative to prosecution such as a fiscal fine or a fiscal compensation order may be indefinitely required to disclose the fact if, for example, they are asked the right question at a job interview or when filling in an insurance form. That happens because people who have accepted an alternative to prosecution in Scotland are not afforded protection under the 1974 act, which provides protection only for people who have been convicted of an offence. The 1974 act does not protect people who have accepted a penalty as an alternative to prosecution, as they have not been convicted.

However, that is no longer the position in England and Wales. The Criminal Justice and Immigration Act 2008 extended protection under the 1974 act for people with spent convictions to cover situations involving cautions, reprimands, warnings and any equivalent order that is issued outside England and Wales. A person who accepts an alternative to prosecution in Scotland or a caution in England might therefore find it more difficult to get a job or might have to pay higher insurance costs in Scotland as a result of the lack of protection under the 1974 act. Amendment 447 corrects that anomaly by inserting two new sections—8B and 9B—and a new schedule 3 into the 1974 act.

The effect of amendment 447 is that, when an alternative to prosecution becomes spent, the person will not have to declare it or any circumstances that were ancillary to the offence, and failure to do so will not be a ground for dismissing or excluding the person from any office, profession, occupation or employment or prejudicing the person in any way.

Amendments 452 and 453 are minor consequential amendments.

I move amendment 447.

Amendment 447 agreed to.

The Convener: Amendment 448, in the name of the minister, is in a group on its own.

Kenny MacAskill: In early 2007, ministers established the prison health care advisory board to explore the feasibility of transferring enhanced primary health care services in Scottish prisons from the Scottish Prison Service to the national health service. The advisory board comprised senior staff from the SPS and NHS boards, NHS and SPS staff organisations, and Scottish Government advisers. The board's report recommended that all primary care services in prisons should become the responsibility of NHS boards.

The alignment of primary care services in prisons with those that are available to the public is recommended by the World Health Organization. A similar change was completed in England and Wales in 2006 and in Northern Ireland in 2008. Amendment 448 facilitates that transfer of responsibility in Scotland. It amends the Prisons (Scotland) Act 1989 and the Criminal Justice and Public Order Act 1994 to remove the duty on Scottish ministers to provide medical services in state-run prisons and the duty on the contractor to provide those services in contracted-out prisons. The responsibility for providing

primary care services in prisons will fall to NHS boards under general health legislation.

Amendment 448 maintains the special role and status of medical officers in prisons. It requires the Scottish ministers or contractors to designate one or more medical officers for each prison and limits who can be designated as a medical officer. It provides that medical officers will no longer be deemed to be prison officers as they will no longer be appointed by the Scottish ministers to provide medical services in prisons. Medical practitioners will be appointed by health boards to provide medical services in prisons and the Scottish ministers will designate certain of those practitioners to be medical officers for the purposes of the 1989 act and the Prisons and Young Offenders Institutions (Scotland) Rules 2006.

The rest of amendment 448 ensures that the medical officers who are designated under the new powers will have much the same status within the prison as the medical officers who are appointed under current powers have, for example in relation to searches and restrictions on the disclosure of information.

I move amendment 448.

Robert Brown: I support the general intent of the amendment. I say in passing that I am hugely impressed by the number of amendments that we have considered so far in which the Scottish National Party Government is seeking to bring us into line with the position in England. However, I have a question about the practical implications of amendment 448, because moving from one system to another often creates hiccups and difficulties. Will the minister give the committee some information on how the system will work in practice? I am particularly interested to know whether different standards of service will apply to prisoners and to the general population.

It has long been accepted that there are high levels of people with mental health problems, developmental difficulties and other challenges in prisons. The issue arose recently with regard to the number of psychologists. Nobody pretends that the level of support under the present system is necessarily what it ought to be. However, my point is that there probably require to be significantly higher levels of support by psychiatrists, psychologists and certain therapists than is available to the general community, and those higher levels are not in place in prisons at present. How will that be reflected in the level of provision that is made on the ground? We certainly do not want any negative unintended consequences from what is otherwise a positive move. Any such consequences would impact badly on the effectiveness of the criminal justice system.

Dr Simpson: I have two points to raise, the first of which is technical. I ask the minister whether the phrase "registered medical practitioner" in proposed new section 3A(2) of the 1989 act should read "licensed medical practitioner" given that, since November last year, those who are actually practising are required to be licensed as well as registered. I think that the wording will need to be updated at stage 3. I will be interested to hear whether the minister's officials agree.

Secondly, I have questions about paragraphs (5) and (6) of proposed new section 3A of the 1989 act.

Paragraph (5) refers to the purpose of the search as

"the purpose of providing medical services for any prisoner at the prison",

but it states that the search is

"a search of any person who is in, or is seeking to enter, the prison".

I would like the minister or his officials to explain the link between the prisoner to whom medical services are intended to be provided and the person entering the prison who is to be the subject of a search.

Finally, I wonder whether paragraph (6) takes the right approach. The amendment refers to

"the person's clothing other than an outer coat, jacket, headgear, gloves and footwear".

Rather than state that the rules do not allow the governor

"to authorise an officer of a prison to require a person to remove"

garments, should it not be stated that those officers are not authorised to require persons to remove those garments? The descriptions, as drafted, are not all-embracing.

Those are my slight concerns. Otherwise, I very much support the Government's action in moving health care in prisons back into the national health service. It should not have been taken out of the NHS under a previous Government. That was understandable at the time because of difficulties in providing primary medical services to the prisoners at an appropriate cost—that was why services were put out to Blue Arrow and Medacs Healthcare. However, I welcome the intention to return those services to the health service. We should not underestimate the difficulties or the costs involved—those are the reasons why, although the policy has been agreed in principle, it is taking a lengthy period to implement.

Angela Constance (Livingston) (SNP): I did not intend to be political with regard to the amendment. Nevertheless, I say to Robert Brown that it is interesting that it has taken an SNP

Government to move health care in prisons towards best practice.

Like Richard Simpson, I remember well the difficulties associated with contracting out health care in prisons. From experience, I know that medical services in prisons were, at times, not what they should have been. In general, the amendment is a sensible, pragmatic move towards doing the right thing. Our national health service should apply to us all, irrespective of our rank or status and irrespective of whether we are law-abiding citizens or offenders. If we are even remotely serious about making prison work, we must ensure a good standard of health care in prisons.

The Convener: Those who are detained should receive the same degree of care as anyone in the outside world. On that subject, I recently wrote to the cabinet secretary about a particular prisoner of some notoriety who has now been released. I received the appropriate assurance in that respect, for which I am grateful. When someone's liberty is taken away, we must ensure that the care that is provided is as we would all wish it to be.

A number of points of a technical nature have been raised by Robert Brown and Richard Simpson, which I invite the cabinet secretary to address in his response to the debate.

Kenny MacAskill: On the comments that have been made by Richard Simpson and others, we welcome the general direction of travel. The Government has not taken an ideological position on the subject; we are simply trying to do the right thing, as has been mentioned.

The reference to garments and searches will allow prison rules to reflect the change that is being made. We are more than happy to reflect on the matter and if there are better ways of achieving that change, we will see what can be done at stage 3. We are simply trying to ensure that matters remain as they are.

On whether the wording should be "licensed medical practitioner" rather than "registered medical practitioner", my understanding is that it should be "registered medical practitioner". However, we will check and address the matter if changes are necessary.

On Robert Brown's points, the support was never provided by the NHS; it was provided by the civil service before being outsourced. The intention is not to take one step forward and two steps back. It would be counterproductive if we allowed health care in prisons—especially in the field of mental health, where we know that there are significant problems for the Prison Service and prison officers—to deteriorate. A programme board will oversee the issue. Its members will work together according to a principle of equivalence, to try to end the situation that exists in health care—as in other areas—whereby there is no joining up of services when people are released from prison back into the community, and to place on the NHS a duty to ensure a smooth transition.

10:45

The Convener: We accept that this significant change or transformation will not be problem free. However, all parties—unions, management, governors and health boards—are working together. We will check the small print to ensure that it is correct and appropriate. Equally, we will take on board the points that Robert Brown and others correctly made, because we must ensure that this well-intentioned direction of travel does not have unforeseen consequences.

Amendment 448 agreed to.

Section 80—Assistance for victim support

The Convener: Amendment 413, in the name of Angela Constance, is in a group on its own.

Angela Constance: Amendment 413 is a probing amendment that I lodged after discussions with Action for Children Scotland. The amendment seeks to insert, after "victims" in section 80(1), the phrase

"including children and young people".

The purpose of the amendment is to ensure that bodies that provide support to victims of crime include in their work a strong focus on assisting children and young people who have been victims of offending.

Members will be aware that section 80 provides the Scottish Government with the power to make grants to bodies

"for the purposes of or in connection with the provision of assistance to victims, witnesses or other persons affected by an offence."

I hope that this probing amendment will clarify how such grants will help to support children and young people who have been victims of offences, given that young people are far more likely to be the victims than the perpetrators of crimes. I always think that it is worth reiterating that children and young people are more likely to be victims than perpetrators.

I am sure that, in the bill, "victims" means "victims of all ages", but I am interested in the cabinet secretary's views as to whether there is any added value in specifically mentioning children and young people. I appreciate that there may be no legal or technical need to mention them specifically, but I wonder whether there would be merit in doing so and whether that would bring a focus on work with children and young people. As

I said, children and young people are more likely to be victims than perpetrators.

I move amendment 413.

James Kelly (Glasgow Rutherglen) (Lab): I oppose amendment 413. It is well intentioned, but I do not think that it is necessary. Section 80 as drafted covers children and young people. The amendment focuses on victims, whereas section 80 makes provision for grants to assist witnesses, too. I also believe that there would be unintended consequences from our agreeing to amendment 413 that could lead to confusion.

Kenny MacAskill: As Mr Kelly said, section 80 will give the Scottish ministers greater flexibility in this area—for example, flexibility to fund local authority support for victims of human trafficking. Section 80 provides for an enabling power; it does not signal a change to the overall approach to paying grants to organisations that support victims and witnesses. Although we understand and appreciate the intention that lies behind amendment 413, the existing wording of section 80 covers all victims, regardless of age, so it allows the payment of grants to organisations that support children or young people who are victims of crime. Moreover, singling out one group of victims for specific mention could lead to questions about support for other groups. The amendment is therefore unnecessary.

Furthermore, if the amendment were agreed to, section 80 could arguably be read as limiting Scottish ministers to paying grants only to organisations that support both adults and young people. That would inadvertently reduce, rather than enhance, ministers' ability to help victims, which we are sure is not the intention. We invite the member to withdraw amendment 413, given the assurances that I hope we have provided.

The Convener: I invite Angela Constance to wind up and press or withdraw amendment 413.

Angela Constance: I think that I have made my point that children and young people are more likely to be victims than perpetrators.

The Convener: Three times, in fact.

Angela Constance: Four, actually.

I am content with the cabinet secretary's answer and take on board members' comments. Amendment 413 was certainly not meant to have unintended consequences for victims who are not children or young people, so I will withdraw it.

Amendment 413, by agreement, withdrawn.

Section 80 agreed to.

Sections 81 to 84 agreed to.

Section 85—Meaning of "information"

The Convener: Amendment 696, in the name of the minister, is grouped with amendments 553, 697, 555 and 556.

Kenny MacAskill: Amendments 696, 553, 697, 555 and 556 are minor technical amendments that seek to simplify section 85, which establishes the meaning of "information" for the purposes of part 6. The simplification of the provision is, in part, a response to concerns that were expressed during stage 1 about the overall complexity of the provisions contained in part 6 of the bill as introduced.

We will no doubt return to this theme when we debate later groups of amendments, but it might assist members if I explain some of the challenges that we face. In his concluding remarks during the stage 1 debate in the chamber, the Minister for Community Safety reminded members that disclosure is complex. There is no escaping that. Nonetheless, we are trying to achieve a body of law that is clear, coherent and effective. We do not consider that we can leave the development of the detail of the fundamental duty on the prosecutor to the development of the common law.

Prosecutors, investigators and accused persons need certainty. We have reviewed the provisions in part 6 to remove as much complexity as possible from the bill. Our amendments seek to remove provisions that can then be placed in secondary legislation or in the code of practice. We accept we have not been able to go as far as members of the committee might have liked. We also accept that part 6 remains a complex and highly technical part of the bill, but we want to impress on members the reasons for that.

First, it is important to put the length and complexity of the provisions in context. Lord Coulsfield's report ran to some 110 pages and contained 21 chapters and 13 annexes. He made 44 recommendations, 14 of which referred explicitly to the need for legislation. The current Crown Office guidance on disclosure runs to some 300 pages. There is also an ACPOS guidance manual for police forces, which runs to some 200 pages. That gives a flavour of the detailed requirements of work on disclosure and of the intricate nature of what we are trying to distil into legislation.

There is a statutory scheme for disclosure in England, Wales and Northern Ireland, where the Criminal Procedure and Investigations Act 1996 and supporting legislation have disclosure provisions of a similar length to those we are proposing. In that context, we believe that the level of detail that we are proposing is reasonable.

If our amendments are accepted, the provisions in the bill will be longer than they were previously. That is because, although some of our

amendments will simplify the provisions, there are also areas that were not covered when the bill was introduced but which we consider we need to seek to add in. Those include provisions on disclosure post conclusion of first-instance proceedings, on appeals and on ensuring that there is a means of representing reserved interests in decisions about the non-disclosure of information on public interest grounds.

The need for statutory provision on disclosure post conclusion of first-instance proceedings arose from the decision of the Judicial Committee of the Privy Council in McDonald v HMA, which did not issue until October 2008 and therefore post-dated Lord Coulsfield's review. It was not possible to develop provisions on this substantive matter prior to the introduction of the bill.

Similarly, the need for a mechanism for the secretary of state to be able to make applications to the court for information to be withheld to protect the public interest became clear only during engagement with UK Government officials following the introduction of the bill.

Finally, we stress the importance of certainty in creating a statutory disclosure scheme. One of the key motivations for creating a statutory scheme is to ensure that the duties and responsibilities in the scheme are as clear as possible and to get away from the moving target of constantly evolving substantive common law in this area.

Unless we make clear in legislation all the significant rights and duties, the risk is that those gaps will be filled in through case law, which will undermine certainty for police and prosecutors, which is one of the most important benefits of a statutory scheme.

Although many of the interests that responded at stage 1 would not be adversely affected by the continuing evolution of the law, prosecutors and the police most certainly would. We therefore ask the committee to give appropriate weight to the evidence of the bodies that play a central role in operating the scheme.

In particular, we remind the committee of the Lord Advocate's evidence at stage 1, when she said:

"Although the essential concept appears to be breathtakingly simple, its practical application is extremely complex ... Much more streamlined legislation would be more attractive, but to leave open some issues might imperil future convictions because a decision that the obligations were different from those that had been understood by prosecutors would, to some extent, have retrospective effect."

The Solicitor General for Scotland echoed the Lord Advocate's comments when he said:

"Prosecutors need certainty. You need to know with which rules you must comply in order to comply with disclosure obligations ... The bill gives us a comprehensive set of rules so that the police and the prosecutor know that if they comply with those rules, they will comply with their disclosure obligations, which will ensure a fair trial in accordance with article 6 of the European convention on human rights."—[*Official Report*, *Justice Committee*, 9 June 2009; c 2072-73.]

Given that our proposed statutory disclosure regime is of a similar size to that which operates in England and Wales, and for the reasons that we have set out today, we are convinced of the need to ensure that we have appropriate statutory provisions in Scotland, which we accept results in complex and technical provisions.

We have sympathy with Lord Coulsfield's concern that police officers should have a clear and simple statement of what they are supposed to do. The bill does not stand alone; it is supplemented by the ACPOS guidance, and all Scottish police officers are undergoing training on disclosure to ensure that what is expected is clear to them. Attempts to set out the duty more simply often miss critical elements. Although the formulation offered by Lord Coulsfield in his written submission to the committee is helpful, it omitted an essential element of the duty: namely, that of providing the accused with material, relevant information that the prosecutor intends to lead in evidence against him. It is vital that the bill covers all aspects of the prosecutor's duty. It is also essential that developments in the nature of that duty in appellate proceedings that post-date Lord Coulsfield's report are included in the bill.

We remain willing to keep the provisions under review and to continue searching for means of simplifying the provisions ahead of stage 3. Although such opportunities might be limited for the reasons that I have just set out, we will look positively at any suggestions that come forward from any source. As a start, we hope that members will agree that amendments 696, 553, 697, 555 and 556 offer a useful simplification of section 85 and ensure that the meaning of "information" in the section extends across all criminal proceedings at first instance and appeal.

I move amendment 696.

Robert Brown: As the minister said, this is a complex area. I accept his rationale for adding in the new things. Having said that, I was conscious that although he used the words "clear" and "coherent", the word "concise" did not enter into his explanation. It seems to me that there is a relationship between the length and complexity of the provisions and their comprehensibility to those who have to operate them in practice.

I will make a number of points, starting with the general observation that it is very difficult for the committee to seek with any confidence to amend the provisions that the Government has put

forward in this very technical area. I certainly do not feel confident about doing that to great effect, even though I have a legal background. I will restrict myself to probing one or two bits.

It seems to me that the main effect of the amendments is to widen the definition of "information" to include precognitions and victim statements. I am not clear about the exact effect of that. The point is developed in a later group, on means of disclosure, but I want to know what the purpose is. Amendment 618, which we will come to later, makes it clear that the Crown—rightly in my view—is under no duty to release either a Crown precognition or a victim statement as such to the defence. As far as I can see, the only purpose of the amendments is to make positive provision for situations in which the Crown intends to rely on a statement by referring to it in court. That seems a very complex approach, given that I think I am right in saying that the Crown is currently under no duty to reveal precognitions. I wonder whether we are getting into a way of doing something that is slightly more complex than it has to be, when a relatively simple and straightforward point is at the heart of it.

Stewart Maxwell: I agree with much of what Robert Brown and the minister said. This has been a very difficult area for the committee. I want to make one or two general remarks. Since our stage 1 report was produced, many of us have thought about this area quite a lot and have examined it in detail.

I supported the report's comments about the difficulty that we faced in dealing with the complexity in part 6, which deals with disclosure. However, examination since stage 1 of some of the reasons for that has helped me to come to a fairly simple conclusion.

11:00

I accept that the requirement for clarity and certainty overrides the preference for conciseness. I am concerned that, if the bill ends up being too concise, it will result in less certainty and clarity. The people from whom we took evidence and with whom we discussed the matter indicated that the requirement for clarity and certainty with regard to disclosure is paramount. The provisions are necessary. They may not be perfect and may not be exactly how we would like all law to be—concise, if at all possible—but the need for clarity and certainty is paramount. It is important that we support amendments that lead to that outcome.

James Kelly: I will make some general comments. I agree with what other members have said about the complex nature of part 6. Given the technical nature of a number of the provisions and amendments, it is difficult for the committee to get to grips with.

I accept the comments that have been made about the rationale for lodging some of the amendments, given the additional court cases and discussions that have taken place at UK level. I also accept the cabinet secretary's point that it is important to ensure that there are no gaps in law that would allow case law and precedent to develop as the basis for thinking in the area. Although the provisions are complex and some of the amendments are lengthy, in general I favour an approach that provides for certainty.

The Convener: To save time later in proceedings, I will make my contribution now. This is undoubtedly a complex matter. There is no division in principle between what the Government is trying to do and what anyone else is trying to do. With the incorporation of European human rights requirements in Scots law, it was necessary to do something under this heading; the McDonald case simply underlined that.

No one has a reasonable problem with the principle of disclosure, which is a continuation of the well-established Scots law principle of best evidence. Where, in the course of a police inquiry, evidence that could exculpate the accused comes to light, it is important and, understandably, in the interests of justice that that be disclosed to the defence. There is no difficulty with that.

My difficulties related to the complexity of the provisions. I had a real fear that we were making life a bit more difficult for our prosecuting authorities than was necessary. Lord Coulsfield, who produced the original report on the issue, took the same view, although I accept the cabinet secretary's point that work on the report predated some of the appeal cases that have been determined not only at the Scottish court of criminal appeal but in the House of Lords, as was.

I thought that we could simplify matters, but the amendments that have been lodged would add 20 sections to the bill. There is undoubtedly a degree of irony in that, although the good intentions of all are under no particular scrutiny. Some of the amendments that I lodged are basically wrecking amendments in respect of this part of the bill, but they contain a probing element. The secondary target has been achieved. The committee was reassured by our visit to the procurator fiscal's office in Edinburgh, where we had a lengthy, detailed discussion of the disclosure requirements. I particularly found comfort in the fact that a thorough process is in place that involves the fiscals, the advocate deputes, and the police. Accordingly, I am as confident as I can be that the appropriate procedures will be followed. Inevitably, things go wrong from time to time, as they do in any organisation, but the systems are in place. I

put on record the committee's appreciation of the facility that was given to us, which was a very positive experience; I am sure that those who attended the visit will agree.

That brings me to the other questions that arise about whether it is appropriate to have everything codified in the bill. My preferred option is to keep it simple. That said, I accept the arguments made by those whom we met during our visit, and those to whom we spoke last week during our useful lunchtime session with the officials, and that were made in the evidence that was provided by the Lord Advocate and the Solicitor General when they addressed the committee. Therefore, with some slight misgivings, I am prepared to allow matters to proceed. We should consider the issue again before stage 3, because some points might arise that we have not anticipated until now. However, this has been a constructive exercise to which all members of the committee have contributed. That being the case, I see no particular need to pursue my blocking amendments to remove disclosure from the bill. I am as reassured as I can be.

Kenny MacAskill: I put on record my gratitude to the committee for its forbearance and understanding. Disclosure is a complex area of law, but it is important to get it right, otherwise injustices might occur and guilty people might go free. We have to provide as much certainty as we can, albeit in a changing world with court cases being heard regularly in appeal courts and elsewhere. We have to provide some basis for understanding by the police and prosecutors about what is involved.

I will deal first with Robert Brown's specific issue, and then with more general points. Precognitions and victim statements were not previously supplied to the court, and that situation does not change, but the Crown will have to see whether any information contained within them should be provided to the court. There is no change, in that documentation will not be provided, but any appropriate information that requires to be disclosed that would be relevant to the defence and which forms the basis of the prosecution will have to be transmitted. That is simply a replication.

On the more general matter, we accept, and it is my own view, that the law should be as simple as possible and should be easily understood by the man or woman in the street. Equally, we live in a world with the European convention on human rights, court challenges and obligations to be a bit more specific for front-line practitioners. We are happy to undertake to seek to review the situation as we go into stage 3. I cannot say that we have identified any particular areas to review, but we acknowledge the committee's direction of travel and we will see what we can do. We all agree that disclosure is a complex area of law that needs to be reviewed, but if we do not set out some guidance, constant challenges could be made that would make life difficult for the police and prosecutors and that could fundamentally undermine justice being served.

Amendment 696 agreed to.

Amendments 553, 697, 555 and 556 moved—[Kenny MacAskill]—and agreed to.

Section 85, as amended, agreed to.

Section 86—Provision of information to prosecutor

The Convener: Amendment 557, in the name of the minister, is grouped with amendments 558 to 565 and 689.

Kenny MacAskill: As was touched on previously, we acknowledge the stage 1 evidence that expressed concern about the complexity of the provisions in part 6 of the bill. We are conscious that the provisions about schedules of information attracted particular comment and we considered very carefully how best to address that. We do not wish to set in stone administrative arrangements for investigators and prosecutors that might need to change and adapt over time and which, for that reason, would more properly belong in the code of practice or in guidance that will operate alongside the new legislation. Therefore, amendments 557 to 565 seek to address that by removing the provisions that deal with the administrative aspects of the scheduling of information. They will now be dealt with in the code of practice or in guidance.

The amendments do not, however, change the scheme that we envisaged at introduction. There will still be schedules of information in solemn cases. All that the amendments do is remove from the bill the administrative and practical details of that scheme. The amendments also adjust the provisions as necessary to ensure that the prosecutor is able to comply with the duties imposed by virtue of this part of the bill.

I move amendment 557.

The Convener: That seems straightforward.

Robert Brown: I have just a couple of comments—I said earlier that I wanted to probe one or two things. Sections 86, 87 and 88 are all about the duty of the investigating agencies, particularly the police, to give information to the prosecutor. I accept that there is an issue about schedules, but I am not clear what the duty adds to the current position. When I was a procurator fiscal depute, I expected the police to provide me with all the relevant information and would have caused a bit of a fuss if they had not done so.

Surely it is entirely unnecessary to state that specifically in statute.

Leaving aside the issue of the schedules, I am not clear what the duty adds to the existing position. I would have thought that the issue could be dealt with through a behind-the-scenes arrangement between the police and the prosecuting authorities that does not need to be in the bill. It might well be that the matter is carried forward practically through the schedules, but do we really need to get into all the detail of it in the bill?

Kenny MacAskill: The police have a statutory duty to provide information to the prosecutor, but it is not as comprehensive as what we propose in the bill. The amendments put on record that information must be provided. It is not so much a question of practice as one of principle. As the Solicitor General said in evidence to the committee when he spoke about the duty of the prosecutor:

"You need to know with which rules you must comply in order to comply with disclosure obligations."—[*Official Report, Justice Committee*, 9 June 2009; c 2072.]

In the same way, investigators need to know the rules with which they must comply so that the prosecutor can comply with his disclosure obligations. The amendments are about ensuring that we provide some statutory basis for what the police require to do so that people work in conjunction. There is no duty to make the prosecutor aware of the existence of information not provided to him nor to provide details of that information. As I said, the amendments ensure that we set things out clearly. There will be ACPOS guidance, but it is appropriate that we state in the bill what we expect from officers as well as from prosecutors.

Amendment 557 agreed to.

Section 86, as amended, agreed to.

Section 87—Continuing duty to provide schedules of information

Amendments 558 to 562 moved—[Kenny MacAskill]—and agreed to.

Section 87, as amended, agreed to.

Section 88—Review and adjustment of schedules of information

Amendment 563 moved—[Kenny MacAskill]—and agreed to.

After section 88

Amendments 564 and 565 moved—[Kenny MacAskill]—and agreed to.

Section 89—Prosecutor's duty to disclose information

The Convener: A number of the arguments under section 89 have been dealt with. Amendment 566, in the name of the minister, is grouped with amendments 567, 147, 148, 568 to 572, 149, 573, 574, 150, 575, 151, 576, 152, 577 to 579, 153, 580, 581, 154, 582, 155, 583, 156, 157, 606, 158, 607, 617, 159, 619, 160 to 165, 690, 166 and 691. I draw members' attention to the pre-emption information on the list of groupings.

11:15

Kenny MacAskill: Amendments 566, 567, 569, 570, 577 to 583, 591, 606, 607, 617, 619, 690 and 691 are a range of minor technical amendments, many of which seek to simplify the provisions in part 6.

Amendments 568 and 571 and consequential amendments 572, 574 and 576 simplify the duty of disclosure by removing unnecessary detail from the bill—detail that is explanatory and administrative in nature and, as such, can more properly sit in the code of practice or rules of court.

Amendment 573 introduces a new section after section 89 that applies to solemn proceedings. The provision is designed to replace the provisions concerning schedules that were in sections 86 to 88 when the bill was introduced and is aimed at removing unnecessary administrative detail. Amendment 575 works alongside amendment 573 by simplifying provisions in section 90.

Most of the other amendments are relatively minor technical ones. Amendment 566 makes it clear that section 89 is triggered by the events listed in section 89(1). Amendment 567 is a minor technical amendment to section 89(1)(b) to make it clear that, in solemn proceedings, that section applies when the accused appears for the first time on indictment only when he has not previously appeared on petition in relation to the same matter. Without the amendment, it could be argued that the duty is triggered at the stage at which an accused person appears on indictment for the first time.

Amendment 571 seeks to remove subsections (4), (5) and (6) of section 89. Amendment 568 seeks to reinstate the duty of disclosure set out in section 89(5) and give it greater prominence in the section. The effect of amendment 568 is to require the prosecutor to disclose to the accused information that meets the tests set out in subsection (3). Amendments 572, 574 and 576 are consequential on amendment 568.

Amendments 569 and 570 are minor technical amendments, the purpose of which is to make it

clear that the prosecutor must disclose to the accused information that is likely to be led by the prosecutor in the course of the criminal proceedings.

Amendment 573 will leave the provisions to focus on the core, statutory, duty to disclose details of non-sensitive information that is relevant to the case for or against the accused. Amendment 573 also seeks to make it clear that, in assessing the sensitivity of information, it is the risk as opposed to the likelihood of harm that is to be weighed.

The effect of amendment 573 is to set out a specific duty for the prosecutor to disclose to the accused details of information that is not sensitive and that the prosecutor is not required to disclose under section 89 but which may nonetheless be relevant to the case for or against the accused. Amendment 573 defines "sensitive" in relation to an item of information and has the effect of requiring that prosecutors assess the risk of any of the harms specified in proposed new subsection (4) coming to pass as a result of the disclosure of that information, rather than the likelihood of any of those harms occurring.

Amendment 580 is a minor technical amendment to section 91. Amendment 581 is a minor technical amendment to section 92 that is designed to simplify the provisions, and amendment 582 is a minor technical amendment that reorders the provisions by moving section 92 to sit after section 96. Amendment 583 is a technical amendment that seeks to remove section 93 and is consequential on amendment 573. Amendment 591 is, in turn, a technical amendment that is consequential on amendment 583.

The purpose of amendment 575 concerns the nature of the continuing duty of the prosecutor to disclose information to the accused and to make provision for a continuing duty, following the duty proposed by amendment 573. The effect of amendment 575 is therefore to remove the unnecessary specific process step for the prosecutor to consider whether section 89(3) applies and, instead, simply impose a duty to disclose information to which section 89(3) applies. Amendment 578 is a minor, technical amendment that is consequential on amendment 575. Amendment 579 is a minor, technical amendment, as is amendment 606, which is consequential on other amendments in the group in relation to the duties of the prosecutor to disclose information to the accused.

The convener's amendments 156 and 157 are likely a response to the concerns expressed during stage 1 about defence statements. Those concerns were, in the main, focused on the proposal to require a defence statement to be lodged in solemn proceedings. Our position on defence statements is simple and twofold. First, the provisions in the bill are designed to ensure that everything that should be disclosed to the accused in order for them to receive a fair trial, is disclosed. That is fundamental, and we cannot risk something not being disclosed, inadvertently and through no fault of the prosecutor, because they did not appreciate and could not have appreciated its significance—that would not be fair or just. Secondly, if the defence seeks additional information, it should be required to provide some information to explain the materiality and relevance of the information sought. If the defence challenges lack of disclosure, we believe that it must explain why it is making that challenge and, to do that, must refer to those aspects of the accused's defence to which the information is material and relevant. The question is not one of payment, as the Glasgow Bar Association suggested in its submission to the committee, but rather one of proper argument being made in what is, after all, an adversarial procedure.

We also remind members that we are seeking to implement Lord Coulsfield's recommendations on the matter. He stated:

"The legislation or the statutory code of practice should explicitly place on the Crown a responsibility to review disclosure decisions in the light of any new information provided by the defence."

In reaching that conclusion, Lord Coulsfield said:

"There is no doubt that it can be to the advantage of the defence to provide such a statement if there is a particular and positive line of defence and the defence are looking for material to support it. Any system of disclosure therefore needs to enable and encourage the defence to make an advance statement of their position whenever they perceive that this would help to secure fuller relevant disclosure and a fair trial for their client."

I urge members to reject the convener's amendments.

Amendment 607 is a minor, technical amendment, as indeed are the other outstanding amendments.

I move amendment 566.

The Convener: I intimate that, in line with what I said earlier, I will not pursue the matter, so I will not move amendment 147. Do other members wish to contribute?

Robert Brown: I have one or two little comments. This may be a slight quibble, but amendment 566 seeks to add the phrase "in a prosecution" after the word "where" in section 89, which states:

"This section applies where—

(a) an accused appears for the first time on petition".

I confess that I am at a total and utter loss to understand what that phrase would add to the meaning of section 89. As far as I am aware, petitions, indictments and summary complaints always relate to prosecutions. I cannot think of any circumstance in which they might relate to something else. What on earth would the phrase add?

I also have small quibble about amendment 567. The Government's proposal is to add in parenthesis after the word "indictment" in section 89(1)(b) the words:

"not having appeared on petition in relation to the same matter".

Surely to goodness the insertion of the word "or" after section 89(1)(a) would achieve the same effect without having to add all those words. I mention those amendments as examples because I came across them, but it seems to me that they echo a slightly more general point.

The convener's wording of his amendments 147 and 148 on disclosing rather than reviewing was, dare I say, more lucid than that of the Government's amendment 568. Similarly, Government amendments 569 and 570 seem to me to add nothing but words, without making any clarification.

I will say a brief word about defence statements, which we will discuss in more substance when we come to a later group of amendments. The cabinet secretary appeared to say that their introduction was justified because the defence had to explain why it was asking for more disclosure and the proper way forward was to do that by defence statement. Any judge who received a request for more disclosure would require justification and background before he could address the specific point.

It is worth observing that, as the committee noted in its stage 1 report, the view of Lord Coulsfield—whom the cabinet secretary drew in evidence—was that there should be an option for defence statements, rather than a duty on the defence to provide them. That presents a substantial difference to the position that the Government takes, which is not justified by Lord Coulsfield's view.

Nigel Don (North East Scotland) (SNP): I will allow the cabinet secretary to draw breath for a moment by commenting on general principles.

A lay reader of the *Official Report* or anyone who has tuned in and is watching the meeting live is entitled to ask themselves whether committee members are absolutely aware of the detail of every provision that is in front of them. Speaking personally, it is clear that I am not. Before the committee meeting, I looked at the cabinet secretary's purpose and effect notes, which run to 44 pages on the amendments on disclosure.

It is worth acknowledging that I cannot pretend that I am familiar with every detail of the matter. I am grateful that we have a qualified lawyer on the committee but, as a layman, I am content to rest on the knowledge that the Crown Office and the Government have liaised on disclosure and are trying to put together a comprehensive and workable system. They and the police will have to work it out. I am grateful to them for all the hard work that has gone into it but, as a layman, I have to hope that they have got it right.

Perhaps disclosure should have been the subject of a separate bill. I am probably not alone in thinking that the Criminal Justice and Licensing (Scotland) Bill has grown so big that it is very difficult for any of us to see the wood for the trees. That is not a criticism of how the Government has managed what has turned up, but perhaps there is a lesson for the future in that some of the issues should have been put into separate bills to enable us to address them more comprehensively.

Kenny MacAskill: There are two specific matters. In amendments 566 and 567, we are trying to clarify that section 89 relates to a particular prosecution. People can appear on a petition warrant but that is not the first indictment. Amendments 566 and 567 seek to clarify that the provisions are concerned with the first indictment.

The second issue concerns disclosure and whether defence statements should be optional. The position could be resolved by the court, which could sit in an administrative capacity to try to work out what information should be passed between the Crown and the defence. However, the purpose of putting some onus on the defence is to give the Crown notice of what it should be looking for. It would be perfectly open to a defence agent simply to say that the defence was one of case denied, in which case the Crown would have to put together what it could. Equally, if the defence said, "It wasn't them. They weren't there. It was somebody else," that would put the Crown on notice that it should provide any relevant information that it found when looking through precognitions or victim statements.

The purpose of introducing disclosure is to try to ensure that we resolve as much as possible and focus in. The courts will still be able to intercede, but the provisions on defence statements are meant to ensure that, before we even get to court, we know the situation so that the defence and the Crown provide appropriate information. The provisions will not force people to make incriminatory statements and the option will exist for the defence simply to say that the case is denied. Equally, if there were something relevant, it would be helpful if the Crown knew what it

should be looking for in any victim statements, or whatever—for example, that a man in a red jersey was seen running in a north-westerly direction.

The provisions on disclosure are being introduced in an attempt to draw matters together before a case gets to court.

The Convener: We will shortly revisit the issue of defence statements.

11:30

Amendment 566 agreed to.

Amendment 567 moved—[Kenny MacAskill]—and agreed to.

Amendments 147 and 148 not moved.

Amendments 568 to 572 moved—[Kenny MacAskill]—and agreed to.

Amendment 149 not moved.

Section 89, as amended, agreed to.

After section 89

Amendment 573 moved—[Kenny MacAskill]—and agreed to.

Section 90—Continuing duty of prosecutor

Amendment 574 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 150 is pre-empted.

Amendment 575 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 151 is pre-empted.

Amendment 576 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 152 is pre-empted.

Amendments 577 and 578 moved—[Kenny MacAskill]—and agreed to.

Section 90, as amended, agreed to.

The Convener: This is an appropriate point at which to adjourn for a few minutes.

11:34

Meeting suspended.

11:45

On resuming—

Section 91—Exemptions from disclosure

The Convener: If amendment 579 is agreed to, I cannot call amendment 153, on the ground of pre-emption.

Amendment 579 moved—[Kenny MacAskill]—and agreed to.

Section 91, as amended, agreed to.

Amendment 580 moved—[Kenny MacAskill]—and agreed to.

Section 92—Redaction of non-disclosable information by prosecutor

The Convener: If amendment 581 is agreed to, I cannot call amendment 154, on the ground of pre-emption.

Amendment 581 moved—[Kenny MacAskill]—and agreed to.

Section 92, as amended, agreed to.

Amendment 582 moved—[Kenny MacAskill]—and agreed to.

Section 93—Solemn cases: additional disclosure requirement

Amendment 155 not moved.

Amendment 583 moved—[Kenny MacAskill]—and agreed to.

Section 94—Defence statements: solemn proceedings

The Convener: Amendment 584, in the name of the minister, is grouped with amendments 585 to 602, 611 and 624.

Kenny MacAskill: This matter was touched on earlier. The amendments will ensure that the prosecutor is well placed, first, to assess all the information of which they are aware and, secondly, to disclose information that the bill requires them to disclose. That ensures, in turn, that the criminal proceedings are fair to the accused.

Amendments 584 to 601 make a number of technical amendments to those provisions that are aimed at simplifying the prosecutor's duties in response to receiving a defence statement and the interplay between defence statements and special defences, to avoid duplication. They also insert new provisions that are designed to make clear the accused's responsibilities. The accused must provide an update on his defence statement at least seven days before the trial in summary proceedings. The amendments also require the accused in both solemn and summary proceedings to provide a further update covering the period right up to the trial date and even during the trial, if permitted by the court. The amendments also insert provision requiring the lodging of defence statements in court and the provision of copies to the prosecutor and any co-accused.

Amendments 591 and 596 amend provisions in sections 94 and 95 to expand on the information that the accused must include in his defence statement.

Amendment 602 makes new provisions on the lodging of defence statements in summary proceedings where there has been a material change in circumstances. The provisions are necessary to ensure that the accused has every opportunity to inform the prosecutor of any material change in his defence and that, in turn, the prosecutor has every opportunity to ensure that any additional information that needs to be disclosed as a result is disclosed.

Amendment 611 relates to appellate proceedings and ensures that there are mechanisms for an accused person to seek disclosure of items of information in appeals. That does not detract from the prosecutor's duties, but we believe that it is an important right for the appellant to have.

Amendment 624 is a minor, consequential amendment.

I move amendment 584.

Robert Brown: I appreciate that defence statements are covered in a number of sections, but it might be appropriate to comment on them now. The minister is aware of the committee's scepticism on the issue. He will recall that we reported at stage 1:

> "the Committee is not currently persuaded that there is merit in the proposal to make defence statements compulsory in solemn cases, as it appears that the timing of their production may risk jeopardising important principles of justice."

We requested further information on the Scottish Government's position.

I am reluctant to seek to override the professional view of the Government and its team of advisers on these matters, but I ask the minister to justify further the commitment to the concept of defence statements, which I must say smacks of an inappropriate import from English law. Indeed, we took some evidence to that effect, if I recall correctly, from Ian Duguid of the Faculty of Advocates and others. There have been difficulties in English law anyway, but the context is also procedurally different.

I am not totally struck by subsection (4) of proposed new section 70A of the Criminal Justice and Procedure (Scotland) Act 1995 as inserted by section 94 of the bill, nor by the Government's recasting of it in amendment 587, or by amendment 602, which extends it to summary procedure. Not only is there to be a defence statement, there is also to be a supplementary procedure about whether there is to be a second defence statement. Surely subsection (5), which allows the defence to lodge a defence statement at any time, is enough. The more complicated the provisions are, the more scope there is for problems. I dissent from the view, which the minister expressed earlier, that stating the whole thing in statute necessarily makes it clearer. The longer and more complicated it gets, the more likely it is that there will be problems.

Amendments 589 and 590, on the other hand, are sensible changes if there are to be defence statements at all. I am not sure that I see the point of amendments 592 and 596, which seem to replicate in different words new section 70A(6)(a) of the 1995 act and section 95(2)(a) of the bill.

We also have amendment 611, which provides for a second shot at disclosure. Again, there might be a reason for that, but one would have thought that it could be stated in one sentence without the need to repeat the whole thing ad longum. Again, the amendment seems to make things more complicated rather than more straightforward.

The Convener: As Robert Brown says, defence statements are dealt with under a number of headings but it is probably appropriate to have the debate now. I, too, have some reservations.

As the law stands, accused persons or their representatives require under certain circumstances to lodge special defences, such as incrimination of an individual or a number of individuals or an alibi, which is probably the most common special defence that is lodged. Notice must be given to the Crown two weeks before the preliminary diet that the accused intends to lead such a defence. The purpose of the requirement is self-evident. It gives the Crown the opportunity to investigate the special defence and adjust the case accordingly if necessary. We could not have a situation in which a trap could be set for a prosecutor whereby evidence was introduced that incriminated a third party and the Crown had not had an opportunity to have the police investigate the matter.

The requirements under some of the amendments are a little different in that the defence would be asked to lodge with the Crown a defence statement on which the defence case would be based. That approach could have dangers. An accused person has the presumption of innocence and it is for the Crown to prove beyond reasonable doubt that the accused committed the crime that is libelled against him. Nothing in our existing law states that we have to make life easy for the Crown. Indeed, if we make life too easy in some instances, it could be contrary to natural justice. It is a question of balance. This is an unfortunate import from the law south of the border, which at this stage I think we could do without. I will listen to the cabinet

secretary's response and other contributions with considerable interest. At this stage, I am a little short of being persuaded that the general measure is appropriate.

Kenny MacAskill: I assure both the convener and Robert Brown that we are not simply bringing in an English import. There are many defences that do not fall within the category of special defences, which are entirely separate from defence statements. If we do not have supplementary defence statements, how do we ensure that the procurator fiscal and the Crown are up to date? A defence position can change during the course of a prosecution. It is not about setting a trap for the defence but about ensuring that the Crown can make available any appropriate information that is relevant. If the Crown does not know what the nature, or intended nature, of the defence is, it has to either trawl through information and make assumptions or simply provide whatever information it thinks is relevant. It is perfectly appropriate and acceptable for the defence to change position and direction, which happens in many instances, but it would be helpful for the conduct of the case if that could be made clear, so that the Crown could review whether any further information might be relevant and, as we have discussed, whether any precognitions and victim statements should be made available.

The point has been made by the Crown, whether through the Lord Advocate or through the Solicitor General, that in many major cases the number of witnesses is huge. Some are there not to deal with substantial matters but to say that they secured perimeters, for example. A prosecutor might originally think that that is not of any relevance. However, if the defence was made at some stage that the area of ground in question was of significance and that something had happened there, it would be appropriate for that information to be made clear—even though, during the Crown's first trawl, the fact of an officer stating his name and age and saying that he roped off a bit of land at a crime locus might appear to be of little relevance or benefit to others. That is why we have to ensure that we have the ability to update information and that we do so throughout.

Lord Coulsfield recommended standard forms for defence statements. He clearly saw some merit in them and some benefit of them in Scotland, although we accept that he did not necessarily see them as mandatory.

Amendments 592 and 593 are intended to ensure that defence statements are as effective and comprehensive as they need to be and, to that end, that they contain all the information that might have a bearing on the prosecutor's duty of disclosure. Amendment 592 will insert a new paragraph into new section 70A(6) of the 1995 act, which will require that the accused sets out in his defence statement

"particulars of the matters of fact on which the accused intends to rely for the purpose of the accused's defence".

At present new section 70A(6)(c) of the 1995 act requires only that the defence statement sets out

"any point of law in relation to disclosure".

On further reflection, we considered that the limitation of the phrase "in relation to disclosure" is unnecessary and could lead to the unintended consequence that points of law that do not expressly relate to disclosure but nevertheless have a bearing on what might require to be disclosed are not intimated to the prosecutor. In turn, there could be a risk that information that the prosecutor requires to disclose for the accused to receive a fair trial is, inadvertently, not disclosed. Amendment 593 will give effect to that by removing the words "in relation to disclosure".

Amendment 596 will insert a new paragraph into section 95(2) of the bill, which will require that the accused sets out in his defence

"particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence".

At present, subsection (2) requires only that they set out

"any point of law in relation to disclosure".

On further reflection, we considered that the limitation of that phrase was unnecessary.

The convener is, quite correctly, concerned about the unintended consequences and dangers of defence statements. Prosecutors need some understanding of the nature of the defence if they are to be able to check out matters, but a defence statement should, by its very nature, be helpful to the accused rather than incriminatory. The requirement for a defence statement is not meant to set a trap, which the convener is correctly concerned about. In trials of significant size and complexity that involve huge numbers of witnesses and productions—many of which, quite correctly, might not necessarily be relevant to the issue of who did what—the defence statement will provide some focus so that the Crown can ensure that matters of relevance are provided. The defence statement provides that appropriate assurance.

12:00

The English provisions are much more complicated and detailed. We have not adopted them wholesale, but we have learned from them. As I said, we believe that the issues that were raised in stage 1 will be addressed through the

amendments, but we are happy to review matters if the committee requires further details.

If the Crown failed to provide information on the basis not that it sought to deny information to the defence but that it considered the information not to be relevant, justice would not have been provided for. However, if the Crown is to be able to fulfil its duty and obligation to the accused, the Crown needs some information about what the defence is looking for in the victim statements, precognitions and other productions. As I said, the purpose of defence statements is not to incriminate the accused but to ensure that the Crown has sufficient knowledge to be able to provide all the relevant information that will allow the defence to put forward its position.

The Convener: That concludes what has been a reasonably full debate on another difficult matter.

Amendment 584 agreed to.

Amendment 585 moved—[Kenny MacAskill]—and agreed to.

Amendment 586 moved—[Kenny MacAskill].

The Convener: The question is, that amendment 586 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)

Against

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

The Convener: The result of the division is: For 6, Against 2, Abstentions 0.

Amendment 586 agreed to.

Amendments 587 to 594 moved—[Kenny MacAskill]—and agreed to.

Amendment 156 not moved.

Section 94, as amended, agreed to.

Section 95—Defence statements: summary proceedings

Amendments 595 to 601 moved—[Kenny MacAskill]—and agreed to.

Amendment 157 not moved.

Section 95, as amended, agreed to.

After section 95

Amendment 602 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group of amendments is about court rulings on disclosure. Amendment 603, in the name of the minister, is grouped with amendments 604, 605, 615 and 616.

Kenny MacAskill: Amendments 603 to 605, 615 and 616 will assist accused persons and appellants who disagree with a prosecutor's assessment of the information that is to be disclosed under the new statutory regime. The bill already contains some provision to allow accused persons to challenge the prosecutor's decision, but our amendments go one step further by allowing accused persons and appellants to apply to the court for a ruling on whether the information in dispute is material. Accused persons will be able to do that only following the prosecutor's determination of a defence statement, and appellants will be able to do that only after they have lodged a statement seeking further disclosure under the provision to be inserted by amendment 611, which was dealt with in the previous grouping. There is no intention to interfere with the principle that the prosecutor is the main decision maker in relation to information that is to be disclosed; our amendments simply provide a mechanism for the prosecutor's assessment to be tested by the court.

I move amendment 603.

Robert Brown: I am sorry to be difficult on this one, but amendments 603 and 604 seem to add yet more verbiage about court rulings on disclosure and a review of them by the court. I would have thought that a ruling by the court and perhaps even a request for a review of new information would be implicit powers of the court in any event. Can the minister confirm that that is the case? The specific appeal provision may be necessary, but the Government seems to require the equivalent of "War and Peace" to state the procedure, which is surely commonplace in other circumstances, and that seems unnecessary. Do we need amendments 605, 615 and 616?

The Convener: I think that that question needs to be addressed, Mr MacAskill. Once again, there is a danger of overcomplicating matters.

Kenny MacAskill: This is a brand new procedure and there are no obvious existing provisions for it. It is about making things clear to the court, providing relevant information to the court and setting the scene for the court.

Amendment 603 will allow an accused to apply to the court for a ruling when information has not been disclosed in response to a defence statement. The application may be made when the

information would materially weaken or undermine the evidence that is likely to be led by the prosecutor; when the information would materially strengthen the accused's case; or when the information would be likely to form part of the evidence to be led by the prosecutor. Amendment 603 sets out the procedure by which the court will appoint a hearing for the purposes of making a ruling on the information that is in dispute.

Amendment 604 will permit an accused person to seek a review when further information that was not available at the time of the ruling has emerged that is considered to have a material bearing on the court's consideration. Amendment 604 also sets out the procedure by which the court will appoint a hearing for a review for the purposes of a determination of the application. The court may affirm or recall, in full or in part, the ruling in respect of the information that is in dispute.

Amendment 605 will allow the prosecutor or the accused to appeal to the High Court against the ruling made under the provision that is inserted by amendment 603, and the High Court may affirm the ruling or remit the case back to the court of first instance.

Amendments 615 and 616 make the same provision that I have outlined in respect of amendments 603 and 604. However, instead of applying to criminal proceedings in the first instance, they enable an appellant in appellate proceedings to seek a ruling on disclosure in the same way.

If we did not have the procedure that is provided for in amendment 604, the accused would have no remedy through a review. I appreciate the committee's concerns on a whole array of issues relating to the amendments, but they introduce a new procedure regarding defence statements and it is important that there should be some opportunity for the accused and their agents to seek a review, whether in the first instance or on appeal. That is why we must insert this formal procedure for appeals to the courts and the opportunities for review. It is regrettable that we must do that, but if we want to ensure that the accused has a remedy, we must provide for it and specify what that remedy is.

Amendment 603 agreed to.

Amendments 604 and 605 moved—[Kenny MacAskill]—and agreed to.

Section 96—Effect of guilty plea

Amendment 606 moved—[Kenny MacAskill]—and agreed to.

Amendment 158 not moved.

Amendment 607 moved—[Kenny MacAskill]—and agreed to.

Section 96, as amended, agreed to.

After section 96

The Convener: The next group of amendments is on disclosure—application to appellate proceedings. Amendment 608, in the name of the minister, is grouped with amendments 609, 610 and 612 to 614.

Kenny MacAskill: Sections 86 to 90 set out the duties of disclosure on prosecutors and investigating agencies in proceedings at first instance, before a verdict has been reached in a case.

We are conscious that these amendments add new provisions that are technical and may appear rather complex in nature. We believe that they are necessary, though, to take into account the most up-to-date and authoritative jurisprudence of the higher courts on the crucial question of what the prosecutor requires to disclose to persons to whom criminal proceedings relate before those proceedings can be fair and compliant with the European convention on human rights.

The case of McDonald v HMA, to which we referred earlier, affirmed that the duty of disclosure is a continuing one, which continues even after an accused person is convicted. It made clear that the nature of the duty after conviction and during appeals is different from the duty at first instance. Lord Coulsfield did not envisage, and could not have envisaged, that when he was carrying out his review. In light of that decision, we are seeking to add in provisions to reflect those differences in the duty.

The purpose of the amendments is to define the nature of the duty after the conclusion of the proceedings and in any appellate proceedings that follow any first instance proceedings. The amendments will ensure that the prosecutor's duty of disclosure is laid out in statute for all criminal proceedings, not only those at first instance, and including after the proceedings have come to an end. Without them, there would be an incomplete picture in statute as to the prosecutor's obligations.

The provisions to be inserted by amendments 612 to 614 make it clear that there is no requirement on the prosecutor to proactively review the information he holds, as to do so would place an undue burden on prosecutors.

We appreciate that that adds complexity to the scheme for disclosure of evidence, but that complexity is unavoidable if we are to ensure that prosecutors have certainty as to their duties and convicted persons and appellants have certainty and comfort that their rights to disclosure will continue to be met by prosecutors throughout the proceedings relating to them, and beyond.

As the Solicitor General said in his evidence to members at stage 1,

"You need to know with which rules you must comply in order to comply with disclosure obligations."—[*Official Report*, *Justice Committee*, 9 June 2009; c 2072.]

I move amendment 608.

Robert Brown: Why do the amendments in this section that relate to appellate proceedings and things of that kind not simply say something like, "The duty of disclosure applies on appeal as it does at first instance and the provisions of this part apply to appellate proceedings with any necessary modifications," and set out any kind of exception? The minister touched on reasons why the detail of the need to review the whole thing again did not apply on appeal. I did not entirely catch the point there. There may be exceptions to it. Why do we not have just a general statement of principle, rather than going through the whole thing all over again. To my mind, that adds complexity to the whole arrangements.

Kenny MacAskill: Mr Brown makes a valid point. The reason is that the McDonald v HMA case made it clear that the proceedings were different and distinct. Therefore, I think that it is necessary that we differentiate between what happens at first instance and what happens in appellate matters. It is not simply a matter of replicating the duty, because there are differences.

Amendment 608 agreed to.

Amendments 609 to 616 moved—[Kenny MacAskill]—and agreed to.

Section 97—Means of disclosure

Amendment 617 moved—[Kenny MacAskill]—and agreed to.

Amendment 159 not moved.

12:15

The Convener: The next group of amendments is on the means of disclosure. Amendment 618, in the name of the cabinet secretary, is the only amendment in the group.

Kenny MacAskill: Amendment 618 seeks to clarify and simplify the bill's provision on the treatment of witness statements in the context of the prosecutor's duty of disclosure. It goes hand in hand with amendments 553 and 555, which remove the existing provision on the issue, which was set out in section 85.

Amendment 618 is a technical amendment and our policy has not changed. The intention is still to conform to Lord Coulsfield's recommendations that witness statements, as a class of document, should have to be disclosed only in solemn proceedings in respect of those witnesses whom the prosecutor intends to lead in evidence.

Our position has also not changed on summary proceedings. In practice, prosecutors will continue to provide the accused with a summary of the evidence for and against him, but they will not be under a duty to disclose the statements, as a class of documents, of any witnesses regardless of whether they intend to lead the witness in evidence. However, comments that we have received about the complexity of the provisions have made us think that the provision should be moved and adjusted, and amendment 618 seeks to do that.

I move amendment 618.

Amendment 618 agreed to.

Section 97, as amended, agreed to.

Section 98—Confidentiality of disclosed information

The Convener: Amendment 619, in the name of the minister, has already been debated with amendment 566. I point out, however, that amendment 619 and amendment 160, which follows, are direct alternatives.

Amendment 619 moved—[Kenny MacAskill]—and agreed to.

Amendment 160 not moved.

The Convener: We turn now to the confidentiality of disclosed information, and disclosure to third parties. Amendment 620, in the cabinet secretary's name, is grouped with amendments 621 to 623 and 692.

Kenny MacAskill: Section 98 makes provision on the confidentiality of disclosed information, and section 99 creates an offence when a person knowingly uses or discloses information in contravention of section 98.

Amendment 620 makes it clear that sections 98 and 99 apply to persons who have received disclosed information in an unauthorised manner, and it clarifies that the confidentiality provisions do not apply to information that is in the public domain at the time of its use or disclosure.

Section 98 permits the accused to use information that has been disclosed to him for the preparation and presentation of an appeal. Amendment 621 will ensure that that includes petitions to the nobile officium and proceedings in the European Court of Human Rights.

Amendment 622 seeks to remove section 100 as, on reflection, we do not think that it is necessary to include specific provisions on the accused being able to apply to the court for an order allowing him to disclose information to a

third party. There are sufficient existing mechanisms for an accused person to seek information through requests under data protection and freedom of information legislation, and also to seek the recovery of information and documents in civil court proceedings. Amendments 623 and 692 are consequential amendments that arise from amendment 622.

I move amendment 620.

Amendment 620 agreed to.

Amendment 621 moved—[Kenny MacAskill]—and agreed to.

Section 98, as amended, agreed to.

Section 99 agreed to.

Section 100—Order enabling disclosure to third party

Amendment 161 not moved.

Amendment 622 moved—[Kenny MacAskill]—and agreed to.

Section 101—Contravention of order under section 100

Amendment 623 moved—[Kenny MacAskill]—and agreed to.

Section 102—Application for non-disclosure order

The Convener: Amendment 624, in the name of the cabinet secretary, has already been debated with amendment 584. Once again, I point out that amendment 624 and amendment 162, which follows, are direct alternatives.

Amendment 624 moved—[Kenny MacAskill]—and agreed to.

Amendment 162 not moved.

The Convener: Amendment 625, in the minister's name, is grouped with amendments 626 to 652, 666, 669 to 671, 673, 675 to 678, 680, 686 and 687.

Kenny MacAskill: Sections 102 to 106 implement Lord Coulsfield's recommendation that legislation should provide for a system of public interest immunity hearings in Scotland. We are conscious of reservations that were expressed at stage 1 about the complexity of the scheme for primary legislation and we have sympathy with those views. However, as we said in our response to the stage 1 report, it is vital that the bill sets out the procedure and considerations that are to be taken into account in such decisions, so that sufficient judicial safeguards are in place to ensure that information is not withheld on the ground of public interest unless doing so is strictly necessary.

The scheme as a whole must be compatible with the accused's rights under the European convention on human rights. Leaving important elements of it to subordinate legislation might mean that ECHR compatibility was achieved only later, when rules were made. We need to be able to demonstrate to Parliament here and now that the scheme as a whole is compatible.

We have looked again at the provisions and considered whether scope exists to fillet out parts of them to be dealt with in subordinate legislation. We have concluded that it would be inappropriate to extract elements of the scheme and put them in subordinate legislation. Instead, we have lodged several amendments to simplify some of the more complex provisions in the scheme and to make clearer the tests that the court is to apply.

We have also responded to the Sheriffs Association's concern at the apparent anomaly that the proposed test for non-notification orders appears to be lower than that for exclusion orders.

I move amendment 625.

Amendment 625 agreed to.

The Convener: If amendment 626 is agreed to, amendment 163 will be pre-empted.

Amendment 626 moved—[Kenny MacAskill]—and agreed to.

Section 102, as amended, agreed to.

Section 103—Application for non-notification order or exclusion order

Amendments 627 to 635 moved—[Kenny MacAskill]—and agreed to.

Section 103, as amended, agreed to.

Section 104—Application for non-notification order and exclusion order

Amendments 636 to 638 moved—[Kenny MacAskill]—and agreed to.

Section 104, as amended, agreed to.

Section 105—Application for exclusion order

Amendments 639 to 643 moved—[Kenny MacAskill]—and agreed to.

Section 105, as amended, agreed to.

Section 106—Application for non-disclosure order: determination

Amendments 644 and 645 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendments 646 and 164 are direct alternatives.

Amendment 646 moved—[Kenny MacAskill]—and agreed to.

Amendment 164 not moved.

Amendments 647 to 652 moved—[Kenny MacAskill]—and agreed to.

Section 106, as amended, agreed to.

After section 106

The Convener: Amendment 653, in the name of the minister, is grouped with amendments 654 to 656, 679 and 681 to 685.

Kenny MacAskill: Members will recall that Lord Coulsfield recommended that legislation should provide for a system of public interest immunity hearings in Scotland, and provisions for that are included in the bill. The amendments in this group are designed to create a parallel system to enable the secretary of state to apply for similar orders in the public interest.

The purpose of amendments 653 to 656, 679 and 681 to 685 is to establish a system to enable applications to be made to the court by a UK Government minister for orders prohibiting the disclosure of information that the prosecutor is otherwise required to disclose, and for other orders ancillary to such orders where, if the information were to be disclosed, there would be a real risk of substantial harm or damage to the public interest.

The scheme that is set out in our amendments broadly mirrors the scheme that is set out in sections 102 to 106, which enables such applications to be made by the prosecutor. The amendments recognise that public interest issues might arise in criminal proceedings in which secretaries of state might have an interest.

The new scheme might use different terminology to the scheme that is set out in sections 102 to 106, but the concepts and procedures are broadly the same. A section 106 order corresponds to an order preventing or restricting disclosure, an exclusion order corresponds to a non-attendance order and a non-notification order corresponds to a restricted notification order.

The key to that is that, despite any differences in terminology, in considering the applications and in any review by the court of its decisions in relation to those applications, the court will broadly do the same thing. It will always closely consider disclosure versus non-disclosure, balancing the competing interests of the injury to the public interest imperative on the one side with the private individual's interests and their right to receive a fair trial on the other.

Amendments 679 and 681 to 685 repeat and mirror those further aspects that already exist in the domestic regime.

I move amendment 653.

Amendment 653 agreed to.

Amendments 654 to 656 moved—[Kenny MacAskill]—and agreed to.

Section 107—Special counsel

The Convener: Amendment 657, in the name of the cabinet secretary, is grouped with amendments 658 to 661, 668, 672 and 674.

Kenny MacAskill: Sections 102 to 106 establish a scheme to enable the court, on the application of the prosecutor, to determine whether information that the prosecutor would otherwise be required to disclose should be withheld on public interest grounds. Amendments 653 to 685 seek to establish a similar scheme to enable applications to be made by the secretary of state.

Section 107 makes provision regarding the appointment of special counsel by the court and their duties in those hearings. Amendment 657 is consequential on amendments 653 to 685 and extends section 107 to cover applications by the secretary of state for orders to prevent or restrict disclosure in the public interest.

Amendment 658 is a technical amendment that is designed to clarify that the special counsel role is limited to the determination of the applications and does not apply to the whole criminal trial proceedings.

Amendment 659 seeks to ensure that the prosecutor or, as the case may be, the secretary of state and, in certain circumstances, the accused are able to make representation to the court before the court decides whether to appoint special counsel. It also makes provision for appeals against the decision of the court not to appoint special counsel. Amendment 659 also gives the prosecutor and secretary of state the power to appeal against a decision not to appoint special counsel and gives the accused a similar power to appeal in any case other than a non-notification or restricted notification case.

Amendment 660 provides that only solicitors or advocates may be appointed as special counsel.

Amendment 661 makes provision to regulate the role and functions of special counsel and the interaction between the accused and special counsel. It will establish a duty on special counsel to act in the best interests of the accused in so far

as to ensure that the accused receives a fair trial. It also specifies the rules that special counsel must follow in respect of information to which they have access and how they will interact with the accused.

Amendments 668, 672 and 674 will enable special counsel to seek a review of the decision of the court in respect of a section 106 order and will extend the powers that are available to the court in reviews that are carried out under section 111 to reviews by special counsel.

I move amendment 657.

12:30

Robert Brown: I think that the provisions on special counsel are necessary in rare cases, but I query how section 107 and the new section that is proposed by amendment 660 would operate in practice. The implication seems to be that any solicitor or advocate may be appointed as special counsel, but, given that we are talking about cases that might involve terrorists or people with a background in organised crime, I assume that anyone who acts as special counsel will have to have some experience or special expertise beyond the normal. Will the court keep a list of such people? Who will suggest such people? Could the defence do so? On what basis will the matter be decided by the court? In short, how will people be chosen to act as special counsel?

The Convener: Mr MacAskill will deal with that in his summing up.

Kenny MacAskill: There will be a list, but the details of how it will be provided are still being worked out.

We must take those points on board to ensure that there is a fair balance and that not just anyone is appointed as special counsel. Those matters are being worked out and we will keep the member and the committee informed.

Amendment 657 agreed to.

Amendments 658 and 659 moved—[Kenny MacAskill]—and agreed to.

Section 107, as amended, agreed to.

After section 107

Amendments 660 and 661 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 662, in the name of the minister, is grouped with amendments 663 to 665 and 667.

Kenny MacAskill: Sections 108, 109 and 110 enable appeals to be brought in relation to section 106 orders, exclusion orders and non-notification orders. Amendments 663, 664 and 665 will remove those sections from the bill, and amendment 662 will insert, in their place, a new, expanded section on appeals, which will give the prosecutor, the accused, the secretary of state and special counsel appropriate rights of appeal in relation to the various orders that can be made under the bill. In addition, amendment 662 specifies how appeals will be dealt with under the revised scheme.

Amendment 667 seeks to simplify section 111.

I move amendment 662.

Amendment 662 agreed to.

Section 108—Appeal by prosecutor against refusal of application for order

Amendment 663 moved—[Kenny MacAskill]—and agreed to.

Section 109—Appeal by accused against making of exclusion order or non-disclosure order

Amendment 664 moved—[Kenny MacAskill]—and agreed to.

Section 110—Appeal by special counsel

Amendment 665 moved—[Kenny MacAskill]—and agreed to.

Section 111—Review of grant of non-disclosure order

Amendment 666 moved—[Kenny MacAskill]—and agreed to.

The Convener: I point out that if amendment 667 is agreed to, I will not be able to call amendment 165 on the ground of pre-emption.

Amendment 667 moved—[Kenny MacAskill]—and agreed to.

Amendments 668 to 678 moved—[Kenny MacAskill]—and agreed to.

Section 111, as amended, agreed to.

After section 111

Amendment 679 moved—[Kenny MacAskill]—and agreed to.

Section 112—Review by court of non-disclosure order

Amendments 680 to 685 moved—[Kenny MacAskill]—and agreed to.

Section 112, as amended, agreed to.

Section 113—Applications and reviews: general provisions

Amendments 686 and 687 moved—[Kenny MacAskill]—and agreed to.

Section 113, as amended, agreed to.

Sections 114 and 115 agreed to.

After section 115

The Convener: Amendment 688, in the name of the minister, is in a group on its own.

Kenny MacAskill: Amendment 688 introduces a new section into the bill that ensures that the disclosure provisions in the bill will displace the current common law rules on disclosure, but only to the extent that they are replaced by or are inconsistent with the bill's provisions. The new section also clarifies the interaction between the scheme that is proposed in our amendments for court rulings on materiality and existing common law remedies that allow persons to recover documents. That is to ensure that, in making applications to the court, whether under the bill or at common law, the accused does not get a second bite at the cherry by being able to go back to the court for a ruling on broadly the same grounds. That is necessary to avoid delays to cases and duplication of work by our courts.

I move amendment 688.

Amendment 688 agreed to.

Section 116—Interpretation of Part 6

Amendment 689 moved—[Kenny MacAskill]—and agreed to.

The Convener: I call amendment 690, in the name of the minister. If amendment 690 is agreed to, I cannot call amendment 166, on the ground of pre-emption.

Amendment 690 moved—[Kenny MacAskill]—and agreed to.

Amendment 691 moved—[Kenny MacAskill]—and agreed to.

Amendment 692 moved—[Kenny MacAskill].

The Convener: The question is, that amendment 116 be agreed to. Are we agreed? I am sorry. There is a typo in the brief. For the record, the question is, that amendment 692 be agreed to.

Amendment 692 agreed to.

The Convener: We turn to section 117—[*Interruption*.] Unfortunately, there is another typo in the brief. First, I must put the question on section 116.

Section 116, as amended, agreed to.

Section 117—Criminal responsibility of persons with mental disorder

The Convener: The next group is on mental disorder and unfitness for trial. Amendment 24, in the name of Angela Constance, is grouped with amendments 167 and 195.

Angela Constance: I seek assurances that those who should have access to the special statutory defence do, indeed, have it. The purpose of amendment 24 is to ensure that all those with a mental disorder that is diagnosed by a psychiatrist and defined by law and who commit an offence have access to the statutory special defence where appropriate and necessary, even when the individual knows that what they are doing is wrong but they have nonetheless committed the act because their illness compels them to do so.

I remind the committee of the recommendation in our stage 1 report, in which we concluded:

"However, we are not yet confident that the proposed special defence of mental disorder has been appropriately defined, given the concerns raised in evidence and the differences of interpretation between ... witnesses about whether the special defence would be available to people who know their conduct is wrong, but are driven by their mental illness to do it anyway."

The Mental Welfare Commission for Scotland raised concerns on the definition, saying that

"a mental disorder may not just impair an individual's ability 'to appreciate the nature or wrongfulness of the conduct', but may also impair their ability to control their behaviour even though they may appreciate that their actions are wrong."

Similar concerns were raised by the Law Society of Scotland and the Scottish Association for Mental Health.

The Law Society of Scotland said that the mental disorder defence might not be available to someone who commits an offence while "suffering from a depressive illness", for example, or who is compelled to act because of command hallucinations. Of course, the committee also heard from the very learned James Chalmers who felt that that was not the case. He said that the Law Society of Scotland had misunderstood the position as it had wrongly assumed that the bill relied on the "much criticised English position".

In response to the committee's concerns, the Government was clear in stating that the statutory special defence did not include reference to a volitional element. In giving its reasons for saying that, the Government said:

"We take the view that if the 'appreciation' criterion"—

by which I think that it means a person's understanding and rational thinking—

"is to be understood in a wide sense, as we argue that it should, then there is no need for any volitional element.

Indeed, there might be dangers in adding on a volitional part to the defence as doing so might give rise to narrow interpretations of the scope of the appreciation element."

In its discussion paper, the Scottish Law Commission said that it was inclined to adopt the position that the test for defence should not contain a volitional element. However, it went on to say:

"we have not reached a concluded view".

I am most concerned about the latter point.

The SLC also said that, although most of its consultees were divided on the question, most agreed that the wider cognitive criterion of appreciation would cover any relevant volitional failing. About half of the consultees who responded on the issue accepted that there was no need for any volitional element and two consultees gave clear support for it. I suppose that it is of significance that none of the consultees could provide any example of an instance in which a person might fail the test for the defence on the appreciation criterion but satisfy it purely on the volitional element.

I seek clear reassurance that people who require a special defence are indeed covered by that defence, as it is not in the interests of justice for people wrongly not to be subject to the measures of compulsion that are available under the Mental Health (Care and Treatment) (Scotland) Act 2003. To put it in blunt terms, it is not in anybody's interests for those who have a mental disorder and who should be cared for by the mental health system to end up inadvertently in prison.

I move amendment 24.

12:45

Dr Simpson: I thank Angela Constance for raising this issue, which is clearly difficult. The question of insight as opposed to compulsion is difficult. I was not involved in the committee's consideration of the bill at stage 1, but I can fully understand the consultees' difficulty in reaching a conclusion on the issue. I will be interested to hear whether the cabinet secretary can provide clarification, because it is an extremely difficult issue on which to reach a conclusion.

The Convener: Yes, this is a difficult issue—we seem to be running into a lot of them this morning. In speaking to amendment 24, Angela Constance demonstrated in a very sensitive manner the knowledge that she acquired in her previous occupation. The committee wants to get this right, and seeks the appropriate reassurance from the cabinet secretary. I do not think that the concerns on the issue are restricted to Ms Constance.

Kenny MacAskill: Amendment 167 is a minor technical amendment that is aimed at improving the readability of section 117. Amendment 195 is a minor technical amendment that will help to tidy the statute book of redundant provisions.

Section 117 introduces a new statutory defence to replace the common-law defence of insanity. This new statutory test provides for a special defence in respect of persons who lack criminal responsibility by reason of mental disorder at the time of the commission of the offence with which they are charged. There are two elements to the test, both of which must be met for the test to be met. The first element is the presence of a mental disorder suffered by the accused at the time of the conduct constituting the offence. The second element is that, for the defence to be available, the mental disorder must have a specific effect on the accused: the inability of the accused to appreciate either the nature or wrongfulness of the conduct constituting the offence.

Amendment 24 seeks to alter the test so that a person could also claim the special defence when the effect of their mental disorder was such that they were unable to determine or control their conduct despite being able to appreciate the nature or wrongfulness of it. That would likely be a departure from the current common-law defence of insanity and would certainly be a departure from the test recommended by the Scottish Law Commission in its 2002 report, upon which the provisions in sections 117 to 120 are based.

During its careful consideration of the proposed test, the Scottish Law Commission looked closely at whether a volitional element of the sort proposed by amendment 24 should feature as an explicit part of the test, and thought that it should not. It may be helpful if I quote from the Scottish Law Commission's considerations as they relate to the issues raised by amendment 24. Paragraph 2.53 of the SLC's 2002 report states:

"Volitional issues pose major practical questions. How can the law distinguish between someone who could have desisted from criminal conduct but chose not to desist, and someone who could do no other than commit the act? As this question is often put, what is the difference between an irresistible impulse and resistible, but not-resisted, impulse? This issue can only be resolved by looking to the reasons for the person's acting as they did, but this approach leads back to considerations of what are essentially cognitive matters."

The report goes on to say:

"The use of an expanded cognitive base for the test could cover all the cases where a person should not be found criminally responsible. Consider the example of a woman who feels she is 'driven' to killing her children to save them from her own bad parenting. This case essentially involves a cognitive failing (based on the depression which gives rise to her perception of inadequacy as a parent) rather than a purely volitional one. The question becomes one of trying to identify any case

where a person who committed criminal conduct would be found criminally responsible on the appreciation test but would be treated as lacking criminal responsibility in respect of a volitional incapacity."

In response to the Scottish Law Commission's consultation, the majority of consultees considered the question and offered the view that the wider cognitive criterion of appreciation would cover any relevant volitional failing. None of the consultees could provide an example in which a person might fail the test for the special defence on the appreciation criterion, but satisfy it purely on a volitional one.

The Scottish Law Commission concluded that:

"We take the view that if the 'appreciation' criterion is to be understood in a wide sense, as we argue that it should, then there is no need for any volitional element. Indeed, there might be dangers in adding on a volitional part to the defence as doing so might give rise to narrow interpretations of the scope of the appreciation element."

We agree with the Scottish Law Commission's reasoning on the framing of the test and we do not support amendment 24.

Angela Constance: Thank you. I think that I am satisfied with the cabinet secretary's answer, particularly his clear statement that, if it is the view that the

"'appreciation' criterion is to be understood in a wide sense as we argue that it should, then there is no need for any volitional element."

To reserve my position, I will study the cabinet secretary's response in detail. However, at this stage, and with the committee's permission, I will withdraw amendment 24.

Amendment 24, by agreement, withdrawn.

Amendment 167 moved—[Kenny MacAskill]—and agreed to.

Section 117, as amended, agreed to.

Sections 118 to 120 agreed to.

The Convener: We should be moving to a new topic—licensing—so this is an appropriate point at which to finish for the morning. I thank members and the ministerial team for their attendance and contributions. We have discussed a number of issues on which individual members and the committee in general are keen to ensure a continuing dialogue up to and including stage 3.

The deadline for stage 2 will be the subject of consideration by the Parliamentary Bureau this afternoon.

Meeting closed at 12:53.

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