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Official Report

JUSTICE COMMITTEE

Tuesday 21 December 2010

Session 3

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JUSTICE COMMITTEE
37th Meeting 2010, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*James Kelly (Glasgow Rutherglen) (Lab)
*Stewart Maxwell (West of Scotland) (SNP)
*Dave Thompson (Highlands and Islands) (SNP)

COMMITTEE SUBSTITUTES

Claire Baker (Mid Scotland and Fife) (Lab)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)
Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Kenny MacAskill (Cabinet Secretary for Justice)
Patricia Scotland (Scottish Government Justice Directorate)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 21 December 2010

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

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I remind everyone to switch off their mobile phones. We have received no formal apologies for absence, but some of the committee members are held up on a train that is coming from Glasgow, which seems to be a fairly commonplace occurrence at the moment. I have suffered the experience myself.

Item 1 is a decision on taking business in private. I invite the committee to agree that consideration of our draft stage 1 report on the Double Jeopardy (Scotland) Bill and our draft report on the affirmative instruments under consideration today should be taken in private at future meetings. Is that agreed?

Members *indicated agreement.*

Subordinate Legislation

Public Appointments and Public Bodies etc (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2011 (Draft)

Criminal Justice and Licensing (Scotland) Act 2010 (Consequential and Supplementary Provisions) Order 2011 (Draft)

Advice and Assistance (Assistance By Way of Representation) (Scotland) Amendment Regulations 2011 (Draft)

Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (Scotland) Order 2011 (Draft)

10:04

The Convener: There are four draft affirmative instruments for the committee's consideration today. This item is an opportunity for us to take evidence from the Cabinet Secretary for Justice and his officials on the instruments before we formally consider motions to approve them under the next item. The Subordinate Legislation Committee has not drawn any of the instruments to the attention of the Parliament or the committee.

I welcome the Cabinet Secretary for Justice, Kenny MacAskill MSP, who is accompanied by a plethora of officials. There are four policy officials and four Scottish Government lawyers. I understand that the officials will change places after the first two instruments have been dealt with.

The first instrument is the draft Public Appointments and Public Bodies etc (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2011. I draw members' attention to the cover note, which is paper 1, and invite Mr MacAskill to make a short opening statement, after which I will invite members to ask questions.

The Cabinet Secretary for Justice (Kenny MacAskill): Thank you, convener.

The purpose of the draft order is to remove the appointment of a Lord Commissioner of Justiciary member of the Parole Board for Scotland from the regulatory remit of the Office of the Commissioner for Public Appointments in Scotland. In the past, the procedure has been that my officials in the justice directorate have invited the Lord President to nominate a replacement Lord Commissioner of Justiciary, but OCPAS has recently confirmed that the appointment is subject to OCPAS procedures, because appointments to the Parole Board are

listed under schedule 2 to the Public Appointments and Public Bodies etc (Scotland) Act 2003. That means that any such appointment is required to comply with the OCPAS code of practice.

The Lord Commissioner of Justiciary appointment is a unique position in the Parole Board that requires specialist skills and experience, which are found only among the 34 senators of the College of Justice. I believe that the Lord President is best placed to determine which of the 34 senators combines the necessary experience with the ability to devote the necessary time to the Parole Board role. Therefore, I wish to remove the appointment of a Lord Commissioner of Justiciary from OCPAS's remit. OCPAS is aware of my proposal and is content with it.

The Convener: Thank you. Are there any questions for the cabinet secretary?

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Have any appointments been made using the facility of the 2003 act since it was passed?

Kenny MacAskill: All appointments are made by OCPAS. The Lord Commissioner of Justiciary has a unique role, so everybody before has gone through OCPAS—no, that is not right. I invite Patricia Scotland to comment.

Patricia Scotland (Scottish Government Justice Directorate): Since the Prisoners and Criminal Proceedings (Scotland) Act 1993 was passed, there have been a number of senators appointed. Since the Public Appointments and Public Bodies etc (Scotland) Act 2003 was passed, two senators have been appointed by the Lord President, not under OCPAS procedures.

Cathie Craigie: Under the order, the Lord President will appoint them, but there will be similar rules to those of OCPAS.

Patricia Scotland: No. We would expect the Lord President to nominate one of the 34 senators to the position. That has happened twice in the past.

Cathie Craigie: The "Policy Objectives" section in the Executive note on the order says that any such appointment will require to comply with the OCPAS rules.

Kenny MacAskill: Yes. We are working on the basis that nobody would be a senator of the College of Justice unless they fulfilled many of the broader criteria in the OCPAS rules. It is clear that the appointment by the Lord President will not necessarily be made using the same strict OCPAS criteria; rather, it will be made on the basis of who has the experience for the Parole Board, who has the heaviest workload and so on. Members can be assured that whoever the Lord President seeks to appoint would have got through the initial sift from OCPAS, if I may put things in that way, but the criteria that the Lord President will use will probably be more suited to the individual, the role and the running of the High Court.

The Convener: We would be quite concerned if it were otherwise.

The second instrument is the draft Criminal Justice and Licensing (Scotland) Act 2010 (Consequential and Supplementary Provisions) Order 2011. The cover note is paper 2. I invite you to make a short opening statement, after which we will ask questions.

Kenny MacAskill: I welcome this opportunity to contribute to the committee's consideration of the draft order, and I hope that these explanatory comments are of assistance. Section 14 of the Criminal Justice and Licensing (Scotland) Act 2010 inserted new sections 227A to 227N, among others, into the Criminal Procedure (Scotland) Act 1995 to establish the community payback order. From 1 February 2011, community payback orders will replace probation orders, community service orders and supervised attendance orders. The draft order makes provisions for consequential and supplementary amendments that are required.

Part 1 of the schedule to the draft order sets out amendments to the 1995 act to achieve two things. The first is to ensure that, where a community payback order is imposed consecutively on an individual who is already the subject of a probation order, supervised attendance order or community service order, the maximum combined number of hours of unpaid work cannot exceed 300 hours. That is necessary to ensure that, where an individual is subject to more than one order, whether that is a mix of existing orders and a community payback order, or more than one community payback order, the same statutory provisions will apply.

The second purpose of part 1 of the schedule is to amend section 227ZC of the 1995 act to make it clear that, where an individual breaches a community payback order that has been imposed for fine default, and the individual is imprisoned as a result, the original fine that gave rise to the community payback order is discharged. That is a technical amendment to reflect the policy intention of the provisions.

Part 1 of the schedule also amends the Sexual Offences Act 2003, principally to ensure that, where a person has been convicted of a sexual offence, and a community payback order with an offender supervision requirement has been imposed, the sex offender notification requirements apply for the specified period of the offender supervision requirement.

Finally, part 2 of the schedule to the draft order sets out a number of consequential amendments to secondary legislation to remove redundant

references to probation orders, supervised attendance orders or community service orders, and to replace those, where necessary, with references to community payback orders.

The Convener: There are no questions on the draft order, as the matter is fairly straightforward.

10:12

Meeting suspended.

10:13

On resuming—

The Convener: The third instrument is the draft Advice and Assistance (Assistance By Way of Representation) (Scotland) Amendment Regulations 2011. The cover note for the regulations is paper 3.

Kenny MacAskill: The draft 2011 regulations amend the Advice and Assistance (Assistance By Way of Representation) (Scotland) Regulations 2003, to allow state-funded legal representation to be made available for proceedings in relation to community payback orders, which are established under new sections 227A to 227N of the Criminal Procedure (Scotland) Act 1995, which are inserted by section 14 of the Criminal Justice and Licensing (Scotland) Act 2010. The new community payback order replaces probation orders, supervised attendance orders and community service orders. State-funded legal assistance is currently available for proceedings in connection with those three orders, and the draft regulations will enable state-funded legal representation to continue to be available following the introduction of community payback orders.

Robert Brown (Glasgow) (LD): Do the draft regulations have any financial implications? Obviously, there will be more orders, partly because of the presumption against short-term sentences. Is there a significant financial impact?

Kenny MacAskill: I do not think so. Obviously, we factored in that there will be an increase as we move towards community payback orders, but that will happen over a period of time as they replace existing orders. The financial implications for the Scottish Legal Aid Board will not be considered specifically with regard to this Scottish statutory instrument but with regard to our general direction of travel, which is subject to on-going discussions between the Scottish Legal Aid Board and the Law Society of Scotland.

10:15

James Kelly (Glasgow Rutherglen) (Lab): The financial memorandum to the Criminal Justice and Licensing (Scotland) Bill estimated the potential increase in the number of community payback orders at between 10 and 20 per cent. What might the increase be for 2011-12?

Kenny MacAskill: We stand by the figures in the memorandum—those are the predictions and we will see what happens on 1 April. Thereafter, the formulation will come after discussions with other relevant stakeholders, including the judiciary.

The Convener: The fourth instrument is the draft Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (Scotland) Order 2011. The cover note for the order is paper 4.

Kenny MacAskill: I welcome the opportunity to contribute on the draft order. The Crime (International Co-operation) Act 2003 provides statutory powers under which the United Kingdom can both seek and provide various forms of mutual legal assistance concerning criminal matters. However, some of the statutory powers can be exercised only if the state in question is a participating country as defined in section 51(2) of the 2003 act. As a consequence of the agreement between the European Union and Japan that was concluded on 7 October 2010, this order designates Japan as a participating country in relation to certain sections of the 2003 act. Japan has been designated in relation to sections 37, 40, 43, 44 and 45 of the 2003 act. Those sections permit the provision of banking information for criminal investigations into conduct such as economic crime and money laundering. The Home Office laid a draft order making a similar designation in relation to provisions that apply in England and Wales before the Westminster Parliament on 1 December 2010, and this order seeks to deal with matters here in Scotland.

The Convener: There being no questions from members, we move to formal consideration of the motions to approve the four instruments. Do members agree to take the motions on the four instruments together?

Members *indicated agreement.*

Motions moved,

That the Justice Committee recommends that the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2011 be approved.

That the Justice Committee recommends that the Criminal Justice and Licensing (Scotland) Act 2010 (Consequential and Supplementary Provisions) Order 2011 be approved.

That the Justice Committee recommends that the Advice and Assistance (Assistance By Way of Representation) (Scotland) Amendment Regulations 2011 be approved.

That the Justice Committee recommends that the Crime (International Co-operation) Act 2003 (Designation of

Participating Countries) (Scotland) Order 2011 be approved.—[*Kenny MacAskill*.]

Motions agreed to.

10:18

Meeting suspended.

10:19

On resuming—

Double Jeopardy (Scotland) Bill: Stage 1

The Convener: Item 4 is our final scheduled evidence session on the Double Jeopardy (Scotland) Bill. A Scottish Parliament information centre briefing on the interests of justice test has been circulated, and members also have copies of the Subordinate Legislation Committee's report on the delegated powers in the bill. Mr MacAskill is accompanied by Iain Hockenhull, the bill team leader; Danny Kelly, from the criminal justice and parole division; and Anne-Louise House, from the Scottish Government legal directorate. I understand that Mr MacAskill is content for us to move straight to questions.

Nigel Don (North East Scotland) (SNP): Good morning, cabinet secretary and colleagues. I will start with section 11, which you will recognise relates to the position when someone, having originally been accused of assault, is considered for retrial for homicide on the basis that his victim has subsequently died.

You will be aware that the Scottish Law Commission suggested that, when the accused had originally been found not guilty, that would be the end of the matter and he could be reprosecuted only if he had been found guilty first time round, but that is not the position in the bill. What is the justification for that?

Kenny MacAskill: We are maintaining the existing law, whereas the Scottish Law Commission proposal to restrict a second trial in this situation would change it, because currently a prosecution can follow. The subsequent death of the victim means that the court did not hear the full circumstances of a case that resulted in a death. Additional evidence may arise that was not available at the original trial and it appears to us that it is entirely reasonable for assault investigations to be less intensive than murder ones. Clearly, the police would go over matters significantly more in a case of murder or homicide than they would for a simple assault. The police have limited resources, so that is not a criticism in any way; they are required to make a pragmatic judgment.

Witnesses who might be silent about an assault are also more likely to come forward in the case of a murder and, as we all know, medical investigations provide a different perspective on the accused's stated defence, so a special defence that was used at the first trial, such as

self-defence, might seem less applicable and less credible in the light of the victim's death.

Such cases are very rare. The Scottish Law Commission identified only a handful of cases and the Crown Office has identified five cases in the past 10 years in which Crown counsel's instructions were sought following the death of a victim after an earlier prosecution. It seems to us that the reform of double jeopardy in England and Wales did not make provision for such circumstances, but it remains possible there for a person who was acquitted of assault to be retried for murder.

Nigel Don: I am grateful to you for putting all that on the record. What is confusing me slightly is that, although we have recently had a few figures, nobody has indicated why this might have been a problem. There seem to be no notorious cases and nobody seems to be saying that we should be doing this or should not be doing that because of cases that have arisen. All the arguments that we have heard are essentially philosophical ones about whether it is right or wrong, and people's views have varied. Are you aware of any cases that have thrown this up as a real issue or are we, to a large extent, speaking in a vacuum?

Kenny MacAskill: I am aware of one constituency case—I will not go into details—that I have written to the Crown about, when a death occurred following an assault and a conviction for assault.

This has been a fundamental tenet of Scots law; we are not seeking to vary by legislation what has been a principle of Scots law ever since I studied at the University of Edinburgh in the 1970s. These matters may be theoretical and I think that most people who have studied law will accept that sometimes the theory is vastly different from the practice, but it is important that we retain the provision for consideration to be given to someone being retried in these circumstances. It is important that we retain that provision because, to some extent, the basis of the Double Jeopardy (Scotland) Bill is to reaffirm the position that double jeopardy applies and there are only exceptions to it. Equally, it is important that we preserve fundamental principles. Such cases are few, but they cause considerable anguish for the individuals concerned and there is a requirement for the possibility—not necessarily the definitive position—that they can be considered.

Nigel Don: On what may seem to be a technicality, are you aware of the fact that there are different tests of the public interest in the bill? I refer to the SPICe briefing on the interests of justice test—I am not sure whether you will have seen it. If I am reading things correctly—I will need to check this—a consequence of the bill is that the court is to be directed to apply the interests of justice test only when the accused was originally acquitted. No public interest test is set out if the accused was originally found guilty of the assault. Was that deliberate, or is it just the way it seems to have been written?

Kenny MacAskill: That was the intention, and it is about striking a balance. We are keeping the existing law but ensuring that protections are in place. When considering a second trial following an acquittal, rather than a conviction, it seemed right to us to apply a higher test.

In cases in which there was a conviction at the first trial, the emergence of new testimony or new evidence is likely to be less relevant. We are talking about a case in which the victim has died but the person who has been found guilty of causing the fatal injury has not been tried for causing their death. It could be argued that the second trial is a retrial with perhaps more intensive scrutiny and with consideration of slightly different matters. However, it is not double jeopardy: the second trial is the first time it has been possible to prosecute as a result of a death. The provision in the bill is the same as that proposed by the Scottish Law Commission.

The SLC did not think that the interests of justice test was required when the first trial ended in conviction, so it is only our provisions on acquittal that differ from the SLC's approach. We have to bear in mind that Crown counsel will consider all the facts and circumstances of the case before instructing proceedings for a homicide charge. Those facts will include the evidence from the first trial, the sentence received and any factors relevant to the public interest. It is fair and legitimate to consider a situation in which the accused was convicted but the situation then changed because of the death of the victim. That situation is different from one in which there was an acquittal but other matters then came to light. We are striking a balance between protecting the existing law and providing additional safeguards.

Dave Thompson (Highlands and Islands) (SNP): I want to ask about previous foreign proceedings, as covered by sections 7 and 10. Trials in other parts of the United Kingdom are clearly covered, and Schengen pools the UK with other EU states, Iceland and Norway. Obviously, we also have to consider other foreign convictions.

In evidence to the committee, the Faculty of Advocates has questioned whether the bill will work in practice. Will the cabinet secretary elaborate on how he thinks it will work?

Kenny MacAskill: As Mr Thompson suggests, there is scope to disregard foreign verdicts where corruption is suspected. We agree with the dean of the faculty that there may be difficulties establishing the details of a foreign case, but that

does not mean that we should not legislate. The provisions will have to be applied case by case, and it will be for the courts to decide. As I have said, we are establishing a principle. We concede that the numbers will be very limited; the number involving foreign cases will be more limited still.

In the event of there being a valid previous trial elsewhere, including south of the border, accused persons would be able to make a plea in bar of trial under section 7 and the prosecutor would need to establish a special reason for the trial to proceed. We accept that cases from abroad would cause complexity and it is fair to say that the law of Scotland, in contrast to the law south of the border, has always been loth to interfere in matters that occur in other jurisdictions, but it is important that we preserve our opportunity. We must acknowledge the complexity, but we provide in section 7 the opportunity for a plea in bar of trial.

Dave Thompson: I suppose that some cases cross a number of jurisdictions. Are you concerned about the standards that might be applied in some countries, as compared with ours? If the bill is passed, are you happy to revisit it after a period?

10:30

Kenny MacAskill: Absolutely. We recognise that there is variation from jurisdiction to jurisdiction. I think it is fair to say that the states that you worry most about in terms of the nature of convictions are usually those from which you get the least information.

We have had discussions—I am not sure whether in committee or elsewhere—on fatal accident inquiries abroad. I think there is recognition in Scotland that if something happens in a state that we recognise as having an appropriate, balanced and fair jurisdiction, we leave things to that state. We think that it is much better that the state investigates the matter; it has the resources on the ground and linguistic issues, including interpreting, are not involved. Equally, we are aware of matters of significant concern in that regard.

We are always happy to keep the matter under review. I think that it is fair to say that the situation will vary from state to state and case to case. A point of principle is involved: our preference is to protect that principle and leave the matter to Crown counsel and, indeed, the court, which may take the view that it is not satisfied with a trial that has been conducted abroad. If it is satisfied that the trial was conducted legitimately and appropriately, the plea in bar of trial will be upheld.

The Convener: I envisage some excitement on the diplomatic front if there is a view that the trial process in certain jurisdictions is not as we might wish it.

Before we move on to our next line of questioning, Robert Brown has a supplementary to an earlier question.

Robert Brown: I am sorry, convener; I was slow in asking to put it.

You may agree, cabinet secretary, that section 11, on acquittal, raises slightly different issues from those that apply to convictions. The conditions in section 4 talk of the court setting aside the conviction if

"the case ... is strengthened substantially by the new evidence"

that could not with "reasonable diligence" have been found beforehand. Would that apply to an assault case in which the victim subsequently died? If not, why not? Surely the principles are pretty much the same.

Kenny MacAskill: We should return to the principle. This is not double jeopardy. The second trial is caused by someone's death; it is for something that could not have been prosecuted at the time of the first trial. The nature of the case is that the injuries the victim received resulted in death. The provision is about codifying an area of the common law. Neither the Scottish Law Commission nor the Government consider that double jeopardy is involved in such a situation. Contrary to suggestions from the Faculty of Advocates and the Law Society of Scotland, the provisions on new evidence do not apply in that situation; special justification is not necessary when the first trial ended in conviction. We believe that the interests of justice test should be enough when the trial ended in acquittal. We differentiate between acquittal and conviction. In the latter situation, the only change is the death of the victim. In the case of acquittals, we accept that there is significant change not only in the status of the victim—it is now a homicide—but the outcome. That is why a higher test has to apply.

Robert Brown: We can argue whether double jeopardy is involved, but the principle seems to be pretty similar for acquittal and conviction. Someone has been put on trial for an act that they committed, an act that has lead to a death. The accused was acquitted—normally, that is a final state of affairs. In effect, he is brought back to court to thole his assize again. What is the difference in practical terms between that and the new evidence situation? I do not follow the distinction that is being made.

Kenny MacAskill: The distinction is where we are coming from. As I said, the position in Scotland has always been the same when there is a death. We are seeking to codify common law. In doing that, we accept that we have to preserve the principle of Scots law that double jeopardy is not the norm—it does not happen. We are making

exceptions to that principle. Equally, in the bill, we recognise instances where people have been prosecuted and acquitted. When the victim subsequently dies, another trial can apply. This is both a theoretical and practical matter, albeit one that applies in limited situations. We see a practical difference: the status of the victim moves from having suffered injuries—severe or otherwise—to death. In that situation, we have to differentiate between acquittal and conviction. It seems to us that, in the case of an acquittal, matters have to be made clear. That is why we think that this is covered by the interests of justice test.

The Convener: We will now deal with tainted acquittals.

Stewart Maxwell (West of Scotland) (SNP): Section 2 deals with tainted acquittals. Some committee witnesses have raised concerns about the scope of the bill. For example, it has been suggested that the possibility of further prosecution should be limited to more serious offences, as it is in section (4)(3)(d), which talks about the offences listed in schedule 1. What is the thinking behind the fact that that is not the case in tainted acquittals?

Kenny MacAskill: We disagree with the suggestion that the possibility of further prosecution should be restricted to more serious cases. However serious the charge, people should not benefit from attempts to pervert the course of justice and criminal trials. That principle should apply as much to a minor charge in a district court as to a more serious charge in the High Court of Justiciary. We have a fundamental interest in justice being served. No matter how many times proceedings are corrupted or who is responsible for the tainting, it undermines the system and its integrity. The fundamental point is that the first trial was not fair.

The Scottish Law Commission concluded that it is unrealistic to require definite proof that the accused person was involved in the corruption. Lord Gill and the Faculty of Advocates supported the bill on that point. We have to put the caveat that acquittals are to be set aside under section 2 only if that is possible in the interests of justice. That should offer sufficient protection from abuse of process. The fundamental point is that at whatever court and at whatever level, if the acquittal is tainted, justice is undermined—and we do not think that there should be any restriction, for example to offences on indictment.

Stewart Maxwell: That is clear. You said, "No matter how many times" in your response, so I assume your answer to the suggestion that further prosecutions should be limited to one more time, as is the case in other parts of the bill, is the same; that no matter how many times a trial has been tainted, the slate should be wiped clean and another trial held, irrespective of the number of previous trials.

Kenny MacAskill: Yes. As I said, the Scottish Law Commission suggests that it could be argued that someone who makes an admission is consenting to a new trial. When an accused boasts that they have "got away with it", there should be no limit to the seriousness of the offence or the number of trials. Any undermining of the judicial process taints the system and undermines its credibility. We have to protect it at every level and over whatever period of time.

Stewart Maxwell: I will push you slightly on whether the individual who was tried was involved in the tainting. Some of the opinions that we heard said that it would be unjust to retry an individual if they had taken no part in an attempt to taint the trial. The example that was used was of someone who had been accused of rape and an individual from outwith that situation decided to, if you like, get even by trying to taint the trial, irrespective of the fact that the individual who was on trial had no idea that such a tainting was going on. If he were acquitted, it is suggested that it would be unjust to retry him. What is your view?

Kenny MacAskill: That is a factor that Crown counsel and the court would take into account. At the end of the day, it is the interests of justice that matter. If a trial has been tainted—for whatever reason—the victims would expect some consideration of that. What you have described would be a factor relevant to the consideration, but the trial's not being tainted by the person who was being tried should not undermine the possibility that the trial was tainted.

Stewart Maxwell: So that factor should not be an automatic bar to a retrial, but it should be relevant to the consideration of whether it is in the interests of justice to go ahead with a retrial?

Kenny MacAskill: When a court considers a tainted trial it will consider the situation in the round. What you have described will be one factor, but it should not be an absolute bar.

Stewart Maxwell: Thank you.

The Convener: Although I agree that where there is an acquittal that has been tainted there must always be a legal remedy, I think that there would be a view that this legislation would be used sparingly. I do not imagine that there would be many summary prosecutions that would result in an attempt to retry.

Could this matter be dealt with quite simply by libelling a charge of attempting to pervert the course of justice?

Kenny MacAskill: That is a fair point. If somebody gets their brother or somebody else to

take the rap for them in a road traffic offence or something like that, from a pragmatic point of view that might well be dealt with through a charge of perverting the course of justice. That is a matter that we would leave to the Crown and the courts. This is about pragmatism and flexibility. You are right that many minor matters would be dealt with in the manner that you suggest—we would fully support that—but it is important that we retain the principle. There might be circumstances—I do not want to speculate or specify them—in which it is felt appropriate to have a retrial.

The Convener: Let us now turn to admissions. There might be fairly general agreement, but I would like us to tidy up one or two points.

The proposals outlined in section 3 go beyond what was in the Scottish Law Commission's report, in that they would apply to pre-acquittal admissions as well as post-acquittal admissions. Why did the Government decide to depart from the commission's recommendation on that point?

Kenny MacAskill: The general principle that the commission stated in its report was that somebody should not be able to boast with impunity about their guilt. We accept that; the Government agrees with that principle. However, we do not believe that it should be applied differently simply because of the date on which the admission was made. All double jeopardy admissions should be considered by the courts in the same way, whether they are made before or after an acquittal. The extension is only for admissions that the prosecutor could not have been reasonably expected to know about.

The Convener: As you are probably aware from the evidence, there has not been universal approval of the provisions in section 3. Indeed, it has been argued that the exception should be limited to more serious offences and that tests relating to the potential significance of an alleged admission should be strengthened. You have dealt with the type of case to which this should apply. What is your response to the other concerns?

Kenny MacAskill: Our response to the other concerns is that these matters affect the fundamental principle and tenet of justice by which—without quoting any advocate deputes or whatever—our system is sustained. It is important that we sustain the principle. We recognise that there has to be pragmatism and flexibility within the system. In many instances, minor matters will be dealt with in another way. There is more than one way to skin a cat.

A variety of other matters were raised, such as requiring witnesses to explain why they did not come forward earlier. We do not think that a specific provision is needed. Under section 3(4), the court has to be satisfied that the admission could not, with the exercise of reasonable diligence, have become known to the prosecutor at the time of the original trial and that it is in the interests of justice to set aside the acquittal. We think that the suggestion that there requires to be some explanation is not appropriate there.

The same applies to raising the standard for the credibility of admissions under section 3(4) to beyond reasonable doubt. We are not attracted to the suggestion of changing the test for credibility. On the balance of probabilities is satisfactory. "Beyond reasonable doubt" is the test that is applied to the criminal case as a whole, not to each isolated piece of evidence. That is a fundamental matter in any trial, which would be pointed out by any sheriff. The Lord Justice Clerk thought that the bill's test was appropriate. We have to differentiate between individual matters that are part of the causal chain and the fundamental matter that would ultimately be the consideration by the sheriff or the matter for the charge to the jury.

The Convener: As you know, section 3 seeks to cover both post and pre-acquittal admissions. In its evidence, the Scottish Law Commission suggested that there is no longer any justification for having separate sections dealing with admissions and other forms of new evidence. It suggested that all new evidence should be dealt with using the provisions in section 4 and that, from a drafting point of view, section 3 is redundant. Do you have any comments in that respect?

Kenny MacAskill: We think that admissions should be dealt with separately. The accused is specifically waiving his right to be free from further prosecution. That is the approach taken by the Scottish Law Commission. The new evidence section is limited to a specific range of offences. The admissions exception should be capable of covering any offence. Again, that is the approach taken by the SLC. In light of the committee's stage 1 report, we will give further consideration to bringing the tests in section 3 closer to the tests in section 4, so that the bar in both sections is set at the same level.

The Convener: There is an issue in that. It is no great issue of principle, but the bill could be re-examined and strengthened by changing one or other section.

Bill Butler will ask about the general new evidence exception.

10:45

Bill Butler (Glasgow Anniesland) (Lab): The Scottish Government has indicated that a general new evidence exception should apply only to a limited number of very serious offences. It has

been argued that that stated intention is not effectively implemented in the list of offences that are set out in schedule 1, because for example of the inclusion of very broad offences such as sexual assault. Are such concerns valid?

Kenny MacAskill: Those are matters that we are happy to consider and reflect on. The bill covers murder, rape, culpable homicide and serious sexual offences, and I am aware that Patrick Layden of the Law Commission acknowledged the difficulty of the issue. The Law Commission could not come to a resolved view on what should be on the list and therefore recommended a minimum, leaving it to Parliament to consider that remainder position. We welcome the views of the committee and await its report.

Bill Butler: So you are willing to consider the issue as matters proceed?

Kenny MacAskill: Absolutely. We have all been contacted by various organisations in relation to driving offences and other matters. The general view of the Government has been that we should be as open as possible. We accept that it would be possible to go on for ever, but we are talking about a limited number of cases. It might be that there would be some cases that, even if we were to live to the same age as Methuselah, would never be prosecuted. Equally, there is a point of principle in the bill, and I understand how people would feel if a situation arose in which there was a manifest injustice. We are genuinely open and are happy to listen to the committee and to others who have made representations. We view the list as not exhaustive.

Bill Butler: You will be aware that the Subordinate Legislation Committee's report recommends that the Scottish Government consider imposing a robust consultation requirement prior to laying an order to alter the list of offences in schedule 1. Do you intend to modify the bill at stage 2 in light of that recommendation?

Kenny MacAskill: Obviously, we listen closely to what the Subordinate Legislation Committee says. However, the bill uses the affirmative procedure, so Parliament would have full scope to consider any changes and it would be for Government and Parliament to consider what would be appropriate for each case.

If there is to be a consultation requirement, it should be informal—in the interests of avoiding legal challenges based on the consultation process. That comes back to your first point. If we want the flexibility to deal in a pragmatic way with matters such as offences that might arise as technology changes the society in which we live, we must strike a balance. It seems to us that the affirmative procedure provides Parliament with a degree of assurance that matters will not be legislated on or changes dragooned through by an Administration of whatever colour. Equally, I think that including a requirement for a formal consultation process might restrict the will of a Parliament that might be keen to deal with a new situation.

Bill Butler: If your preference is for informal consultation, are you ruling out the use of the super-affirmative procedure, which would involve formal consultation?

Kenny MacAskill: We are happy to bow to the will of Parliament and to take on board the view of the committee. We think that having informal consultation in combination with the affirmative procedure is appropriate. If, after consideration, the committee feels that use of the super-affirmative procedure is necessary, we will be happy to accept that. It comes back to the point that for us to be able to deal with manifest injustices there has to be an element of pragmatism and flexibility. We are not giving an absolute no; we are trying to strike a balance. If the committee feels that we have not struck the right balance we would be happy to consider the matter, but we would be loth to tie the hands of a future Administration by making it have to go through an extensive consultation process and a significant legislative process when the whole Parliament might agree that a particular offence that was not covered by the new double jeopardy provisions should be covered by them.

Bill Butler: So your preference is to have the flexibility that you have described?

Kenny MacAskill: Yes. We think that use of the affirmative procedure, along with informal consultation, strikes the right balance.

Bill Butler: Thank you.

The Convener: I call James Kelly, although the cabinet secretary has to some extent anticipated his questions.

James Kelly: I want to continue the focus on the general new-evidence exception. In allowing for it to be applied retrospectively, the Government has departed from the view of the Scottish Law Commission. In evidence, some witnesses have sided with the commission and opposed the retrospective application of the general new-evidence exception. How do you respond to those who have adopted that position?

Kenny MacAskill: We fully accept that they are entitled to take that position. We always listen but, equally, we are conscious that most of the witnesses seemed to accept that the issue is one for the Parliament to take a decision on. Lord Gill, the Faculty of Advocates, the Scottish Human Rights Commission and the Scottish Law Commission all gave evidence. Although some, if

not all, of them indicated that they opposed retrospectivity, they conceded that it was a matter for the Parliament to come to a view on. There are some issues that are fundamentally legalistic and there are other, much broader issues relating to the interests of justice that need to be considered by the Parliament.

We must set the matter against the backdrop of the concerns regarding public confidence in the justice system. If the new-evidence exception did not apply retrospectively, it would mean that when compelling new evidence emerged—as happened in the Vikki Thompson case in England, which resulted in a prosecution just last week—there would be no prospect of bringing a similar case in Scotland. If such a situation arose in Scotland and we could not deal with it because the general new-evidence exception could not be applied retrospectively, each and every member of the Parliament would receive a considerable amount of mail, electronic or otherwise, from people complaining.

I accept that those who operate in the legal field take a strict interpretation of matters, but it is necessary for those of us who represent the public and who must therefore take a broader, public view to recognise that there is a public interest in allowing retrospective application of the new-evidence exception. I can understand why lawyers do not like retrospectivity—indeed, many lawyers do not like the new-evidence exception, full stop—but we must take cognisance of the public's view. If a situation such as the one that arose in the Vikki Thompson case south of the border arose north of the border, but there could be no prosecution, that would be a manifest injustice. It would not satisfy people who complained to us, as elected members, that that was the law; they would expect the law to be changed.

James Kelly: Another issue that was raised was whether the proposed retrospective application of the general new-evidence exception would be compliant with the European convention on human rights. What steps has the Government taken to ensure that the proposed provision would be ECHR compliant?

Kenny MacAskill: It is ECHR compatible. The safeguards that are contained in the bill mean that double jeopardy prosecutions will be rare. As we have said, only a small number of persons will face further prosecution. The new-evidence exception will affect only a small number of offences. Those whose acquittals have been tainted or who admit their offence should not expect immunity from justice. I do not think that there is any significant suggestion that the proposed provision is not ECHR compatible. Such matters have to be considered before any bill is introduced. Similar legislation south of the border and elsewhere has not been subject to, or revoked as a result of, ECHR challenges.

James Kelly: You declare that you are confident that the legislation is robust and ECHR compliant. Can you give us a bit of detail on some of the work that the Government has undertaken to ensure that that is the case?

Kenny MacAskill: We do that through our lawyers. Any legislation that is to be approved by the Scottish Parliament must be ECHR compatible and that issue has been considered by those who drafted the bill and by the SLC.

The SLC looked at a broad swathe of jurisdictions that have double jeopardy legislation. I concede that not all those countries—I am thinking of New Zealand and the USA, for example—are subject to the ECHR as we are, but the Republic of Ireland, and England and Wales, have reflected on the broader European context. We are in no doubt: there is no question of the legislation not being compatible with the ECHR.

James Kelly: To be clear, the Government lawyers examined the legislation and briefed you accordingly that, in their view, it would be ECHR compliant.

Kenny MacAskill: Yes. We are satisfied that it is ECHR compatible.

The Convener: Let us hope that if the matter is ever challenged that view prevails, although in light of some of the judgments, I cannot be confident.

Nigel Don: I want to come back to the new-evidence exception. As we discussed, schedule 1 lists the offences for which that might be appropriate. It has been suggested that, rather than using that list, we should simply say that any case in which the trial was first brought on indictment would be open to the new-evidence exception.

Kenny MacAskill: We will consider that further, but as most offences can be tried on indictment that would make the potential for further prosecutions on new evidence much wider than the list in the bill.

It may be appropriate in adopting such a test to retain the list, so that the offence would have to have been previously prosecuted on indictment as well as being on the list. We are happy to consider that, but there is good reason to have a list rather than simply saying that the exception should apply to any trial that was brought on indictment rather than on a summary complaint.

Cathie Craigie: At present, an acquitted person gains an assurance from a judgment that they cannot be tried or prosecuted again for the same crime. It may be argued, as we have heard in

evidence, that the state would be reneging on such an assurance if the new-evidence exception was applied retrospectively. Is that appropriate in the field of criminal justice?

Kenny MacAskill: Yes. At present, we are out of kilter with many other jurisdictions, all of which we would concede are ECHR compliant and deal with matters appropriately. No one disagrees—and the bill lays down—that there is a presumption that you have tholed your assize if you have gone through a trial, whether you are acquitted or convicted in a court, except in the circumstances that we have mentioned, such as where the accused has subsequently died.

We believe, however, that there is a fundamental point of principle, which goes back to the reference that we made to the Scottish Law Commission early in the current parliamentary session, following the World's End case. As we all know, there is in Scotland a desire to see justice served. Justice is not served if the submissions from m'learned friend A outweigh those from m'learned friend B, and someone who is manifestly guilty and has tainted evidence or corrupted the process subsequently boasts about it.

We recognise that the provision must be limited and sparing, and that it should apply only in the most serious cases, but justice would not be served if we did not bring in this bill.

Robert Brown: I want to discuss some of the practical implications of the legislation. If the evidence in the previous case has been bunged out by the time the new case comes along, that presents obvious difficulties. Can you give us some feeling for the rules or arrangements that apply to the retention of evidence in cases in which people have been acquitted?

Kenny MacAskill: The same rules as we currently have must apply. There will be complexities, but those matters are more for Crown officials. If representations are made that the current arrangements on disclosure or retention of DNA are inadequate or inappropriate, we would be more than happy to examine them. The court must view that as one of the factors. If, for example, all the evidence has been destroyed, one might argue that it would be difficult to get out of the starting block. Equally, I accept that representations may be made if defence evidence has gone. The best test is to leave the matter to the courts, which will have a clear view of the wish of the Parliament.

11:00

The bill cannot cross every t or dot every i, because each case will be fundamentally different. We have the interests of justice test and a variety of other provisions. We are also well served by our judiciary. At the end of the day, we must remember that it is not simply a matter for the Crown and that the judiciary must weigh the evidence in the scales of justice. We should leave it at that. I am happy to take on board particular representations from the committee on what may need to be done, but I am wary of anything that would impose further bureaucracy on the police by requiring them to retain more evidence than they currently retain, which is significant.

Robert Brown: Perhaps I did not phrase the question as well as I might have. I was looking not so much at the court test as at the practical implications of physically retaining evidence for the police and the prosecution. It would be helpful if you could tell us what currently happens with regard to the retention of evidence when people are acquitted. Does the sheriff clerk normally keep the evidence for a certain period, is it thrown out or does it go back to the police?

Kenny MacAskill: Such matters are dealt with by practice rules between the Crown and the police, which discuss where evidence should go and what evidence should be retained. The issue is best dealt with by them. It would be inappropriate for me to interfere in the discussion of whether evidence should be retained by either the Crown or the police. If you need more information on the issue, I can ask the Lord Advocate or the Solicitor General for Scotland to advise you. We understand that arrangements will be made and discussions entered into between the Crown and the police about how such matters should be dealt with.

Robert Brown: It might be helpful if you could provide us with some information in writing after the meeting. More to the point, I was trying to get at whether the proposed change in the law will have practical implications for the Government and the various agencies that must deal with it. Will it affect how they store evidence and how they look at cases in which there have been acquittals in the past? How will they identify cases that may be worth looking at again? Will issues simply emerge from the woodwork? Is the Government looking at mechanisms to ensure that we make appropriate use of the new law, without imposing the big bureaucratic burden to which you rightly refer?

Kenny MacAskill: You are right to say that we are wary of imposing a big burden. We understand that the likely costs will be fairly de minimis. The issue will be subject to practice notes and discussions between the Crown and the police. You were correct to refer to the fact that there are practical matters that must be addressed. We are wary of going anywhere near that, as we could reach the point almost of giving directions to the

Crown and the police, which we do not, would not and constitutionally cannot do.

Although the Parliament legislates on disclosure and a variety of other matters, we believe that the issue is best dealt with through discussion between the Crown and the police. If they believe that there is a legislative lacuna, we will be more than happy to consider that. However, we understand from discussions with both the Crown and the police that they already have procedures in such circumstances. Those will have to be reviewed and, doubtless, modified as a consequence of double jeopardy proceedings, but that is an operational matter for the Crown and the police, rather than a legislative matter for the Government.

Robert Brown: I am not sure that that is entirely the case. Presumably someone who has been acquitted is entitled, after a certain amount of time—for example, the period of appeal—to get back physical evidence such as clothing or a computer that has been taken away from them. I do not want to dwell on the issue too much today, but it would be helpful to the committee if you could provide us with an understanding of the current rights of people in that position and whether the Government is looking to change them in any way.

Kenny MacAskill: We will be more than happy to consider the issue. I assure you that the bill is not seeking to change in any way the legislation and regulations that govern DNA retention and so on, which will continue to apply. All that is changing is the possibility, theoretical or practical, of a matter being considered in due course. We are happy to reflect on the issue and to advise the committee. As I say, there will be no legislative change as a consequence of this. Nobody would have their rights on DNA retention changed on the whim or fancy of a police officer or prosecutor—that just would not happen.

The Convener: You see the problem that Mr Brown raises. Let us suppose that there was an allegation of a murder in which the weapon was a motor vehicle. If the prosecution failed and the accused was acquitted, he would be entitled to get his car back irrespective of the Crown's view. The practicality is that we cannot have a massive warehouse somewhere to store bulky productions.

Kenny MacAskill: I fully accept that. That would be a pragmatic decision for the Crown to take. I would have thought that, in such instances, the Crown would first consider an appeal, for which the vehicle may be retained.

Ultimately, it is a matter for the Crown and the police. If there are implications, there may have to be legislative changes, but we will cross that bridge if we come to it. Normally, however, if the murder weapon was a vehicle and there was an acquittal, unless an appeal was being marked and proceedings were being held in some way or other, the vehicle would be returned and any prosecution that followed months or years thereafter would perhaps have to proceed in the absence of the vehicle, as it may have been crushed, destroyed or sold abroad. That is simply one of the hoops and hurdles that result in retrials being few and far between.

Stewart Maxwell: Let us continue with the convener's example of the murder weapon being a vehicle. I presume that, even if the vehicle was not available for any future trial, lots of evidence about the vehicle would be available, such as photographs, film, swabs, the results of any chemical tests that were done, samples of fibres and all sorts of other things.

Kenny MacAskill: Absolutely. We live in a world of best evidence, which is how it has been ever since I entered the legal profession. The best evidence would be the vehicle but, in the absence of the vehicle, it would not be impossible for a retrial to proceed on the basis of a photograph. In the absence of a photograph, something else could be docketed. These are simply procedural matters. They will cause some inconvenience and difficulties for police, prosecution, court and defence, but they will be sorted out in due course.

The Convener: I anticipate some best evidence points being raised. It would be useful, in the generalities, if you could arrange for the appropriate correspondence to be sent to us detailing what precisely is happening at the moment.

I suspect that the committee may largely be with you in quite a lot of what you have said this morning. The one issue that arises is that—as you rightly say—there are cases that attract great public concern, indignation and anger because of a perceived miscarriage of justice. If that miscarriage of justice falls under some of the headings in the bill, which I personally agree with, we will still have difficulty in holding a fair trial, bearing in mind the extent of the publicity surrounding the initial proceedings. Is there a way around that?

Kenny MacAskill: We already have that. The Parliament passed the Judiciary and Courts (Scotland) Act 2008, which enshrined the independence of the judiciary. The judiciary was always independent, but the act makes it clear that it is free from any political interference, whether by the Government or by Opposition members, and that it will act without fear or favour entirely impartially. Equally, the separation of powers and the fact that the Lord Advocate acts in the public interest provide reassurance.

So we have checks and balances, as well as a public prosecutor who is independent from Government and the body politic and who acts in the public interest—not on the basis of being a prosecutor, but on the basis of the public interest being served. We also have a judiciary that is entirely independent from the Government and the body politic. That provides the separation of powers that is necessary in any democracy.

The reason for that is the old adage that hard cases make bad law. That is why we ensure that those matters are not dealt with by the Government or politicians, but by an independent prosecutor and an entirely independent judiciary.

The Convener: I fully accept and agree with what you say. My concern would be finding a jury that has not been affected by the publicity.

You mentioned the World's End case, which caused considerable public concern. As I see it, the bill would not cover an eventuality such as that case, but how would you get round the situation in which potential jurors read about the case and then, within a couple of years, something arises that allows permission for a retrial to be sought? How can a jury, even if properly directed, apply the appropriate detachment?

Kenny MacAskill: First of all, schedule 2 mentions the Contempt of Court Act 1981, which covers that issue. An issue such as that would legitimately be raised by the defence. The judiciary would have to decide whether it felt that a fair trial could take place in the circumstances. I have no doubt that, on occasion, it would take the view that a fair trial could not take place.

Secondly, there are occasions on which empanelled jurors would need to declare an interest. Jurors would be asked about their involvement and so on.

There is a variety of factors, therefore, starting with whether the case would get across the first hurdle of being able to be dealt with. There are then further checks and balances, including when a jury is being empanelled. Finally, I would have thought that at each stage the judge would be making clear the caveat that the jurors have to consider the case on the evidence and the facts as they see them and not on any prejudices or views that they may have picked up elsewhere.

Retrials are more difficult, although the media age in which we live affects every trial. That is why the judiciary ensures that strictures are brought to bear on reporting and jurors are given counsel and warnings about how they are expected to behave.

Robert Brown: Surely one of the difficulties here is the provision in section 4(6)(c), which is one of the conditions that apply to whether the High Court would allow a new trial to be brought. It says that the court has to be satisfied that

"on the new evidence and the evidence which was led at that trial, it is highly likely that a reasonable jury properly instructed would have convicted the person of—

(i) the original offence".

With great respect, it is extraordinarily difficult to envisage how a decision by the court, preliminary to the case going before a new jury, could be anything other than prejudicial if the case has been reported in the press. Regardless of anything else, before the case even gets across first base the view of the court has to be that a reasonable jury properly instructed would have convicted. That is extremely significant.

Bearing in mind the terms of that section, do you envisage that there would be publicity about the request for the new trial or any restrictions in that area?

Kenny MacAskill: Again, those powers do exist. It is an issue for the court. It is not dealt with by the justice secretary, by Government or by politicians. It would be a matter for the good sense of the judiciary. If the judiciary felt that publicity would impact on any possible proceedings, it might seek to restrict it. We would be perfectly comfortable with that and would fully support it.

The matter is dealt with in schedule 2, which says:

"In paragraph 4 (initial steps of criminal proceedings), after sub-paragraph (e) insert—

"(f) the making of an application under section 2(2) (tainted acquittals)".

My understanding is that, when Lord Gill appeared before you, he was content with the provisions. Those are legitimate points to raise. Doubtless, at some stage, a judge may feel that a fair trial could not possibly take place for the reasons that you say, but we must leave that to the facts of the case and the presiding judge.

11:15

It is for us to ensure that the appropriate checks and balances exist in the bill, that we do not interfere with the broader checks and balances and that, if additional checks and balances are necessary, we add them. However, I believe that the reason that Lord Gill is content is that, for contempt of court, we have the facility for proceedings to be in camera and for no reporting to take place. That would allow a trial to proceed.

We have the opportunity to ensure that, as any judge would do at any instance, any potential juror who might be empanelled but had an interest would not go on the jury and that those who serve the public interest on the jury are counselled and

warned about what it is appropriate for them to bear in mind, what they should reflect upon and what they are being asked to do. That is why the charge to the jury remains a significant and important part of a judge's responsibility.

The Convener: There are no further questions. This has been a useful evidence-taking session. Is there any point that you feel has not been raised, Mr MacAskill?

Kenny MacAskill: No. We are happy to provide the additional information requested. Some of the questions that the committee raised are correctly matters for the Crown and the police. There are procedural issues, but we are happy to provide the information.

On the broader issues, we look forward to reading the committee's report. On the areas that we mentioned, we are happy to take its advice.

The Convener: Thank you for that.

Before the cabinet secretary departs and as this is the last public agenda item with which the committee will deal in a fairly exciting year, it is appropriate to wish the compliments of the season to all those who have serviced the committee so well over the past year and those who have given evidence before the committee. We are grateful indeed.

The meeting will now move into private for the remaining agenda items.

11:17

Meeting continued in private until 13:23.

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