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Official Report

JUSTICE COMMITTEE

Tuesday 8 February 2011

Session 3

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JUSTICE COMMITTEE
5th Meeting 2011, 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 ALSO ATTENDED:

Rhoda Grant (Highlands and Islands) (Lab)

THE FOLLOWING GAVE EVIDENCE:

Fergus Ewing (Minister for Community Safety)
Catherine Reilly (Brodies LLP)
Simon Stockwell (Scottish Government Directorate for Justice)
Dale Strachan (Brodies LLP)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 8 February 2011

[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 that mobile phones should be switched off. There is a full turnout of committee members, thus there are no apologies.

The first item is a decision on taking business in private. The committee is invited to decide whether to take in private item 6, and whether to take in private at future meetings consideration of a draft report on the affirmative instrument that is being considered later in the meeting and consideration of a draft stage 1 report on the Long Leases (Scotland) Bill. Is that agreed?

Members *indicated agreement.*

Long Leases (Scotland) Bill: Stage 1

10:04

The Convener: The principal business of the morning is the final day of evidence taking on the Long Leases (Scotland) Bill.

I welcome the first panel of witnesses, who are from Brodies LLP solicitors. Dale Strachan is a partner and Catherine Reilly is a solicitor. We are very appreciative of the fact that you have come to the committee this morning. On the basis of your written evidence, our questions will relate to commercial leases. Bill Butler will ask the first question.

Bill Butler (Glasgow Anniesland) (Lab): Good morning to the panel.

In your written submission to the committee, you express concern that the exemption in section 1(4)(a) of the bill, which relates to annual rent, does not take account of situations in which the rent under the ultra-long lease is variable and calculated by reference to, for example, the income generated from the leased property. However, you will be aware that Professor Gretton and the Law Society of Scotland suggested that the compensation provisions in the bill and the tenant's ability to opt out of conversion adequately protect the position of the parties concerned. Can you further explain why you disagree with Professor Gretton and the Law Society of Scotland on that point? Does Mr Strachan want to start?

Dale Strachan (Brodies LLP): I am happy to do so.

I am a commercial property lawyer. The bill has ambitions to scope matters relating to residential leases and other forms of lease other than commercial property leases. I will confine my comments to commercial properties, if I may, as I have experience in that area.

The issues that are raised are extremely interesting, and it is intriguing to see how they have been approached. The background is that the structuring of investment leases was uncontrolled in all substantive respects until the restriction on lease terms that was introduced in 2000. Before then, the beauty of commercial leases in Scotland was that they were largely treated as contracts and were enforceable as such. Parties were therefore free to make such contractual arrangements as they chose.

Although this is about the law of property, it is truly also about the law of finance. The financing of new structures that have substantially contributed to the reconstruction of the United

Kingdom in the past 50 years has involved the need for the certainty of returns and outcomes that financiers expect when they invest in property. I am really talking about larger-scale urban developments for which variable rentals come into play. There was, in effect, a clean sheet of paper to negotiate the deal that the parties wanted when the reconstruction of city centres with shopping centres and the like was being considered. Like any party, they all came with their own commercial requirements. Perhaps in the heyday of those structures, the local authorities tended to control the land in the city centre that was available for redevelopment, although private parties also did so, and they would have their own reasons for structuring a lease in the way that they wished. They may not have wished to receive full capital receipts in one year; they may have wished to spread the income receipts. I believe that that approach has implications for local authority financing, but taking it was open to them through the leasehold mechanism. The leasehold mechanism in Scotland is delightful because it is so flexible. Unlike some of its counterparts elsewhere in the UK, it is a very flexible vehicle for structuring deals.

No two deals are the same, which may be frustrating. Two straightforward sales are very much like each other, but two leases are rarely like each other. I have experience of many different structures for long leases, and will give an example of the sort that members are addressing. Leases in which the rental receipts from occupational tenants are shared through a hierarchy of leasing structures are not at all uncommon. There may be only one head lease or there may be more, and financing leases may be interposed. They have been normal, and they exist in a number of places. I have not carried out any form of audit of all the leases in Scotland, but others may have done, in so far as that is possible.

Bill Butler: We are grateful to you for taking us through the delights, as you put it, of the leasehold mechanism in Scotland. However, could you perhaps address the point that I am trying to get to? What is your problem with the exemption in section 1(4)(a), and why do you think that Professor Gretton and the Law Society of Scotland are wrong about it?

Dale Strachan: Through the mechanism as drafted, limits have been chosen for reasons that have been explained. The variable element of the lease can often be the substantive receipt to the landlord. Scots law requires only that there is a fixed payment of rent certain, in addition to any other mechanisms that you choose. That could be £1 a year, and it frequently is. The rental sharing mechanism often has regard to the very substantial receipts that derive from the occupational subtenants.

The proposed mechanism for compensation is unfortunate in a number of respects. First, the bill is structured in such a way that the interest of the party who is affected, who holds the landlord's interest in a qualifying lease, is to be unwound at a time not of his choosing. It is an inherent feature of property investment—perhaps shorn of the requirements of those who finance it—that parties are free to realise their investments at a time of their choosing. It would be odd to choose to realise an investment in a market that has experienced a sustained downturn.

The bill deals with valuation of the fixed rental element very differently from the way in which it deals with the valuation of the variable element. The fixed rental element is quite easily dealt with, and the bill deals with the matter at length. You will be familiar with that, so I will not rehearse the point, other than to say that the provisions seek to mimic the redress for feu duty redemption. They establish a capital payment according to terms that other witnesses have referred to as "generous", and I would agree with that. The price of 2.5 per cent consols—consolidated stock—is such that it is probably a better return than most landlords could possibly hope for at the moment. That is confined, however, to the fixed rental, which in my experience can be very small.

The assessment of the compensation for the additional payment—for the variable element—is dealt with very differently under the bill. It essentially leaves the parties to agree a compensation figure—which is perhaps unlikely—or it allows them to remit to the Lands Tribunal for Scotland, but without any guidance, as far as I can find, as to how the tribunal might assess the compensation figure.

The bill goes on to allow the tenant—but not the landlord—to opt out of the scheme if he does not like the answer. I regard that as questionable in the interests of encouraging future investment.

Bill Butler: If I understand you correctly, you are saying that the provisions in the bill as introduced are inflexible, lack certainty and could be viewed as being unfair to the landlord. Is that correct?

Dale Strachan: It might discourage future investment in commercial property by serious investors.

Robert Brown (Glasgow) (LD): Let us develop some of that background. You have given an expostulation of the advantages of the commercial lease arrangement. I find it difficult to see that there can be much certainty in a transaction that has lasted 175 years—which goes back almost to

before the railway age. However, I will leave that to one side.

The Scottish Law Commission published its discussion paper on abolition of the feudal system as long ago as 20 years, in 1991. It could be argued that the eventual prohibition of ultra-long leases was implicitly imminent from that time on. However, commercial entities continued to grant ultra-long leases in the period after that. Can you give us any insight into why they did so? Where might the advantage of certainty be when it comes to such leases being granted from the postulation of the Law Commission's reforms to the point at which future ultra-long leases were abolished?

10:15

Dale Strachan: That probably owes something to the creative ability of lawyers to produce a commercial solution that achieves clients' objectives. It was not in any way an attempt to subvert the abolition of feudal tenure, which was inevitable. It is simply that parties are free to make commercial arrangements within the law and the arrangements that are now in contemplation seek to cut across that, even for some leases of recent vintage.

Robert Brown: People might suggest that ultra-long leases are sometimes entered into for tax advantages, given the way in which they are structured. There is an argument that people who order their tax affairs in such a way do so in the full knowledge—if they are properly advised—that there is a risk of changes to the set-up in the future. Why should the legislature subsequently make special provision to mitigate any problems that might arise from that?

Dale Strachan: In truth, I cannot think of strong reasons why that would be a driver, other than that investors look for certainty in their long-term investments. We mentioned tax structuring in our submission, which is why we deserve this questioning, but I would not major on that issue.

Robert Brown: Accepting the argument that there may be technical issues with the compensation arrangements, would you, in an ideal world, prefer the existing ultra-long leases to continue without the intervention of statute in the form of the bill?

Dale Strachan: It is my submission that parties who made commercial arrangements in a free environment should not have them unwound against their will. Parliament has made clear its intentions for the future by restricting the length of leases permitted after 9 June 2000. That will be adhered to. Leases were put in place before then for good reasons and often after extensive negotiations with the benefit of commercial advice and knowledge of the law as it then was. Retrospective legislation such as the bill is potentially a disincentive to investment. That is my concern.

James Kelly (Glasgow Rutherglen) (Lab): The City of Edinburgh Council, supported by Glasgow City Council, pointed out in evidence to the committee that leases in which a large grassum is paid with a low or peppercorn rent are unfairly caught by the bill's provisions on conversion. The alternative position that the Law Society and the Scottish Law Agents Society advanced to us is that such leases are precisely what the bill is designed to capture, because someone who makes a big payment up front has an interest akin to ownership. What is your view on those two positions?

Dale Strachan: There is a distinction to be made between situations in which the vendor was a local authority and, possibly, subject to common good restraint and those in which the vendor is a commercial party. If the vendor is a commercial party, receives full value and chooses to receive a peppercorn rent in exchange for a long period, I have every sympathy with the bill's intent, which will be applied to good effect.

In the case of local authorities, until the law of common good is clarified, some allowance should be made for the difficulties in which local authorities found—and still find—themselves in relation to the structuring of long-term commercial investments. There are many examples of structures lasting for hundreds of years in which local authorities have made limited disposals. They may be entitled to think that their city-centre land may yet have some future use for future generations.

Dave Thompson (Highlands and Islands) (SNP): Good morning to you both.

Professor Rennie said in oral evidence to the committee that it would be "crazy" to set the rent exemption level as low as £100, and that the alternative might be to set a formula for the rent that refers to a percentage of the capital value of the property. Do you have any views or thoughts on that?

Dale Strachan: That is extremely difficult. I am not a property valuer, but I fully accept that if the intent is—as I understand it from the policy memorandum—not to capture within qualifying leases those that are granted on commercial terms, a view must be taken on where the level is set.

Ample research has been carried out on the Scottish Government's behalf on the range of those rental levels. In my experience, rental levels either lie at the minimal range of £1 or £5 per annum, or go into hundreds of thousands or millions of pounds in turnover rents. There is really

not much to be gained by considering whether £100 or £500 is the relevant level, as the levels are relatively polarised. However, I do not have an issue with a level being set, provided that the variable rent element is taken into account.

Dave Thompson: Thank you for that. We heard from Professor Gretton, who does not support the exemption in principle, that an alternative approach might be to extend the qualifying duration to 225 years rather than 175 years. Would that option find any favour with you?

Dale Strachan: I am glad that you asked me that; I read Professor Gretton's evidence with interest. The history of property development in Scotland is an interesting pointer in that regard. As I said, many town centres were redeveloped from the 1960s onwards, through the 1970s, 1980s and 1990s. When we reached the current century, the 175-year lease restriction was put in place.

There is policy consistency and strong merit in seeking to raise the bar. If I was asked for my opinion on where the qualifying period should lie, I would suggest that a 225-year period would preserve the commercial elements.

If an earliest cut-off point of some date in 1950, say, was applied to the 225-year lease term and the lease was required to have at least 175 years to run as at 9 June 2000, I can see that there would be a strong policy element in terms of dealing with the issue in a way that is consistent and addresses the structural concerns with regard to 999-year leases and the remainder, which were sometimes, but rarely, on commercial terms.

I have experience of a one million-year lease for part of a building in Paisley: that is Victorian conveyancers' optimism at its very best. I have no issue with the conversion of ultra-long leases, but there was no restriction on a one million-year lease.

I would favour a 225-year initial term as a cut-off point, with at least 175 years to run on the date when that became the maximum lease length.

Dave Thompson: Would you be concerned that moving to 225 years as opposed to 175 years would lead to a lack of consistency with the requirements in the Abolition of Feudal Tenure etc (Scotland) Act 2000 and so on? That point has been put to us by a number of witnesses, and consistency was the argument that convinced them.

Dale Strachan: Consistency has its merits, but so does pragmatism. We are dealing with a period of about 50 years in which all the town centres in Scotland have been redeveloped, largely using other people's money. The pragmatic view is that we retrospectively unwind those arrangements at our peril, in the interests of future investment.

The Convener: Are there any other questions for Mr Strachan? I see that Nigel Don wants to come in.

Nigel Don (North East Scotland) (SNP): Good morning. Have you read the discussion in the *Official Report* on leases for underground pipelines and the like? I hope that you have followed that debate in your reading. Do you have any wisdom to bring to the discussion? It has been an interesting discussion over the past few weeks, but I am still not sure that we really know where the answer lies.

Catherine Reilly (Brodies LLP): One of the witnesses thought that they were not leased—is that right?

Nigel Don: Yes.

Catherine Reilly: Others said that they were. We are talking about the leases for the pipes and cables.

Nigel Don: The certainty is that there are pipes and cables down there; the uncertainty is whether leases exist.

Catherine Reilly: I know that there are leases because I have been involved in that kind of thing. In Scotland, in the law of servitudes, for there to be a benefited property you require to take your pipeline to a benefited property that you own, and that is not always the case. So, pipeline leases are taken. I took one to allow an oil company to bring a pipeline in from the North Sea. That was not an ultra-long lease, but it is an example of a lease being used for a pipeline. I am aware of such leases.

Nigel Don: Are you confident that such a lease is a meaningful, legal entity in Scots law?

Catherine Reilly: Yes, and I have taken an opinion on that from another academic. Because of the importance of bringing oil in from the North Sea, it is not something to be done lightly.

Nigel Don: I am grateful for your answer. You are the first person to have confirmed on the record that such leases are regarded as legal entities.

Dale Strachan: I agree.

The Convener: Is there anything that you would like to add, Mr Strachan?

Dale Strachan: No. I am grateful for having had the opportunity to address the committee.

The Convener: Ms Reilly?

Catherine Reilly: No. Not for now, thank you.

The Convener: It was important for us to have had you here for this session and to have received your written submission. It has been exceptionally

helpful that you have come to the committee to answer our questions, and we are most appreciative.

10:27

Meeting suspended.

10:28

On resuming—

The Convener: I welcome the final witnesses: Fergus Ewing MSP, the Minister for Community Safety, who will be with us for the bulk of the remainder of the morning to discuss various issues; and Simon Stockwell, the bill team manager, from the Scottish Government. We will take a short statement from Mr Ewing, after which we will move to questions.

The Minister for Community Safety (Fergus Ewing): Thank you, convener, and good morning to everyone. I will make a few introductory remarks on the background to and principles behind the bill. I promise that I will make it short.

The bill implements the recommendation of a report by the Scottish Law Commission to convert ultra-long leases to ownership. The Government estimates that there are around 9,000 ultra-long leases in Scotland. The statistical survey in appendix C of the report shows that many of those leases are for 999 years. The bill's key proposals include the conversion to ownership of ultra-long leases—in other words, those of more than 175 years with more than 100 years left to run; provision for compensation and additional payments to be paid to landlords; allowing some leasehold conditions to become real burdens in title deeds; allowing landlords to preserve sporting rights in relation to game and fishing; and allowing tenants to opt out of converting to ownership if they so wish.

10:30

I have sought to follow the evidence taken by the committee, which has not only comprehensively dealt with the bill's many intricacies, including issues to do with pipes and cables, leases let on commercial terms and the bill's impact on common good land, but considered the bill's overall purpose. This is the last piece of the Scottish Law Commission's work on property law reform, it is unfinished business and it is needed to modernise Scots property law. I was pleased to issue the Government's consultation on the bill last year and am pleased to be here this morning to give evidence and to answer members' questions.

The Convener: Thank you very much. Robert Brown will open with questions on common good.

Robert Brown: Common good has been a thorny issue, partly because it is, for good reason, very difficult to accept that the registers of common good assets are comprehensive. Indeed, in the course of its evidence taking, the committee has heard about bits and pieces of common good land that might be subject to ultra-long leases, including Waverley market, the common good status of which has been a matter of contention. Are you attracted to the suggestion that a number of witnesses have made of having an exemption for common good properties? Notwithstanding whatever situation they find themselves in, the councils also seem to think that it is a reasonable way of getting shot of the problem. What is the Scottish Government's position on the matter?

Fergus Ewing: I do not consider that an exemption should be made for common good. Let me expand and explain: the number of ultra-long leases of common good land is low. Based on the SLC's analysis, which is contained in the report and has been painstakingly carried out over a long period, we have estimated that there are around 9,000 ultra-long leases in Scotland. However, the number of such leases relating to common good will be less than 1 per cent of that total. The committee needs to bear that important point in mind.

Of course, that is not a reason for taking a particular course of action. I point out, though, that, as with all other ultra-long leases that will convert to ownership, the bill contains provision for compensatory and additional payments to be made in respect of ultra-long leases of land held in the common good. In other words, the rationale behind the bill is that long leases are convertible and that there is provision to ensure that, in relation to all long leases, whether or not relating to common good land, compensation will be payable to landlords. The formula for compensation is based on a certain purchase of consolidated stock and it is no accident that it mirrors the provision that existed under the feudal system. The point is that all properties should be treated the same unless there are very good reasons to create an exception and we should bear in mind that the bill contains clear compensation provisions in relation to rent and additional payments. Indeed, this morning, I took the opportunity to remind myself of some of those provisions. They are certainly not straightforward in their detail, but they exist for the very clear purpose that I hope I have explained.

Last week, Nigel Don raised the pertinent point that exempting common good land might well encourage litigation over whether the land being sold off by local authorities is indeed common good land. All of us as elected representatives know that this issue causes strong emotions. The committee has heard evidence on the issue from

Mr Wightman and others. We all know from our work in constituencies that local communities get exercised—rightly so—about the status of common good land. However, if there is doubt about what is common good land and we create an exemption in the bill so that common good land is treated differently, the first question that will arise in every sale by every local authority of every piece of land is whether it is common good land. That would open the door to litigation, although that in itself is not a bad thing. However, because there seems to be some dubiety about whether some property can or cannot be classified as common good land, we should at least weigh carefully Mr Don's point, which tends to support the case against exemption. Any litigation in that regard could lead to considerable public expenditure for local authorities at a time when local authorities all over the country are making their views known about the impact of funding pressures.

We should not make the suggested exemption lightly, if at all. For the primary reasons that I have given, I believe that we do not need to make such an exemption. I have a briefing on particular cases that have been mentioned by the committee, although I am not in a position to express a legal opinion about any of them. However, if members want to press me further on this, I can go into that aspect as well.

Robert Brown: Mr Ewing is perhaps overstating the case. Could he guide use by telling us how many of the 9,000 ultra-long leases are held by councils—let us forget about the common good aspect for the moment—so that we can have a measure of the significance of the matter?

Fergus Ewing: As far we can ascertain, there are three. I can give details: Aberdeenshire Council reported a 999-year lease in Stonehaven of recreation lands that may be held in the common good. The City of Edinburgh Council—

Robert Brown: With respect, I think that you have misunderstood. Forgetting common good for the moment, can you tell us how many ultra-long leases are in the hands of councils?

Fergus Ewing: I am sorry. Three is the number of ultra-long leases of common good land that we found in the survey. Simon Stockwell may be able to help you with the number of ultra-long leases that are granted by councils, or he may not.

Simon Stockwell (Scottish Government Directorate for Justice): I do not have specific information on that. We did a survey of the number of ultra-long leases of common good land let by local authorities. When we did that survey, local authorities also told us how many ultra-long leases they had. The answer seemed to be that they had relatively few. I think from memory that Fife Council said that it had three in total. However, we do not have specific information on how many ultra-long leases are held by local authorities. That was not in the SLC report, and we have not asked specifically for the information that Mr Brown has asked about.

Robert Brown: I asked for that information because the minister made great play of the fact that the proposed exemption would cause all sorts of confusion and cost if there were challenges to councils' dispositions of land. However, the land involved could only be, first, land held on an ultra-long lease and, secondly, land that might be common good land. If the number of such examples is only in single figures or perhaps in the scores at most, it does not seem to me that we are talking about a huge issue here. However, the problem is that we do not know how many examples there are, because of the indeterminate definition of common good and the lack of clear information about how many ultra-long leases councils hold.

Fergus Ewing: Simon Stockwell has just said that we do not have information as to the precise number of ultra-long leases granted by local authorities. However, I agree with Robert Brown that there are relatively few ultra-long leases of common good land—there are only three—and that this is not a huge issue compared with the other 9,000 leases that are the main topic of the bill. I am sure that the committee will be aware that councils have carried out a fair amount of work to compile records of common good land. In February 2010, the Auditor General for Scotland published findings on the progress that local authorities have made in compiling common good asset registers. If the committee wishes to pursue the matter further, it might be worth while having a fresh look at the findings that were made on the topic, which I recall followed a consideration of the common good issue in the previous session by the Local Government and Transport Committee, of which I was a member.

A fair amount of attention has been devoted to common good. In general, councils have taken reasonable steps to comply with the guidance, although some concern remains about whether some of the registers represent a complete record of common good assets. Those were the findings of Audit Scotland. Perhaps they would be worth considering in order to guide the committee in the approach that it wishes to take in the area.

Robert Brown: It is a difficult area. I accept that we do not want an exemption for no good reason but, nevertheless, even in the committee's own inquiries, apart from the dispute about the Waverley market—I do not think that we want to go into the details of individual cases—we came across representations about a property in Fife, it

has turned out that a property in Pollok park in Glasgow is held on an ultra-long lease within the common good fund and issues have been raised about the status of a number of other parks, in particular.

One aspect is the question of compensating people for losing the residual rights. That is fair enough as far as it goes, but does the common good not have an aspect of possible inalienability, or more difficult alienability, perhaps against the background of the importance of the pieces of ground that are held in the common good in city centres, town centres or public parks, where it is desirable to keep them in public ownership and control? Is that not an issue that lies behind the agitation from a number of sources about the potential for alienating, through the mechanism of the bill, common good land that is held by councils?

Fergus Ewing: That is a fair point, and it might apply to some of the few cases where there have been ultra-long leases of common good land. We are aware of the Glasgow and Fife cases, and possibly one involving the City of Edinburgh Council. However, if there is an argument that there is a sort of inalienability, perhaps because the land was intended for community benefit, such as use as a park, it may well be—this is something that could be further researched if the committee so chose—that the lease itself would contain conditions that would require the land to be used in perpetuity for that purpose. The lease might well impose conditions to which the tenant's use of the land is subject—in other words, that the land must be used as a park in perpetuity. I have not studied the leases in question, but one would expect to see such provisions where the purpose of the ultra-long lease was to ensure that a park was to remain as a park in perpetuity for the recreation of citizens of whichever part of Scotland it is located in. If that is the case, there are provisions in the bill to protect those conditions.

Nonetheless, it is a reasonable point. I think that we have reached agreement that it affects a very small number of properties—quite how many, we do not know. We are willing, with the committee, to make any further reasonable inquiries that might seem to be of use but, for the reasons that I have stated and on the information that we have available to us at present, our view is that it would not be sensible or necessary to proceed by way of general exemption.

Robert Brown: The minister's reply is helpful in that context, but does he accept that the big difficulty here is that there is a huge element of uncertainty—I use the word "huge" in the sense in which the minister has used it before—because the registers are not complete? Things have been emerging during the consideration of the bill, but we simply do not know—and the minister has not been able to tell us today—the number of ultra-long leases that are held by councils generally, or even how many might in theory be subject to all of this. Can he suggest any compelling reason why there should not be an exemption? Would that not be the safest way in which to proceed, given the importance of the subject and the emotion that is attached to it?

10:45

Fergus Ewing: I do not think so. I do not think that it would be fair to characterise the issue as being marked by huge uncertainty—

Robert Brown: I am sorry to interrupt but, with respect, you already said that the measure would cause chaos to councils because of the financial pressures. I based what I said on your earlier comments. You suggested that there was a significant problem. I think that we can perhaps agree that it is a modest problem, but is it not significant, given the uncertainty about this matter? Is it not easier to exclude common good properties? Is there a strong reason why that would cause disaster for the Government's programme?

Fergus Ewing: We have found only a small number of ultra-long leases of common good land. There is not a huge level of uncertainty as to the incidence and usage of such leases. There are barely any in Scotland. There is not a huge degree of uncertainty.

I said that there might be difficulties if, by passing legislation, we unwittingly encourage the growth of litigation. That would lead to difficulty and uncertainty, but that is not what we are proposing. That is what would happen if the committee were to accede to Mr Brown's suggestion that we exempt common good land; that would create uncertainty and difficulties.

To answer Mr Brown's question, the justification for not exempting common good land is that we are acting on general principle here. The bill is to complete the reform of the feudal system—a process to which the late Donald Dewar committed himself and to which most if not all of us here subscribed, by and large. This is the final piece in the abolition of the feudal system.

We do not want to go about creating exceptions willy-nilly, especially on grounds that, with respect, appear to me to be flimsy. In any event, the convertibility of long leases is the principle here, as the SLC report sets out eloquently. Ultra-long leases were granted because of a quirk of history and are tantamount to ownership. They are a form of pseudo-ownership and we are now allowing tenants under this form of tenure in Scotland, which arose by and large for certain historical

reasons, all of which are canvassed in paragraph 1.7 of the SLC report, to have the situation rectified. We think that that is an important principle. Finally, there is adequate and fair provision for compensation to landlords.

With respect, we do not feel that the case for an exemption has been made.

Robert Brown: I have one final question, which relates to the argument that there might be all sorts of cases of people challenging this sort of thing. I think that I am right in saying that we heard evidence that any citizen of the town or city concerned has the right, title and interest to sue where a common good issue is at stake. Against that background, is there not already the potential for people, if they are so minded, to raise actions for declarators to the status of certain land that is alleged to be common good land, regardless of whether any change is made in the bill?

Fergus Ewing: Are you talking about enforcement of real burdens in a common scheme of a ius quaesitum tertio nature?

Robert Brown: No. Where there is a question as to whether particular land is common good land, would it not be the case—we have heard evidence to this effect—that any citizen affected, perhaps because they live in the vicinity of the park in question, could bring the matter to court? They could say that because the land is claimed to be common good land, they have a potential interest in the matter. Therefore, there is no increased risk of litigation because of changes that might be made in the bill.

Fergus Ewing: There would be an increase in the risk of litigation, because we would be creating an exemption in property law that would be critical and would deal with common good land differently. I think that that would encourage litigation. As to the prospects or incidence of litigation by a member of the public who can argue that he has a right and an interest, by virtue of being a citizen of Nairn, to the Nairn common good fund, I cannot really comment, but I do not think that the bill will really affect that. We are talking about what Professor Gretton described as "a vanishingly small possibility" that a substantial number of properties will be affected.

The Convener: The issue still arises. As all of us know, there are people in every community who get a bee in their bonnet about certain issues. Glasgow is the most obvious example, because it is the biggest local authority. The number of people who are likely to make an issue of common good land in Glasgow is considerably greater than the number of those who are likely to do so in places such as Nairn or Aberchirder. That danger exists, does it not? Every one of the 760,000 people who live in Glasgow would have an interest and a title to pursue.

Fergus Ewing: Given that we have been alerted to the fact that there are some ultra-long leases of park land and that some of that may be common good land, it would be sensible to invite Glasgow City Council to provide us with its views on the matter. The door having been opened, the committee may feel that it is sensible to pursue the points that Mr Brown and others have made. If the committee wishes to do that, it is fine; I would not disagree with that approach. I give an undertaking to communicate with Glasgow City Council to seek its views on the matter, given that it has been pursued today, and to report back with the responses that we receive.

The Convener: I was merely citing Glasgow as an example. In fairness, it is probably the extreme example, because of its population, but the issues could apply just as readily, albeit on a much reduced scale, to any other local authority area.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): That leads on to a point that I wanted to make. You will see that there is uncertainty in this area. Our job as a committee is to try to be as certain as we can when we consider legislation. I am sure that you have looked at the evidence that we heard on the issue from Glasgow City Council, but I invite you to look at it in more detail. I understand that, towards the end of 2010, the Scottish Government wrote to all 32 local authorities on the issue and asked them to respond by 21 January. How many did so?

Simon Stockwell: I will need to write to the committee with the exact number, but it was about 21. We have not heard from all local authorities. As the minister mentioned, we found three leases as a result of the survey.

Cathie Craigie: I understand that local authorities are supposed to produce registers or to compile lists of all the properties concerned. Were those included in the responses, or was your question specifically about the detailed point concerning ultra-long leases?

Simon Stockwell: It was specifically about that detailed point. We asked authorities how many ultra-long leases of common good land they had granted. The answer that we received was three.

Dave Thompson: Cathie Craigie made the point that certainty is important. I would have thought that not having an exemption would give us greater certainty, because making an exemption for common good land would allow any citizen to challenge a case. If there is uncertainty and there are challenges, I imagine that some of those challenges could run on for many years and cause all sorts of problems and expense. Given that local authorities hold few long leases and few

of those relate to common good land, would it not be better not to have an exemption for common good land, as that would provide more certainty?

Fergus Ewing: Yes. I have made clear that we broadly support that argument. Notwithstanding that, in view of the questions that Robert Brown, Cathie Craigie and the convener have posed today, we will look at the issue carefully once again and come back to the committee if we have any further reflections. However, I hope that we have given a fair account of our view on an issue that I admit is not without its difficulties.

The Convener: We will now move on to perhaps less contentious issues. You have had the opportunity of listening to the evidence of Mr Strachan, of Brodies, and you have also had sight of the evidence that we have received in recent weeks.

Professors Gretton and Rennie dispute the policy need for an exemption from the scope of the bill of ultra-long leases where the annual rent is £100 or more. Why do you believe such an exemption is justified?

Fergus Ewing: The £100 cut-off is set out in section 1(4)(a). The exception was set out following comments that were made by the Scottish Rural Property and Business Association and the Law Society of Scotland that the bill could inadvertently cover leases let on modern commercial terms, which could not be said to amount to pseudo-ownership. We considered the issue carefully and took the view that the leases that were being described were not meant to be covered by the bill and should be exempted. We also considered whether the arrangement that was set out in the bill for the compensatory and additional payments would cover the points that were made by the SRPBA and the Law Society. On balance, we considered that those provisions would not adequately deal with those concerns.

In determining the figure of £100, we considered the information in paragraph 17 of appendix A of the Scottish Law Commission report, which says, with regard to leases of more than 175 years:

"Only 26 leases (1.52% of the sample) have a rent of more than £50, and of those a mere 7 have a rent of much more than £100".

Clearly, that is useful factual information that shows that, of the approximately 9,000 long leases to which the bill applies, a mere seven have a rent of much more than £100.

We and the Justice Committee would want to consider evidence from all sources. We have considered the evidence that Brodies provided on—I think—12 January, but we have not yet had an opportunity to consider the evidence that Brodies provided this morning, although we will do so very carefully indeed, just as we will consider other evidence as well. However, I hope that that gives a clear indication of why £100 was fixed as a cut-off point. Some people have criticised that from one direction and others have criticised it from another direction.

The Convener: To some extent, we are talking about the matter in a vacuum, as we do not have the numbers on which we could make a reasoned judgment. The estimate that only seven leases would be affected suggests that the issue is not of great importance, but we cannot be totally satisfied that that is the correct figure. That causes some concern because Professor Rennie stated that it was "crazy" to set the rent level as low as £100, particularly if the intention is to exclude commercial leases, and that a preferable approach would be to use a formula based on a percentage of the capital value—I refer you to columns 4107 and 4108 of the *Official Report* of last week's meeting for further details. Do you think that that criticism is valid? I suspect that you do not but, if you were to accept it, do you think that Professor Rennie's approach might be preferable?

11:00

Fergus Ewing: We selected the cut-off point of £100 on the basis of evidence that was carefully researched by the SLC and which I think is fairly clear cut. The SLC has examined all the leases and has gone through all the registers in order to arrive at a figure of how many leases there are. All of that is set out clearly in its report. It has produced a very useful and solid piece of research on which to found the bill and its principles.

There are approximately 9,000 long leases, a mere seven of which involve a rent of more than £100. We are proceeding on the basis of the information that we had when the bill was produced. Of course, logically, we must consider all the information that has been obtained subsequently, and we will do so extremely carefully, especially when it has been provided, pro bono, by witnesses from commercial businesses that work in such areas who have given of their time freely to come here. I notice that Brodies said that long leases would have been entered into for various reasons, including tax reasons to do with capital allowances and stamp duty. It would be rash for us to ignore such matters, so we will consider them fully.

It might help the committee to know that we considered an alternative approach to the £100 provision—we considered having a cut-off date, rather than a cut-off amount of rent, whereby long leases that were granted before a particular date would be convertible and those that were granted after it would not. That must be considered in relation to the fact that, as I understand it, the

feudal reforms prevent the creation of a new lease that is in excess of 175 years. My recollection is that, when that provision was proposed, the original period was 125 years but that, after some debate such as we have had this morning, it was increased to 175 years. I think that it was Mr Thompson who suggested that there should be verisimilitude between the bill and the Abolition of Feudal Tenure etc (Scotland) Act 2000 and that we should stick with a period of 175 years. We agree with that.

However, we rejected the idea of having a cut-off date because it would have been arbitrary and, as such, would have carried particular risks, not least under the European convention on human rights, under which any arbitrary measure that affects property rights could be struck off. We rejected having a cut-off date because it would have been arbitrary and could have excluded leases that were not let on commercial terms.

I hope that that illustrates the fact that we considered an alternative approach. We struck on the figure of £100, which we think is right for the reasons that I have outlined but, given the evidence that has been received on the issue—I noted Professor Rennie's comments in column 4107 of the *Official Report* of last week's meeting—we will consider the matter very carefully indeed.

The Convener: Did you consider Professor Gretton's suggestion—which there is certainly evidence to support—that it might be advantageous to increase the period from 175 years to 225 years?

Fergus Ewing: We considered the length of the lease, as I have outlined. I should say, for the sake of completeness, that the recommendation was that convertibility should apply not simply to leases of more than 175 years, but to leases of more than 175 years that have more than 100 years left to run. That is very important because it was felt that where there was less than 100 years of a lease left to run, the landlord would have a recognisable property interest. That was the broad rationale of the SLC's proposal, as I understand it.

The SLC outlined the arguments in paragraphs 2.13 to 2.15 of its report. It noted that a period of 175 years would be consistent with the 2000 act. Professor Rennie is on our side in that regard, as he said that he would

"stick with 175 years, for reasons of consistency."—[*Official Report, Justice Committee*, 1 February 2011; c 4101.]

I am advised that similar points were made by the Law Society of Scotland, the Scottish Law Agents Society and the Faculty of Advocates in their evidence on 25 January, which can be found in columns 4060 and 4061 of the relevant *Official Report*. We agree with those arguments and believe that the period should remain at 175 years.

The Convener: Cathie Craigie will finish off the questioning in this area, but before she does, I draw your attention to the fact that although the SLC looked at entries in the land register for its study, it did so for only four out of the 33 land registration counties. One hopes that its findings were typical of the whole of Scotland, but when a study is fairly limited, the figures can sometimes be skewed. That underlines the concern that I expressed earlier.

Cathie Craigie: I do not know whether my committee colleagues are interested in this—I certainly am. The minister said that there are roughly 9,000 ultra-long leases. Does the Scottish Government know how many people own the leases? How many owners or landlords are we talking about?

Simon Stockwell: We know that many of the ultra-long leases were originally granted by landed estates and we have some information about who the landlords are in Blairgowrie, because we made inquiries as a result of issues to do with renewable leases that arose there: the committee has discussed the matter. However, we do not have specific information on who the landlords are in the ultra-long leases. That is partly because, although leases might have been granted by the landed estates in the first instance, the landlord interest might have been sold on over the years, given the period that might have elapsed since the leases were first let.

We have not asked Registers of Scotland to produce a complete run of the ultra-long leases that it has in the general register of sasines and the land register, simply because to go through the registers would require a great deal of work and time. The short answer to your question is that we do not have precise information.

Cathie Craigie: Can you check with Registers of Scotland, to find out the cost in time and financial resources of doing the work?

Simon Stockwell: I know the answer to the question, because I have asked it. What we are talking about is a significant piece of work, mainly because Registers of Scotland would have to look at the register of sasines, which is an older register and is not plan based. Going through the whole register would be quite a job. Registers of Scotland has done work for us in relation to limited examples, but to do it for the whole lot would be a significant task.

Cathie Craigie: When Registers of Scotland did the work on limited examples, what did it learn about how many owners there are as a percentage of the number of leases and about who the owners are? How did that pan out?

Simon Stockwell: We know that ultra-long leases tend to be found in pockets of the country. They tended to be granted in specific parts of the country, perhaps because the landed estates were granting them at the time, for some reason.

Cathie Craigie: We have 9,000 ultra-long leases and I am trying to get an idea of how many owners of leases we are talking about. Are we talking about 10 people or 1,000 people?

Simon Stockwell: It is certainly more than 10—

Cathie Craigie: Is it fewer than 1,000?

Simon Stockwell: If you asked me to guess, I would say that 1,000 might not be a bad guess, but I would need to check the information that I have, because I do not have it to give off the top of my head and I have not asked how many landlords are out there. Martin Corbett of Registers of Scotland is probably shouting at me if he thinks that I am going to ask him to try to find out. However, I can ask the question and see what response I get.

The Convener: An awful lot of leases will be concentrated in comparatively limited areas. Is there a danger of getting a skewed result?

Simon Stockwell: Yes, there is. We know that ultra-long leases exist in specific parts of the country, so certain areas will produce significant results and others might not do so.

The Convener: We will move on. James Kelly will ask about finance.

James Kelly: Am I right in saying that the figure of 9,000 ultra-long leases is an estimate that is based on an extrapolation from the Government's survey?

Simon Stockwell: Yes.

James Kelly: I wanted to be clear about that.

The minister said that he wants to consider the evidence from Brodies, which has expressed concern that the rent exemption is not wide enough. It feels that variable rents, which might be based on income that is generated from leased property, will not be captured by the exemption. Do you have an initial view on that?

Fergus Ewing: Yes. We considered that when we were framing the exemption. It is necessary to look at the provisions on compensation in relation to rental, and to additional payments. Section 49(1)(c) allows a claim for additional payment to be made in respect of

"any right to a rent to the extent that the amount payable is variable from year to year".

That provision was not in the SLC's draft bill—we added it after our consultation.

I take the point that the bill could convert leases that are let on commercial terms where the rent is variable, although as we have just discussed, £100 is a very low threshold and is not really a commercial rent. The Government might need to reflect further on the issue, taking account of the evidence that the committee has received and its stage 1 report.

James Kelly: If you were listening to the evidence earlier, I am sure that you would have heard the discussion about the point that Glasgow City Council and the City of Edinburgh Council have made about substantial grassums being paid up front with peppercorn rents of perhaps less than £100. The councils feel that the bill should not apply to such contracts. The alternative view that has been put to us by the Law Society of Scotland and the Scottish Law Agents Society is that, when a large payment has been made up front, a type of ownership has, in a sense, been taken on and therefore it is correct that such leases should be captured by the bill. Do you have any comments on those views?

Fergus Ewing: I am no expert in that area, but I am aware that in some lease transactions a grassum is paid—a grassum being a price that is paid at the outset. My understanding is that, in such cases, the grassum is the main element of the consideration that is received by the landlord. Indeed, it might be argued that the grassum is equivalent to the price that would be paid for the property were it being purchased, especially if the rent is a peppercorn rent of £1 a year or something like that. If the annual rent is modest and the lease is for more than 175 years and with 100 years left to run, there are good arguments for conversion to full ownership in the normal way with, of course, appropriate compensation and additional payments. However, I think that Mr Kelly's point—if I understood him correctly, I agree with it—is that, in those cases, payment has, in effect, been made already at the outset of the transaction and the landlord has received payment by way of a grassum of a sum that is broadly equivalent to the price that he would have received had there been a sale transaction. In those circumstances, full consideration may well have been received. If the rent were, say, £1 a year, the compensation will plainly be nugatory.

Cathie Craigie: On that point, a local council that has entered into such an arrangement with a payment up front that was probably the market value might want a lease so that it can keep the property on behalf of the community. It might be in an important part of a city or of the local authority area. Is that a way of allowing councils to keep that public interest?

Fergus Ewing: My answer to that is the argument that I raised earlier: the bill provides not

only for leases to be converted, but for title conditions to be preserved. If title conditions are granted to protect an element of public interest, there is provision for those title conditions to be preserved and, therefore, for the public interest to be preserved.

11:15

The Convener: That issue can be considered.

Nigel Don: Good morning, minister. I am sure that you are aware of the discussions that we have had over the weeks on the vexed subject of leases for underground pipes and cables. The principle was questioned by Professor Gretton, I believe—

The Convener: I think that it was Professor Rennie.

Nigel Don: Let us not worry about the source.

The question is whether such leases are even leases and whether under the bill something that is not yet recognised under Scots law will actually be recognised as a lease. Clearly that has been countered by what the witnesses from Brodies had to say this morning. Could you, too, address the point?

Fergus Ewing: I must confess that it has been some time since I read Professor Gretton's evidence of 18 January. He said:

"What bothers me is that the bill states that there is an exception for a type of lease that the law of Scotland does not recognise."—[*Official Report*, *Justice Committee*, 18 January 2011; c 4034.]

Nigel Don: That is where I am starting from.

Fergus Ewing: That seemed to be the point that we needed to study—and study it we will. We introduced the exemption following representations that were made by the SRPBA and the Law Society of Scotland. At that time the SRPBA said that it was aware of leases for pipes and cables that were exactly 175 years long and which would not, as a result, convert under the bill because the leases in question have to be of more than 175 years. However, the SRPBA said that there could be leases of more than 175 years and the Law Society pointed out that until section 77 of the Title Conditions (Scotland) Act 2003 came into force there was some legal doubt about the use of servitudes in respect of pipes and cables. We started off from that statement.

Plainly there is a reason in principle to ensure that the bill does not affect the property rights, whatever they are, that have been granted for leases on pipes and cables. It is not our policy intention to disturb those matters and it is important that we do not do so, for obvious reasons. I believe that there is a common interest in doing more work in this area to ensure that, in the first instance, we get more information on the agreements that have been let in practice. If you will forgive the pun that was made by one of my officials—not, I add, the one who is with me today—we will need to dig further into this.

Nigel Don: I think that we need to cast some light where there is currently darkness. There are plenty of opportunities to do so today.

Do you have any comments on the suggestion that has also been put to us that section 1(4)(b) should also explicitly cover installation as well as access?

Fergus Ewing: We can consider that.

Nigel Don: With regard to non-exclusive rights of access to private roads, it was also put to the committee that it seems unreasonable that a leaseholder would suddenly become the owner of the property in question. Another problem that could arise with the provision, and which I do not believe was raised, would be in cases in which two mutual non-exclusive rights of access to a private road were held by a third party.

Fergus Ewing: We have looked at that issue. It was raised by the SRPBA, which cited in particular the example of part of an estate being sold off with an access road being leased to ensure that both the estate owner and the owner of the part that had been sold could use the estate road. Such practical arrangements have probably been made in most estates in Scotland. However, it is not clear whether they are likely to be covered in the bill, under which leases have to be, or must be capable of being, registered. It is possible that there are such leases, although, as I have said, my view is that such arrangements are unlikely to come under the bill. In any event, my officials will explore the issue further with the SRPBA.

Bill Butler: Section 7 of the bill addresses the preservation of sporting rights. As you will be aware, Professor Paisley has argued that it is not advisable in policy terms to preserve sporting rights as a "separate tenement" because that would deprive landowners of a material aspect of the right to develop the land without compensation, which may in turn raise ECHR issues. To what extent do you see merit in Professor Paisley's arguments?

Fergus Ewing: I have not studied the particular arguments that Professor Paisley has advanced, but it is plain that section 7 of the bill allows a landlord to preserve rights to game and fishing. We have received advice that those rights are preserved as a separate tenement in land—in other words, they can be owned separately from the physical land to which they relate. We followed the approach that the SLC recommended in its report.

Bill Butler: So you believe that no unintended consequences will arise from section 7, and that the bill is rational and coherent in that respect.

Fergus Ewing: We believe that the bill is consistent with legislation that was passed by previous Administrations to abolish feudal tenure: exactly the same approach has been taken. We are not aware of any significant problems in that area, which has arisen from the Abolition of Feudal Tenure etc (Scotland) Act 2000, and we would not expect many cases to come up.

The SLC's report notes at footnote 22, which relates to paragraph 5.13, that 65 notices to preserve sporting rights were registered under the 2000 act. I can pass that information on to you, although we expect far fewer cases to arise in relation to ultra-long leases.

Stewart Maxwell (West of Scotland) (SNP): Good morning, minister. On the conversion scheme for leasehold conditions in the bill, the SLC, as you will be aware, recommended that conditions contained in qualifying ultra-long leases that are comparable to real burdens that are found in conveyances transferring ownership should be subject to a conversion scheme of their own—from leasehold conditions to real burdens—in the bill. The Scottish Government has followed those recommendations in part 2 of the bill.

The conversion scheme for leasehold conditions in the bill mirrors the scheme in the 2000 act and the 2003 act in respect of real burdens that were formerly enforceable by feudal superiors. It has been argued that, in contrast to the position of real burdens that are contained in conveyances, it has never been clear that implied enforcement rights can be created in favour of parties other than the landlord in respect of leasehold conditions that are imposed under a common scheme.

It is a complex area, but given the arguably different starting points of the two pieces of legislation, how appropriate is it to replicate section 53 of the 2003 act in section 31 of the current bill?

Fergus Ewing: Our approach in adopting section 53 of the 2003 act follows the SLC's recommendation at paragraph 4.52 of its report, in which it noted that it was following the regime that was laid down in section 53. In response to the first part of your question, we are acting on the clear recommendation of the SLC, having looked at its consideration of the matter in its report.

What did section 53 of the 2003 act do, and can it be criticised? I am advised that, in effect, it has meant that more people have implied enforcement rights in respect of real burdens. There has been some criticism of that, but the SLC felt—I agree—that if we did other than follow the regime that has already been set by the 2003 act in relation to properties that are held under feudal tenure—that is, owned and bought properties—and instead applied a different regime to leases that would be converted under the current bill, we would create an approach that the SLC described as "anomalous and potentially confusing".

Stewart Maxwell: So, do you think that section 31 of the bill effectively clears up—I suppose that that is one way of putting it—the arguable position that the two different starting points of the two different bits of legislation end up at section 31? Is that the best way of dealing with the issue?

Fergus Ewing: We thought that it was. I understand that the criticism that has been made of section 53 of the 2003 act is that enforcement rights might be given to too many people. In the past, of course, the feudal superior and the landlord could enforce title conditions, but modern society recognises that, with a tenemental flat, every owner or tenant has an interest in ensuring that the building is properly maintained, and that those rights should extend beyond the feudal superior and the landlord. Modern mores and times require the recognition that a greater variety of people may have an interest in enforcing rights than we might have opined had we been sitting here 150 years ago, for example. I heartily subscribe to that progress.

Simon Stockwell: Section 53 of the 2003 act was quite controversial when it went through, but, somewhat to my surprise, we have not had much correspondence about the existing section. I think that the general tenor of the evidence that the committee has received so far is that there were concerns about the section, but that it is not as bad as critics suggested it might be. That is certainly reflected in our correspondence. We get a lot of correspondence about property law issues, but not on that section.

Fergus Ewing: I think that that is the case from the evidence that Kenneth Swinton of the Scottish Law Agents Society gave. He said:

"there is no evidence from case law"—

I presume since 2003—that the section has had

"adverse consequences, so perhaps the case for repealing it is not that strong. In any event, from a policy perspective, it is rather more important that there is a consistent scheme between the conversion of ultra-long leases and the conversion of titles from the feudal system."—[*Official Report, Justice Committee*, 25 January 2011; c 4060.]

Therefore, there is evidence from the profession—the Scottish Law Agents Society represents a large number of practitioners who are involved in conveyancing on a daily basis—that the section has proved to be not as problematic as it was perhaps thought in 2003 it would be.

Stewart Maxwell: That is helpful. Thank you.

The Convener: We turn to residential ground leases.

Cathie Craigie: The Law Society has expressed concern about residential ground leases, which do not qualify as ultra-long leases under the main conversion scheme in the bill, and which could thereby become targets for title raiders. What reassurance can the minister give the committee on that matter?

Fergus Ewing: We took the view that the bill should not cover residential ground leases of less than 175 years. Ground leases are, of course, leases of ground, not the buildings on top of the ground. That differentiates them in principle from what we have been talking about. The SLC considered that matter in part 9 of its report, but it was not included in the bill. In paragraph 9.26 of its report, it estimated that

"the number of residential ground leases still in existence is less than 1000".

We considered the matter in paragraphs 2.24 to 2.33 of our consultation paper and said that

"it seems preferable not to introduce legislation in this area and instead rely on negotiations between the tenant and the landlord".

Our view remains that the bill is not the best way of dealing with the matter. In particular, as the SLC's report noted, there is a lack of information in the area. If legislation is needed—we are not convinced that it is—we believe that it should be separate legislation.

Cathie Craigie: The Law Society considers that

"some form of mechanism should be put in place whereby on a discretionary basis outright ownership could be granted to a tenant under such leases in return for suitable compensation for the landlord."

Will that be considered?

11:30

Fergus Ewing: I will study the Law Society's views on the matter. I have not read that part of its submission. If there is a proposal involving an element of discretion, that rather sounds like a voluntary proposal. The bill sets out a procedure that would be compulsory. If tenants decide that they wish to convert their long leases, they will be entitled to do so by virtue of the bill.

As I said a moment ago, it might be better to

"rely on negotiations between the tenant and the landlord",

than it would be to introduce new legislation. If the Law Society is suggesting that there should be a procedure involving an element of discretion, it sounds to me as if it is suggesting that negotiations should take place in such cases, and that it would be optional whether or not a transaction were concluded.

Nigel Don: I wish to address the specific issues around Peterhead Port Authority, of which I think the minister will be aware. It made a submission suggesting that it would have a particular problem with one of its piers. Last week, Professor Rennie questioned whether that would be the case, although he admitted that he had not seen the lease. I have not seen the lease—I do not think that the committee would be qualified to comment on it, in fact. Are you aware of that lease's particulars? You will have seen the correspondence about it. Do you believe that we should, in principle, be prepared to make exceptions if necessary?

Fergus Ewing: I am aware that a written submission has been received from Mackinnons Solicitors, on behalf of Peterhead Port Authority, dated 14 January 2011. It has been considered by my officials.

A 999-year lease is clearly akin to ownership, and it is the type of lease that we would expect the bill to cover. The main issue in this instance seems to be whether the lease conditions can convert to real burdens. As I have stated, the bill contains comprehensive provisions on the conversion of conditions to real burdens. For example, section 29 contains provisions on the conversion of conditions to facility or service burdens.

On the face of it, I am not persuaded of the need for an exemption. However, because of the importance of the matter to Peterhead Port Authority, I have asked my officials to write to the authority to obtain more details about its concerns. I will share the outcome of that process with the committee.

Bill Butler: I come now to a matter concerning delegated powers in section 78. You will be aware that the Faculty of Advocates has expressed concern about the significant delegated powers for Scottish ministers in the bill, in particular regarding what the faculty views as the potentially far-reaching nature of section 78. The faculty goes so far as to describe that section's proposed power as

"an extreme example of legislation by statutory instrument."

Will you respond to the points that the Faculty of Advocates raises? Does the faculty have a point, or is it missing the point?

Fergus Ewing: I hesitate to make a judgment about the Faculty of Advocates in such a direct manner as Mr Butler puts it in his invitation. The provisions of sections 78 and 79 appear to me to be of a fairly formal type, which we routinely see in legislation. Having been a minister for four years, I can assure you that there is no Machiavellian purpose to the inclusion of the provisions. Rather, the purpose of such provisions, which have

probably been developed over centuries, is to allow future Governments to correct mistakes that have been made by their predecessors. I have noticed as time goes on that provisions of that sort do not seem to be becoming absent from bills. Nonetheless, I will carefully study the particular points that the Faculty of Advocates makes, and I will revert to the committee in due course on that.

Bill Butler: I am obliged, minister.

The Convener: There are no further questions. I thank the minister and Mr Stockwell for their attendance this morning. There are a number of unanswered questions—more than I would have preferred—so it would be appreciated if we could have the information as quickly as possible.

11:34

Meeting suspended.

11:44

On resuming—

Domestic Abuse (Scotland) Bill: Stage 2

The Convener: Under agenda item 3, we have the only planned day of stage 2 proceedings on the Domestic Abuse (Scotland) Bill. There are 22 amendments—including, unusually, some amendments to amendments—and for the purpose of debate they have been organised into five groups.

I welcome Rhoda Grant MSP and her adviser, and also the Minister for Community Safety and his officials. The advisers who accompany Mr Ewing and Ms Grant have no locus to speak during the meeting, but their attendance is welcome. We do not expect any other MSPs to attend. Members should have their copies of the bill, the marshalled list, and the groupings of amendments for consideration.

Section 1—Amendment of the Protection from Harassment Act 1997

The Convener: Section 1 is on non-harassment orders in cases of domestic abuse. Amendment 1, in the name of Rhoda Grant, is grouped with amendments 2, 3 and 8.

Rhoda Grant (Highlands and Islands) (Lab): I want to put on record my thanks to the minister and his team for their assistance in drafting many of the amendments and for their help with technical issues. We have reached consensus on many issues. Where we have not done so, at least we have shared aims and can put forward alternatives to the committee for consideration.

Amendments 1 and 2 are technical amendments to tidy up the language in the bill. Amendment 1 amends the definition of conduct by removing the reference to “in a specified” place to make it clear that a person’s presence in a certain place may be conduct that amounts to harassment. Amendment 2 tidies up the language by making a change from “pursued” to “engaged in”.

Amendments 3 and 8 relate to the definition of domestic abuse. After taking further evidence, it became clear that the majority wished us to remove the definition of domestic abuse from the bill. Those who responded were clear that the legal process already used the ordinary meaning of domestic abuse without problem. We consulted the minister’s department, as well as the Lord Advocate and the Crown Office and Procurator Fiscal Service. It became clear that the issues surrounding the definition were complex. For section 1, the issue is quite straightforward: a non-harassment order has the same consequence when granted regardless of the route that has been taken to obtain it; the bill changes the route,

not the outcome. By not defining domestic abuse, we leave it to sheriffs to use their judgment on whether the case in point is, or is not, domestic abuse. However, the definition has implications for section 3, which we have sought to remedy by amendment; I will speak to those amendments when we reach consideration of section 3.

Amendment 8 deletes the definition of domestic abuse in section 4. Amendment 3 is a consequential amendment on amendment 8, to remove the reference to the definition in section 1.

I move amendment 1.

James Kelly: I indicate my support for all the amendments that Rhoda Grant has lodged in the group. As she outlined, she has taken account of the stage 1 evidence and debate. She has also had discussions with the minister's department and the Lord Advocate and has taken on board the complications of including such an extensive definition of domestic abuse in section 4. The approach that she has taken is reasonable, as is the case with the amendments that we will consider later.

Stewart Maxwell: I, too, indicate support for Rhoda Grant's amendments in the group. The amendments relate to a difficult part of the bill; there are good arguments on both sides. The evidence that she received and the stage 1 debate in particular were helpful in bringing to the fore some of these points, including those on the difficulty of the definition. Rhoda Grant was right to lodge the amendments in the group. I support them.

The Convener: The issue concerned me, not because I had any particular issues about the direction of travel—far from it—but because of definitional problems that could have arisen. I am pleased about the discussion and progress towards what I regard as a satisfactory outcome. That is, of course, dependent on what the minister says.

Fergus Ewing: Thank you, convener. I am pleased to work with Rhoda Grant, precisely as she has indicated. At the stage 1 debate, I said that we were happy to do that. Both Rhoda Grant and the Government were helped considerably by the committee report, which was extremely useful. We have met Rhoda Grant and her advisers to discuss amendments. As she said, we agreed on a great many of them; where we disagreed, we reached a clear understanding of the lines of disagreement. I thank Rhoda Grant and her supporters for that co-operative approach, which will help us considerably to focus on the issues that we are considering today.

I would like to respond at some length, to read into the record important matters that apply and to indicate why we support all the amendments.

I begin with amendment 1. Section 1 of the bill inserts new section 8A into the Protection from Harassment Act 1997. Section 8A is based on existing section 8 of the 1997 act but makes some modifications. The most significant difference is that section 8A does not refer to a "course of conduct". The new section also includes a revised definition of conduct, which could include just being in certain locations, such as outside the victim's home or workplace, or the school that the victim's children attend. Such conduct might or might not involve speech.

After considering the drafting, we concluded that the definition of conduct did not need to refer to

"speech and presence in a specified place or area".

Instead, it is sufficient for the definition just to say what it intends to cover. Amendment 1 therefore provides that "conduct" includes "speech" and

"presence in any place or area".

I turn to amendment 2. Proposed section 8A of the 1997 act is based on section 8 and applies many of the provisions of section 8, with modifications. Section 8(1) of the 1997 act provides that

"a person must not pursue a course of conduct which amounts to harassment".

By contrast, proposed section 8A(1) provides that

"a person must not engage in conduct which amounts to harassment".

However, section 8(4)(b) has not been modified to refer to conduct being "engaged in" rather than "pursued". Amendment 2 makes that modification, which improves the consistency of the language.

The Government also supports amendments 3 and 8, although those amendments relate to one of the most difficult areas of the bill: namely, whether or not a definition of domestic abuse is required. Allusion has already been made to that issue. I understand why the bill as introduced included a definition of domestic abuse in section 4, so there was clarity on what was meant. However, the definition attracted adverse comment from witnesses at stage 1. The Government agreed that it was too wide and could dilute the focus on abuse within a relationship. However, I considered that there was a strong argument for a definition, given that the bill criminalises breaches of some interdicts.

I believe that we have reached a sensible solution. The definition of domestic abuse was not supported by witnesses and will be removed by amendment 8. However, amendment 5 in my name, which is in the third grouping of amendments, to which we will turn later, outlines which interdicts are to be covered by section 3 and provides the clarity that is needed in relation to

criminalisation. The term “domestic abuse” is also used in section 2, but amendment 4 in my name, which is in the second grouping of amendments, would remove section 2.

Amendment 3 means that the term “domestic abuse” in proposed section 8A of the Protection from Harassment Act 1997, which is to be inserted by section 1 of the bill, will not be defined and will take its ordinary meaning. That may not be a perfect solution. It will place the onus on the courts to determine what is domestic abuse for the purposes of section 8A. However, the key point is that amendment 5 in my name will provide the clarity that is needed on exactly when a breach of an interdict is to be criminalised.

On that basis, we support amendments 3 and 8, as well as amendments 1 and 2.

The Convener: I invite Rhoda Grant to wind up and to indicate whether she will press or withdraw amendment 1, although the answer is fairly self-evident.

Rhoda Grant: Indeed. There is no reason for me to make further comment at this point.

Amendment 1 agreed to.

Amendments 2 and 3 moved—[Rhoda Grant]—and agreed to.

Section 1, as amended, agreed to.

Section 2—Amendment of the Legal Aid (Scotland) Act 1986

The Convener: Section 2 amendments are on the provision of civil legal aid in cases of domestic abuse and the monitoring of such provision. Amendment 13, in the name of Rhoda Grant, is grouped with amendments 4, 14 and 12.

Rhoda Grant: There is anecdotal evidence that, because of financial constraint, victims of domestic abuse are not able to access the protection that is available. That was highlighted in evidence at stage 1. There is no empirical evidence of that because the rules have changed since the evaluation of the Protection from Abuse (Scotland) Act 2001 took place, meaning that the findings are out of date. At that time, almost 40 per cent of victims said that they had experienced difficulty in making a contribution to their legal aid.

The minister and the committee—in its stage 1 report—have made it clear that they do not support section 2. Amendment 13 is, therefore, a compromise that seeks to grant emergency legal aid to victims who are unable to protect themselves, either because they cannot apply for legal aid or because they do not have access to their own resources. Amendment 13 makes it clear that those who obtain this assistance but do not qualify under ordinary circumstances must repay any sums due when they are able to safely access their resources. That means that they can access the protection immediately, but there will be no long-term cost to the public purse.

The minister informs me that that is the case under current legal aid rules, but anecdotal evidence suggests that it does not always happen in practice. Amendment 13 puts that protection in the bill to ensure that everyone is aware that they can get support.

Amendment 14 puts a duty on the Scottish Legal Aid Board to report on the availability of access to legal services. The Government placed a similar duty on the Legal Aid Board in the Legal Services (Scotland) Act 2010, but amendment 14 puts a timeframe on the report and also ensures that it is laid before the Parliament. Ministers have the power to effect the provisions in section 2 of the bill. Amendment 14 would provide them with the information required to allow them to decide whether to do that. It would also allow for that information to be scrutinised by the Parliament.

Amendments 13 and 14 are not my preferred option. I would have preferred the solution that was proposed in the bill, but I am trying hard to reach a consensus.

Amendments 4 and 12, in the name of the minister, seek to remove section 2 without offering further protection.

I move amendment 13.

Fergus Ewing: Amendments 4 and 12 delete section 2 from the bill and make a consequential amendment to the long title. The Government has been opposed to section 2, which removes the legal aid means test, throughout the bill proceedings, as committee members will recall from stage 1. We have concerns about costs, which might range up to £1.5 million per year. We also have concerns about how section 2 would work when an action covers a domestic abuse civil protection order and other matters such as divorce, or contact and residence orders. So there are two general concerns: costs, and the impact on cases in which there are many other craves and issues in dispute and how that will work in practice, as the committee will remember from the persuasive and practical evidence that it took from the Law Society and the SLAB. Accordingly, the committee expressed some of its concern about section 2 in its stage 1 report.

Rhoda Grant lodged amendment 13, which would also remove section 2, and I appreciate that there has been a spirit of compromise; I alluded to that earlier. However, amendment 13 would also introduce substantial further provisions. Regrettably, the Government does not support amendment 13 for a number of reasons. We are concerned that it lacks clarity. There is also a

possibility that it might make matters worse for victims rather than better, which is obviously not intended, but sometimes unintended consequences can arise.

The first proposal in amendment 13 is that the SLAB would have to make legal aid available in the absence of an application, or without an application being determined, subject to three conditions being met. The conditions are set out in amendment 13 as conditions A, B and C—probabilis causa and other provisions. However, without an application, it is unclear how the board could satisfy itself that those three conditions have been met. An application would, by definition, be necessary for the board to be satisfied that the three conditions had been met.

12:00

Even if the board could make those assessments, it might take longer than the current special urgency arrangements. I know that delay is most certainly not what is intended; in fact, I imagine that it is the opposite of what is intended. Any delay in the accessibility of legal aid in these circumstances can be a matter of severe concern for females, in particular, who are likely to be the pursuer seeking legal aid for these purposes.

The current special urgency arrangements allow a solicitor in a set number of circumstances, which include moving for an order for a power of arrest, to carry out especially urgent work without consulting the board. Solicitors are merely required to tell the board within 28 days of starting the work that they have done so. That is the point at which the board makes the determination as to whether, at the time the work was undertaken, there was a probable cause and it was reasonable in the particular circumstances of the case.

Condition B as proposed in amendment 13 is either that documents cannot safely be accessed or that the work is required as a matter of special urgency. That could suggest that the procedures might apply in cases where there is no special urgency, although I am not sure that that is the intention.

Amendment 13 would require the board to disregard any resources if a person was unable to access them safely. In current law and practice, if someone has had to flee the home, the board can assess them as having no resources for legal aid purposes. I heard Rhoda Grant say that anecdotal evidence suggests that that might not happen. The fact is that it can happen. If there is a difficulty, I submit that it is a difficulty of practice and procedure, rather than one that requires legislative change. In any event, that is different from making a judgment about what is safe. Amendment 13 might make matters less clear for the victim than they are under the current system, whereby, as I said, the board can assess someone as having no resources for legal aid purposes if they have had to flee the home. That is a practical and real dilemma for many females, in particular. Rhoda Grant is quite right to seek to bring the issue to the Parliament in this way.

The Scottish Legal Aid Board has produced a comprehensive statement of its support for victims of domestic abuse, which I have sent to Rhoda Grant. Part of that is a duty, which at my instigation was inserted into the Legal Services (Scotland) Bill, to monitor the availability of legal aid throughout Scotland—a proactive duty incumbent on the SLAB for the very first time.

Although we entirely sympathise with the objectives, it is for those reasons, as well as our concerns on financial grounds, that we consider amendment 13 unnecessary and potentially confusing.

Rhoda Grant's amendment 14 relates to the changes made, but not yet commenced, to the Legal Aid (Scotland) Act 1986 by section 141 of the Legal Services (Scotland) Act 2010. Once commenced, section 141 of the 2010 act will give the board the function of monitoring the availability and accessibility of legal services.

Amendment 14 would introduce a separate and express requirement on the board to report on the availability and accessibility of legal services for persons seeking civil protection orders in relation to domestic abuse. It would also require ministers to lay that part of the report before the Parliament. With respect, I do not believe that those additional requirements are necessary to help implement the board's new role in reporting on the availability and accessibility of legal services. The board is setting up an access to justice reference group. Members might recall our discussions on this matter in relation to the Legal Services (Scotland) Bill and my determination—I am not sure that I can use the word "insistence", because I cannot insist that the board do anything—and strong wish that the board include Scottish Women's Aid on that forum. I am pleased to say that Scottish Women's Aid has been invited to join the group. The Government already recognises that access to justice for domestic abuse victims is important. Adding further specific duties and burdens may risk creating unnecessary work for no discernible benefit.

For those reasons, I invite the committee to reject amendments 13 and 14 and to agree to Government amendments 4 and 12.

Robert Brown: I substantially agree with the minister on these matters. It is important that people who suffer domestic abuse should have urgent access to legal aid as required. I do not

dissent from Rhoda Grant's objective in all this, but, as the minister rightly says, the legal aid provisions already provide that, when there is difficulty in accessing documents and there is an urgent need to do so, certain resources can be disregarded. There ought to be a rule that we do not legislate when legislation already exists to deal with something. If there are technical problems, the on-going discussions between Rhoda Grant and the minister will take that forward if appropriate and changes can be made to the legal aid regulations and/or practice as required. Therefore, aside from the technical deficiencies of the amendment—which I had spotted, although not to the same extent as the minister, who has identified a number of points—I do not think that such a provision is the way forward.

On the question of the report, I do not think that there is anything more to be said. We have dealt with the matter already and there is no point in gilding the lily. We have heard that there has been an advance in terms of the inclusion of Scottish Women's Aid on the panel.

For those reasons, I share the minister's opposition to Rhoda Grant's amendments.

James Kelly: I support Rhoda Grant's amendments 13 and 14. She has taken a pragmatic view on section 2. Concerns were expressed in evidence and in debate about singling out domestic abuse victims for priority in legal aid applications, specifically against the backdrop of a contracting legal aid budget. Rhoda Grant's amendments acknowledge those concerns. She set out her position strongly at stage 1 and clearly still supports those arguments, but she wants the bill to be passed by the Parliament; therefore, she proposes to remove section 2.

The guidelines on support that she seeks to put in statute already exist, although there is a difference of opinion between Rhoda Grant and the minister as to the practical effect of putting them in statute. However, at this stage, I am persuaded by her argument that the current arrangements are not given sufficient priority and focus. Including them in the bill will, I hope, give domestic abuse victims access to legal aid funds in appropriate circumstances.

There have been comments about some technical aspects of amendment 13. However, we are only at stage 2 and Rhoda Grant's policy intention is a reasonable one. If there are ways of improving the provision at stage 3, I am sure that she would be open to that.

I also support amendment 14, which requires a report to be laid before the Parliament. Domestic abuse is a serious and high-profile issue, and there is cross-party support for the Parliament taking action on it. What Rhoda Grant seeks to do is in line with the support that we have seen in the Scottish Parliament for not only highlighting our concern, but monitoring domestic abuse victims' access to legal aid. We need to ensure that that is taking place adequately and, if it is not, bring forward further measures to address the issue.

Stewart Maxwell: I very much agree with Rhoda Grant's intention in introducing the bill and I, too, hope that it will have positive, practical effects. For the reasons given by the minister and Robert Brown, however, amendment 14 is unnecessary. The expert group, which includes Scottish Women's Aid, has a clear direction of travel that is welcome.

On amendment 13, I will not rehearse the arguments in the stage 1 report and debate, which made clear the committee's view. I accept James Kelly's point that if there are any technical flaws, they can be tidied up at stage 3. My problem with amendment 13 is that Rhoda Grant may well have identified a problem in the practical, day-to-day implementation of the rules, but I do not believe that amendment 13 is the solution to that problem. The solution is for us to focus on the problem and go from anecdotal evidence to proper, solid, researched evidence and ensure that the practical difficulties are resolved so that women are not left in a position that would, I am sure, be abhorrent to us all—that must not happen. I think that the rules are in place to deal with that situation; if they are not being properly implemented, that is what must be focused on and dealt with. That can be done without legislation, so I do not support amendment 13.

The Convener: It was clear at the stage 1 debate that there were difficulties with regard to section 2. Rhoda Grant has clearly recognised that, because amendment 13 would remove section 2 and substitute a wording that Rhoda Grant feels would assure what we all want, namely that the victims of this type of crime will have easy and ready access to legal aid. When someone is concerned enough to take the trouble to try to come up with a satisfactory solution, as Rhoda Grant has done, it is incumbent on us all to give the matter the greatest consideration. I have given the matter considerable thought, I can assure you, but the difficulty with amendment 13 is that it would make the situation less clear. There is also a cost implication, because I am not naive enough to think that all the costs would be recovered, despite amendment 13's provisions in that regard. As I said, a lot of work has gone into amendment 13, but at the end of the day I cannot be persuaded that it is the appropriate way forward.

I can see amendment 14's direction of travel, but the problem that it addresses is remedied by the fact that the regulations that will apply to the

Scottish Legal Aid Board will enable the appropriate figures and the monitoring of the situation to be well scrutinised by members of the Scottish Parliament. On that basis, I am not minded to support amendment 14, either, although I acknowledge the thought process behind the amendment.

Amendment 4, which of course is the minister's amendment, will remove section 2 simpliciter. I am persuaded that that is the way forward.

I ask Rhoda Grant to wind up and indicate whether she will press or withdraw her amendments.

12:15

Rhoda Grant: I have listened carefully to the committee's and the minister's comments. I am also grateful to the minister for putting on record the current situation, which is very helpful. Obviously, I do not wish amendment 13 to build in delays in the current process, so I intend to withdraw it and consider the matter further to see whether a similar amendment will be required at stage 3.

On amendment 14, I obviously welcome the fact that Scottish Women's Aid is now on the access to justice reference group. I am very pleased about that, but there is a large amount of anecdotal evidence about access to justice and I am not convinced that the approach will entirely solve the problem. I need to reflect on the issue. I will consider whether it is possible to amend the legislation on legal services to make it clear that the access to justice reference group must look at and report separately on domestic abuse. During my work on the bill it has been clear that the evidence on domestic abuse is muddled, because it is mixed with a range of factors and it is difficult to pull out figures that relate only to domestic abuse.

I welcome further discussions with the minister. I intend not to move amendment 14 and to reserve my position until stage 3. I ask the committee to defer amending the long title of the bill until then.

The Convener: Let us deal with matters as we get to them. Believe me, it will make life simpler.

Amendment 13, by agreement, withdrawn.

Amendment 4 moved—[Fergus Ewing]—and agreed to.

After section 2

Amendment 14 not moved.

The Convener: We move on to interdicts, breach of which is an offence. Amendment 15, in the name of Rhoda Grant, is grouped with amendments 15A to 15C, 16, 5, 5A, 17, 7 and 18. I draw members' attention to the pre-emption information in the groupings paper.

Rhoda Grant: I will explain the background to the amendments. The committee and the minister supported the policy objectives of section 3 at stage 1, but there were a number of issues to resolve, not least the definition of domestic abuse. We discussed the issue with the minister and his team and we consulted the Lord Advocate and the Crown Office and Procurator Fiscal Service, and three issues became apparent.

First, we need to name or identify the interdict at an early stage, so that everyone who is involved knows without doubt that it is an interdict, breach of which is a criminal offence.

Secondly, there are complications to do with the relationships that are covered and how we define a boyfriend-girlfriend relationship. The definition in section 4 refers to

"a partner in an established relationship of any length".

The whole definition has been unpopular, and the phrase "of any length" did not find favour anywhere. Boyfriend-girlfriend relationships are covered by the Protection from Abuse (Scotland) Act 2001 and not to include them in the bill would be to take a retrograde step.

Thirdly, currently the power of arrest in interdicts is time limited—it lapses after a set period of time—so protection under the bill would also cease. After a great deal of reflection, the bill team thought that the best approach would be to introduce a new interdict, called a domestic abuse interdict. Naming the interdict would provide clarity, because it would be obvious to everyone that breach of such an interdict would be a criminal offence. The criminal offence of breach of the new interdict would not cease when the power of arrest expired.

Amendment 15, which provides for the new interdict, includes a definition of a boyfriend-girlfriend relationship. Amendments 15A to 15C are designed to give the committee a choice of definition. My favoured option is in amendment 15 and is:

"a partner in an established relationship of a non-platonic nature with B".

It is clear from the definition that the relationship might not involve sexual intercourse but is a romantic relationship. It does not depend on marriage, civil partnership or cohabitation.

The option in amendment 15A is:

"a partner in an established relationship with B".

That does not include the offending phrase "of any length", which is in section 4. It uses the definition that is used in the Protection of Children and

Prevention of Sexual Offences (Scotland) Act 2005.

Amendment 15B offers the option of A being

"in a sexual relationship with B"

which, under amendment 15C, is defined as

"a relationship"

that

"need not involve sexual intercourse".

That definition is currently used by the legal system with regard to sexual assault.

Amendment 16 ensures that the new interdict has to be served before it comes into force and that from that time any breach is a criminal offence.

Amendment 5, in the name of the minister, deals with the same issues. As I have said before, I believe that although we have the same goals, we have different ways of reaching them, and I am concerned that amendment 5 will cover only those people who are in formalised relationships or are cohabiting. In 2009-10, the reported incidence of domestic abuse decreased in every age group apart from the under-18s—the group in which relationships are most likely to be of the boyfriend-girlfriend type—and I simply do not believe that we can leave people in that situation unprotected.

Moreover, amendment 5 does not name the interdict, recognise its difference from other interdicts or deal with the problem of lapsing powers of arrest. By lodging amendment 5A, I have sought to amend amendment 5 to include boyfriend-girlfriend types of relationships by using the definition set out in the lead amendment. Amendment 18 makes clear on the interdict the expiry date of the powers of arrest and that, while the powers of arrest are in force, any breach of the interdict is a criminal offence. However, even with those changes, we are not clear whether amendment 5 is actually the best way forward and I urge the committee to support amendment 15 instead.

Amendment 17 is consequential on amendment 15 and ensures that the new interdict is penalised.

I move amendments 15 and 15A.

Fergus Ewing: I am most happy to consider the anecdotal evidence and other issues that the member in charge mentioned in relation to the previous group and will also ask SLAB to detail what it is doing to implement the duties that are incumbent on it. That might help both the member in charge and the committee.

Amendments 5 and 7, which are in my name, provide crucial clarity on when breach of an interdict is a criminal offence. Amendment 5 adjusts section 3 to define more clearly and limit the circumstances in which it will be a criminal offence to breach an interdict and to make it an offence to breach any future interdict with a live power of arrest that protects a person from abuse by their current or former spouse, civil partner or cohabitee. It retains the need for a power of arrest to be attached under the Protection from Abuse (Scotland) Act 2001 and, in addition, to apply only to interdicts that are granted once section 3 comes into force. Amendment 5 limits the categories of interdict to which section 3 applies by reference to the normally accepted categories of partners—in other words, spouses, civil partners and cohabiting couples. I will come to Rhoda Grant's point in a moment, but we believe that our amendment 5 provides the required certainty and does not dilute our focus on domestic abuse by casting the net too widely. Amendment 7 clarifies that it is an offence to breach an interdict to which section 3 applies.

I am happy to consider further with the member in charge and before stage 3 the issues that she has raised in her amendments. However, we have some concerns, and it would be useful to set them out on the record and for the benefit of members who are taking part in this important debate. Amendments 15 and 16 make it an offence to breach an interdict that protects a person from domestic abuse by a partner in an established relationship of a non-platonic nature and prohibit that partner from entering or remaining in a place, for example the family home. Amendments 15A and 15B offer alternatives, and amendment 15C sets out what a sexual relationship is.

Amendment 5A seeks to amend Government amendment 5 by extending it to a partner in an established relationship of a non-platonic nature. I understand what the member in charge of the bill is trying to do. I can see the argument that people in other types of relationships—people who are not married, civil partners or cohabitants—might require to be protected in a similar way. We all probably accept that argument, but the difficulty lies in establishing what distinguishes people in those other types of relationships from people who are not in them. The fact that Rhoda Grant has offered drafting alternatives shows that there are difficulties in that area.

What is "non-platonic"? What is "established"? Indeed, what is "a sexual relationship"? We all know—especially the lawyers among us—that litigation is made of the interpretation of such phrases. Phrases such as "non-platonic" and "a sexual relationship" leave much scope for complicated arguments to be made by defence lawyers in criminal proceedings, in which all of us—including non-lawyers—know that matters of definition are key.

In Government, we wrestled with concepts such as intimate relationships and boyfriends and girlfriends, and concluded that it was difficult to go down that route because of the need for clarity on when a breach of an interdict becomes a criminal offence and because adopting a wider approach would, as I have said, reduce the focus on domestic abuse. In domestic abuse, the vulnerability of the victim might result from emotional, financial or physical dependency; a devotion to protect others, for example children; or a variety of those factors. Such aspects may feature more strongly in the context of relationships in which individuals are living or have lived together.

We have other concerns about the amendments. Subsection (1) of the new section that amendment 15 proposes to insert would apply only to an interdict that was granted on the application of the person who sought to be protected, but it is possible that an interdict would be sought on their behalf. Subsection (2)(a) of the new section refers to interdicts that are granted for the purpose of protecting against domestic abuse, but it may not be clear what is covered by that. In addition, an interdict that was granted for the purposes of subsection (2)(b) of the new section would not necessarily protect against domestic abuse.

It appears from amendment 16 that the intention is that a breach of an interdict to which section 3 applies will be a criminal offence, regardless of whether a power of arrest was attached to it, but amendment 18 provides that notifications of powers of arrest will have to include

"a statement that, while the power of arrest is in effect, breach of the interdict is an offence".

Therefore, it appears that amendments 16 and 18 are contradictory. However, I share Rhoda Grant's policy aim in amendment 18 of providing as much clarity as early as possible on when a breach of an interdict is a criminal offence. I emphasise that, as I have said, my officials and I are happy to discuss further with her how we can provide such clarity. Amendment 18 contains many useful ideas, which I wish to follow up with her.

To sum up, I ask the committee to note that I will discuss further with the member in charge of the bill the issues relating to abuse of people who are not married, are in a civil partnership or are cohabiting, and the ideas behind amendment 18 on how to provide clarity at an early stage on when breach of an interdict will be a criminal offence. On that basis, I invite the committee to reject amendments 15, 15A to 15C, 16, 5A, 17 and 18, and to agree to Government amendments 5 and 7.

Robert Brown: This is an extraordinarily difficult area, as we all know. We are faced with an almost bewildering number of alternatives, which does credit to Rhoda Grant's attempts to get a definition that will work. The minister's offer to consider further the issues that amendment 18 addresses, not least the time limit on the power of arrest, is helpful and I support it.

At least from my perspective, the phraseology about the non-platonic nature of relationships and the stuff—for goodness' sake—in amendment 15C, which tries to define in almost obscene detail what a sexual relationship is, frankly do not lend themselves to any sort of judicial determination. In dealing with such issues, a clear-cut situation is required that is based on objective, outside evidence. Therefore, I do not think that the provisions are workable in practice.

12:30

Rhoda Grant also used the odd phrase "romantic relationship". I would have thought that the one thing that a domestic abuse situation would not be is romantic, although I understand what she is trying to get at in terms of the relationship's not amounting to cohabitation. The minister has said that he will consider the issue.

There are several other minor points to mention. New subsection (2) in amendment 15 refers to the purposes of the interdict, but it is not entirely clearly whether

"protecting A from domestic abuse by B"

and

"prohibiting B from entering"

are alternatives. There could be odd consequences from that, one way or another. Furthermore, a definitional section that goes on for the best part of two pages does not add clarity for those who have to operate the matter in that kind of way. The same applies to some of the other things.

The minister's definition deals in a traditional and satisfactory way with both same-sex and opposite-sex partnerships of the cohabiting variety as well as of the marriage variety. The fact that it refers to a person who is or was in such partnerships also covers situations in which people have split up. The situation that it does not entirely deal with, which Rhoda Grant has touched on, is that in which there has never been cohabitation but in which there may be issues of on-going harassment because one partner feels that they have power over the other partner in the relationship. It may be that that area simply cannot be dealt with in the bill because of its complexity, and there may be other ways of tackling it. The

minister is going to consider that, and I will be interested in the outcome of the discussions.

I do not think that amendment 15 quite does the trick.

James Kelly: There is no doubt that this is a complex area and that we have a complex set of amendments, which leads on from the proposed deletion of section 4. The bill will not contain a definition of domestic abuse, and there will need to be further clarification of the interdict issue. Rhoda Grant has clearly wrestled with the matter and her amendments show the different thought processes that she has gone through on it, although her preferred option is amendment 15. There have been comments about the nature of the amendments, to which she will return in her summing up.

I have some sympathy with amendment 16, which would confer more wide-ranging powers and give greater protection to victims of domestic abuse.

Amendment 17 is preferable to amendment 7, as it specifies domestic abuse.

I note the minister's comment that amendments 16 and 18 are contradictory. I hope that Rhoda Grant will reflect on that and continue the discussion if she feels that to be the case.

Stewart Maxwell: I support amendment 5, which deals with the problem of having to have a definition. It offers a tight definition of domestic abuse that most of us understand.

My problem with amendment 15 is to do with the wording in new subsection 1(d), which others have already mentioned. It refers to

"a partner in an established relationship of a non-platonic nature with B."

I have some difficulty in understanding exactly how that would be understood. Unfortunately, although I understand why, it harks back to the wording in section 4(1)(a)(ii):

"a partner in an established relationship of any length".

I can understand why the member in charge of the bill wishes to insert the wording in amendment 15, but my problem with that is the same problem that I had with the definition in section 4, which is that if we widen, we also weaken, and we will lose focus in our attempts to deal with domestic abuse. Amendment 15 is in danger of straying into that territory.

It would be difficult to define when a relationship crossed the line and a boyfriend-girlfriend relationship moved into the area of

"a partner in an established relationship of a non-platonic nature with B",

where an assault would be domestic abuse as opposed to an assault of some other description.

The law protects people from assault in any relationship. I am more comfortable with that definition of how people are protected in a relationship, which applies irrespective of how long the two people have been going out. Whether they have had only the first date or the relationship has existed for several years, the two people are protected by the law in relation to any assault by one party on the other. We should not risk diluting our focus on domestic abuse by trying to include such relationships in the definition of domestic abuse. For that reason in particular, I do not support amendment 15.

Nigel Don: Having heard Stewart Maxwell's comments, I endorse everything that he has just said.

The Convener: As has already been commented upon, we have before us a plethora of amendments that are predicated on the difficulties of definition. We anticipated that at stage 1. It is not easy to come up with a satisfactory definition. If it was, I would have lodged an amendment as well, but I could not find a wording that I considered appropriate. I would not in any way criticise anyone for coming up with a wording, because at least they could argue that they made an effort so to do, and in Rhoda Grant's case she has done that in a most constructive manner.

However, a number of the amendments are fraught with difficulties of definition. As has been said, a relationship that is platonic to one person will not be so to someone else, and the definition of a sexual relationship is also subject to varying levels of interpretation. We are left trying to come up with an answer, but we might reflect that one would require the wisdom of Solomon to make such a determination.

I am not persuaded that amendment 15—which, as Robert Brown said, is lengthy and perhaps a little convoluted—is the answer, because the more room we make for misinterpretation or selective interpretation, the more problematic the situation becomes. At this stage—I stress that it is my view at this stage, because there is a dialogue still to be had—I am persuaded by the minister's amendment 5. However, I heard what Ms Grant and Mr Ewing said about further discussion on the matter, and I direct them both down that route.

I ask Rhoda Grant to wind up and say whether she wishes to press or withdraw amendment 15A.

Rhoda Grant: I am grateful to the committee for spending time on this issue, which I recognise is not straightforward. I am also grateful to the minister for saying that he will be happy to work with us further on the issue.

We drafted a long amendment because the issue needs clarity, and our amendment 15 at least tries to provide that. It is clear that amendments 5 and 15 have different approaches. Our amendment 15 seeks to create a new interdict and get rid of the confusion with the existing interdicts. That is the main difference between our approach and the minister's. Neither of the amendments is retrospective.

My real concern, however, is about the nature of boyfriend-girlfriend relationships. Last year, 11,379 people in that category contacted the police regarding domestic abuse, which puts an onus on all of us to allow such people to be protected under the bill.

Domestic abuse is not always assault, and I note what members have said about assault being dealt with by the courts, but many of the victims do not currently receive satisfaction or protection through the courts. It is imperative that any amendment that the committee agrees to covers that type of relationship, otherwise we will fail those people. They are already covered by the Protection from Abuse (Scotland) Act 2001, and it is only right that they should have the further cover that the bill offers.

I am happy to work with the minister on these amendments to try to find solutions to the problem. I am happy for amendment 15 to be amended at stage 3 to make it workable, but there is a point of principle with regard to whether we create a new interdict or try to change interdicts that are already in statute. Those are two different approaches, and it would be helpful if the committee considered the amendments in that light. That would at least give us some guidance on how to move forward. I will press amendment 15.

The Convener: We are talking about amendment 15A.

Rhoda Grant: Can I withdraw amendment 15A?

The Convener: We will come to amendment 15 in a moment. This is going to be complicated.

Amendment 15A, by agreement, withdrawn.

Amendments 15B and 15C not moved.

The Convener: The question is, that amendment 15 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

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

Amendment 15 disagreed to.

Section 3—Breach of interdict with power of arrest

The Convener: Amendment 16, in the name of Rhoda Grant, was debated with amendment 15. If amendment 16 is agreed to, I cannot call amendment 5, or as a consequence amendment 5A, on the grounds of pre-emption.

Amendment 16 not moved.

Amendment 5 moved—[Fergus Ewing].

Amendment 5A moved—[Rhoda Grant].

The Convener: The question is, that amendment 5A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

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

Amendment 5A disagreed to.

Amendment 5 agreed to.

The Convener: The next group is on the maximum period of imprisonment on summary conviction. Amendment 6, in the name of Rhoda Grant, is the only amendment in the group.

12:45

Rhoda Grant: Amendment 6 is technical and seeks to bring the bill into line with the Criminal Proceedings etc (Reform) (Scotland) Act 2007, which provides for a maximum penalty in summary proceedings of 12 months; as it stands, the bill provides for six months.

I move amendment 6.

Fergus Ewing: We support this technical amendment, which we suggested.

The Convener: So says the minister, with all due immodesty. I presume that you do not want to wind up, Ms Grant.

Rhoda Grant: No.

Amendment 6 agreed to.

Amendment 17 not moved.

Amendment 7 moved—[Fergus Ewing]—and agreed to.

Section 3, as amended, agreed to.

After section 3

Amendment 18 moved—[Rhoda Grant].

The Convener: The question is, that amendment 18 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Don, Nigel (North East Scotland) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)

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

Amendment 18 disagreed to.

Section 4—Meaning of "domestic abuse"

Amendment 8 moved—[Rhoda Grant]—and agreed to.

Before section 5

The Convener: The next group is on ancillary provision and commencement. Amendment 9, in the name of Rhoda Grant, is grouped with amendments 10 and 11.

Rhoda Grant: I should say that the minister had some dealings with amendments 9, 10 and 11 in my name, too; he does not have to put that on the record himself.

Again, the amendments are technical. Amendment 9, which was requested by the Subordinate Legislation Committee, allows for ancillary provisions to be made under the affirmative procedure. Amendment 10 provides for those powers to commence once royal assent has been received. Amendment 11 allows for the bill to commence three months after the day on which the bill receives royal assent.

I move amendment 9.

The Convener: The amendments appear to be fairly straightforward. Are there any other contributions?

Nigel Don: I welcome amendment 9, bearing in mind the fact that a comment was made that a similar provision in the Long Leases (Scotland) Bill was the wrong way forward. It is crucial to have such provisions in legislation, and this is precisely the kind of bill for which they become so important, for precisely the reasons that are on the record. It is unlikely that we will find that we have missed nothing. It is almost certain that we will have to return to the legislation and we do not want to have to come back to primary legislation to pick up things that have been well discussed but which were simply missed on the way.

The Convener: Against the background of that glowing endorsement, does the minister have anything to add?

Fergus Ewing: We support these necessary and worthy amendments.

The Convener: Ms Grant, do you feel the need to wind up?

Rhoda Grant: No.

Amendment 9 agreed to.

Section 5—Short title and commencement

Amendments 10 and 11 moved—[Rhoda Grant]—and agreed to.

Section 5, as amended, agreed to.

Long Title

Amendment 12 moved—[Fergus Ewing]—and agreed to.

Long title, as amended, agreed to.

The Convener: That ends stage 2 consideration of the bill. There is clearly still a bit of work to be done but, in view of the obvious goodwill that exists, I am confident that that can be achieved.

12:49

Meeting suspended.

12:53

On resuming—

Subordinate Legislation

Retention of Samples etc (Children's Hearings) (Scotland) Order 2011 (Draft)

The Convener: The purpose of agenda item 4 is to allow the committee to take evidence on an affirmative instrument: the draft Retention of Samples etc (Children's Hearings) (Scotland) Order 2011. As noted in paper 3, the instrument relates to a provision in the Criminal Justice and Licensing (Scotland) Act 2010 that was discussed in some detail during the passage of the bill.

I welcome Fergus Ewing MSP to his third appearance this morning. With the minister, from the Scottish Government, are Keith Main, policy manager; Aileen Bearhop, principal policy officer; and Carolyn Magill, principal legal officer in the legal directorate. I understand that the minister wishes to make a short opening statement.

Fergus Ewing: I am grateful for the opportunity to discuss the draft Retention of Samples etc (Children's Hearings) (Scotland) Order 2011 with the committee. The order is an important part of the package of measures on DNA and other forensic data agreed in the Criminal Justice and Licensing (Scotland) Act 2010. The majority of that act's provisions relate to samples taken from adults who are dealt with through the court system. As committee members will recall, for children's hearings we recognised that it may not be appropriate for DNA and other forensic data to be retained for the full list of sexual or violent crimes that is set out in section 19A(6) of the Criminal Procedure (Scotland) Act 1995.

The instrument specifies the particular sexual and violent offences where samples may be retained following a children's hearing. In doing so, it responds directly to concerns that were set out in the committee's stage 1 report on the Criminal Justice and Licensing (Scotland) Bill in 2009. The committee recognises, as does the Government, that this is a very sensitive area—I will not pretend otherwise. However, I want to reassure the committee on a number of counts. We are clear that the majority of children—in fact, the vast majority—who are referred to hearings can and should be dealt with without any requirement to retain forensic samples. As I said to the committee last year:

"we do not want to retain the DNA of children who are involved in playground scuffles".—[*Official Report, Justice Committee,* 27 April 2010; c 3016.]

I should also stress that we have no wish to stigmatise children or affect their lives for years to come. One of the great strengths of Scotland's children's hearings system is that early and appropriate intervention can help a young person to address their issues and become a responsible member of Scottish society. However, sadly, there is a small number—a very small number—of youngsters who commit serious sexual or violent offences. The legislation recognises that fact, as it must. We estimate that the provisions relating to samples would affect up to 100 children a year. That estimate was based on more than 15,000 children being referred to the hearings system on offence grounds in 2006-07.

The purpose of the order is to specify which offences will trigger the retention of samples where a child has been referred on offence grounds and the child and their relevant adult—mostly a parent—accept those grounds, or the grounds are established by a sheriff. The order lists those offences that we consider to be the more serious sexual or violent offences. As such, we believe that it provides an appropriate balance between the needs and rights of the individual child and the need to protect the wider public.

To help achieve that balance, the 2010 act built a number of safeguards and conditions into the process. First, only forensic data that have been taken from a child who is arrested or detained under suspicion of committing an offence can be retained. Secondly, the child would need to be referred to a children's hearing on the grounds of having committed a relevant sexual or violent offence—that is, one of the offences prescribed in the order. Thirdly, a child and their relevant adult—a parent or guardian—must accept that the child has committed the offence that forms the grounds of referral or, where the matter is referred to a sheriff, he or she makes such a finding.

I should reassure the committee that we are developing, with the help of our stakeholders, detailed guidance on the new measures for reporters, panel members, the police and other stakeholders. In addition, we will continue to work with stakeholders to keep the list of offences under review.

I am sure that committee members will have questions on the issues that are raised by the draft order, but I believe that the response that we have produced today is proportionate, which was the requirement that the committee suggested we should comply with. I am happy to answer questions.

The Convener: The list of offences is clearly stated in article 2 of the order. Do members have questions?

Robert Brown: Yes. I was one of those who had concerns about the process. However, the bill having gone through in the form that it did, the

minister seems to me to have made a fair stab at identifying the offences. I have one or two questions that seek clarification on minor points with regard to a couple of the offences. The offence of indecent assault is mentioned in article 2(e). The minister might agree that that offence could range from significant charges down to something that is relatively minor. Has any account been taken of that?

Fergus Ewing: Certainly, I accept that in relation to assault in general, and to serious assault, there is a gradation in the degree of severity from very minor to pretty serious. We considered that matter generally in consultation with the Crown Office and Procurator Fiscal Service. We took the definitions of serious assault from the COPFS scale, which is used by the police, who will continue to report offences on the basis of the available evidence and the identified crime, as per normal procedures. For example, retention of samples would not be triggered in relation to assault or assault to injury within the COPFS scale.

I hope that that indicates that we recognise the point that Robert Brown makes. The offence of assault covers conduct of a wide range of seriousness, and that has been taken into account in formulating the statutory instrument on the basis of the advice that we have received from the Crown Office substantially.

13:00

Robert Brown: In terms of the violent offences, article 3(b) contains the offence of

"uttering a threat to the life of another person".

I am not sure whether that, in itself, is a cognomen—a named offence—as opposed to threatening behaviour. One can imagine a situation in which, whether they mean it or not, someone threatens another person by saying, "I'll kill you" and that kind of thing. Does that not cover a wide variety of circumstances? Is it a common offence? Is it an offence with which people are charged very often?

Fergus Ewing: I do not have statistics to indicate the prevalence of that crime or offence. The list is very long and I wanted to ensure that it was comprehensive. I did not want us to omit offences or crimes that are rarely libelled; therefore, I sought and obtained an assurance that, on the basis of the best information that we received from our legal advisers and the relevant authorities, that has not been the case.

The main justification for including or not including an offence in the list of offences for which a young person's DNA can be retained is whether there is a high risk of their future offending. What is the purpose of retaining DNA? If there is not a high risk of future offending, what would be the purpose of its retention? If there is a high risk of future offending, there is a need to retain DNA, as there is with adults. Whether or not there was a high risk of future offending was, we felt, an appropriate criterion on which to determine the list of offences. That is, broadly speaking, the basis on which we proceeded after having obtained advice from a working party comprising all stakeholders, some of whom we recognised as having principled concerns about the legislation or as being opposed to it. Robert Brown, in particular, will be aware of that.

Cathie Craigie: I have a question on the list of offences. Lists always attract questions from someone. Article 2(i)(iv) refers to section 2 of the Criminal Law Consolidation (Scotland) Act 1995, which relates to the offence of intercourse with a step-child. How can that be an offence that is committed by a child? Can you explain that to me a wee bit?

Fergus Ewing: I suppose that it is possible to be a parent at an early age.

The Convener: Surely, minister, the point is that it is possible to be a step-parent at a much earlier age than that at which one could become a parent.

Fergus Ewing: That is true. That is a fair point, which I would adopt as my own in answering this unexpected line of questioning.

I remind myself as well as members that the hearings include 16 to 17-year-olds, which raises the bar a little bit in respect of the grouping of people who could be either step-parents or parents. We are talking about a small number of children whom we expect to be affected at all. The subset of those who commit that particular offence will be vanishingly tiny—we certainly hope so.

The crimes that were included in the list were those in respect of which, however unlikely it was that they would be committed by a young person, a high risk of future offending would justify what would be seen otherwise as the unjustified measure of retaining DNA samples from children. The safeguards in respect of retention are clear. There is automatic destruction after three years unless an application is made to a sheriff, and the Scottish Police Services Authority holds the records as confidential matters. There are a series of safeguards that I hope we all accept are appropriate.

I am grateful to Cathie Craigie for raising the issue.

Cathie Craigie: If the instrument deals with young people up to the age of 17, it is possible that the offence could happen. In law, someone

could not have a step-child unless they were married.

The Convener: It is a question of arithmetic rather than the law. There being no further questions, we proceed to item 5, which is formal consideration of the motion to approve the instrument that we considered under the previous item. I ask Mr Ewing to move the motion formally.

Motion moved,

That the Justice Committee recommends that the Retention of Samples etc. (Children's Hearings) (Scotland) Order 2011 be approved.—[*Fergus Ewing*.]

Motion agreed to.

The Convener: That concludes the public part of the meeting.

13:06

Meeting continued in private until 13:14.

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