The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 21 February 2012

Session 4

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JUSTICE COMMITTEE
6th Meeting 2012, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Jenny Marra (North East Scotland) (Lab)

COMMITTEE MEMBERS

*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (SNP)
*Colin Keir (Edinburgh Western) (SNP)
*Alison McInnes (North East Scotland) (LD)
David McLetchie (Lothian) (Con)
*Graeme Pearson (South Scotland) (Lab)
*Humza Yousaf (Glasgow) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Kenny MacAskill (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 21 February 2012

[The Convener *opened the meeting at 10:11*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. Welcome to the sixth meeting of the Justice Committee in 2012. I ask people to switch off mobile phones and other electronic devices completely, as they interfere with the sound system, even when they are switched to silent. I have apologies from David McLetchie, who is unwell.

Under item 1, I invite the committee to agree to take items 7 and 8 in private. Do we agree to do so?

Members *indicated agreement.*

Criminal Cases (Punishment and Review) (Scotland) Bill: Stage 1

10:12

The Convener: The main item of business today is the third and—to the delight of members—final evidence-taking session on the Criminal Cases (Punishment and Review) (Scotland) Bill. Today, we will understand the bill. To bring the process to a conclusion, I welcome Kenny MacAskill, the Cabinet Secretary for Justice, who will make it all as clear as crystal to us. He is joined by two Scottish Government officials: Philip Lamont, the bill team leader; and Andrew Ruxton, a solicitor.

We will move straight to questions, as this is an evidence-taking session. No, it is not. Yes, it is. I am already confused. I invite questions from members. Humza, come to my rescue.

Humza Yousaf (Glasgow) (SNP): I am afraid that I cannot quite do that, convener.

Cabinet secretary, as has been alluded to by the convener, sentencing is a complex process to understand. Is there a danger that, in an attempt to fix the anomaly that was thrown up by Petch and Foye, the amount of complexity has been increased? If so, might that erode people's confidence in the sentencing process and the justice system?

The Cabinet Secretary for Justice (Kenny MacAskill): We do not think so. We accept that this is a complex area of law, but we do not think that the provisions are unnecessarily complex. They exist within a context and they seek to address a specific issue. It should also be remembered that, in six years, there have been 75 cases in which a non-mandatory life sentence has been given.

The provisions would give back to the courts the discretion to determine that non-mandatory life sentence prisoners will become eligible to apply for parole only at a point when the court considers that they have served an appropriate period of imprisonment to satisfy the need for the punishment of the offender. It should be remembered that judges in the High Court, who have the power to sentence offenders to imprisonment for life, will be familiar with those issues. Indeed, that was a matter that was commented on in relation to Petch and Foye.

We believe that the bill provides a clear framework within which judges must calculate the punishment part of a non-mandatory life sentence. We are making the law easier to understand. The provisions provide clear limits within which the judge can set the punishment part, and they seek

to remove the areas of uncertainty that gave rise to the Petch and Foye decision.

10:15

Humza Yousaf: Confidence in the sentencing structure gets eroded when people know that somebody who has been found guilty of a particular crime and has been sentenced to 10 years will be let out a lot earlier than that. How does the bill seek to address that? There will still be an element of arbitrariness. The punishment part will still be 50 to 100 per cent of the sentence that has had the protection element stripped out, so how will that help to rebuild confidence in the sentencing structure? How can people be assured that somebody who is given 12 years will serve closer to that?

Kenny MacAskill: First, there are difficulties, which is why the High Court flagged up the issue. It is clearly an anomaly that somebody who is on a non-mandatory life sentence may be eligible for parole at an earlier date than somebody on a determinate sentence, as was the case in Petch and Foye. That caused a lot of consternation and upset, albeit that we caveated that by making it clear that those people were on orders for lifelong restriction.

The first thing to point out is that some provisions have to be included in the bill because of European convention on human rights requirements relating to non-mandatory life sentences. Such sentences are necessary but are used sparingly rather than given out willy-nilly. As I said, there have been 75 in six years. However, the European Court of Human Rights has made it clear that the security element must be viewed separately from the punishment part of the sentence. That left us facing difficulties in Petch and Foye because, when the security element is taken out, the punishment part is less than what would have been the case for somebody on a determinate sentence who had been given a fixed period and not a non-mandatory life sentence.

The bill gives back to the court the power to impose what it regards as an appropriate punishment part, whether 50 or 100 per cent. That will be left to the court's discretion, but it will still be subject to the security provisions. However, the punishment part of the sentence will be imposed according to what the court wishes, which I think will probably be more in line with what the public expect.

The Convener: I just make it plain that we are asking questions on part 1 of the bill at the moment. Before we move to part 2, I declare that I am a member of the Justice for Megrahi campaign. However, we are still on part 1. I was not sure whether Graeme Pearson had a question, so it is John Finnie first, then Graeme Pearson, then Alison McInnes.

John Finnie (Highlands and Islands) (SNP): Good morning, cabinet secretary. You largely covered this issue, but I want to ask again about judicial discretion, because the public place great store on decisions being made after all the facts have been heard. Clearly, part of that discretion is the opportunity to impose a non-mandatory life sentence. Do you believe that the bill enhances judicial discretion? If so, how? Alternatively, is the bill neutral with regard to judicial discretion? You said that, following what happened in the Petch and Foye judgment, the bill is reinstating judicial discretion.

Kenny MacAskill: I think that the bill restores judicial discretion. We fully accept that the interpretation that the courts came to in Petch and Foye resulted in people having a lesser punishment part and being eligible for parole at an earlier point than the sentencing judge had intended. Moreover, the sentencing judge had taken the view that, because of the security risk that the individual prisoner posed to the public, they should be given a non-mandatory life sentence. Such sentences are used sparingly, but they reflect the risk that the judge feels that the convicted person poses to the public. That is why the prisoner is not given a determinate sentence in which they would be eligible for, and would be required to be given, parole at some stage.

The bill restores to the judiciary the ability to bring in a non-mandatory life sentence because of security risks and at the same time impose a punishment part of the sentence, which is the period that the judge views as appropriate before the prisoner can apply for parole. Clearly, in terms of comparative justice, we faced an anomaly whereby somebody who was given a fixed determinate sentence would serve longer than somebody whom the court clearly viewed as a serious risk to the public but who would be eligible for parole at an earlier stage. Therefore, we are restoring judicial discretion, maintaining the ability of a judge to impose a non-mandatory life sentence for security purposes, and restoring their ability to get a clear and—probably from their perspective and from that of the public—adequate punishment period.

Graeme Pearson (South Scotland) (Lab): The committee found it difficult to understand the logic and thought processes that you have just explained so well. My question is about the process. When the introduction of the bill was being considered, was it thought possible that a judge could decide, on the day, the earliest date of release, so that witnesses and victims would know what it was before they left the court? In my experience, and according to what I have been

told by constituents, confidence in the system has often been breached because, although people thought that they understood the process in court, the accused—the convicted person—appeared in the community much earlier than they had anticipated. When you were deciding on the technical process that you have just described, did you think that it might be possible for a judge to give a date until which such a person would not be in the public gaze, or was that deemed inappropriate or unfeasible?

Kenny MacAskill: You raise an extremely important point. The bill is meant to be an immediate fix to Petch and Foye. I have a great deal of sympathy for your point and we are discussing it with the judiciary. Caveats need to be put on them, through either executive release or other means within the discretion of the Government or, indeed, the Scottish Prison Service. We are seeking to progress the issue in parallel.

We took the view that, given the clear problems caused by the Petch and Foye decision, we needed an immediate solution. The timescale means that it is not possible to resolve in the bill the issue that you raise, but your point has already been addressed, to some extent, in more serious cases when a clear punishment part has been disclosed by the judge in the court. I think that misunderstandings are more likely to occur in relation to lower tariffs. Those who are legally qualified understand the issue, but victims and witnesses often do not. Although the point that you have raised is not part of the bill's provisions, we are discussing it on an on-going basis with the judiciary in order to see what can be done. Perhaps the judiciary could issue guidance or further arrangements could be made.

Graeme Pearson: Will those discussions come back to the Parliament in the foreseeable future? Is that the longer-term solution?

Kenny MacAskill: I would like to see it done as early as is practical. Obviously, it is fundamental that issues such as change in judicial high office are signed off by the Lord Justice General, so I have had discussions about that. I can give an assurance that, if we can, we will seek to reach an agreement with the judiciary on what can be done. We are discussing the issue with the judiciary and we will bring it back as soon as we can.

Alison McInnes (North East Scotland) (LD): You have spoken about simplifying the situation and restoring it to its previous status. We heard evidence from the Faculty of Advocates that the bill was complicating the issue significantly and interfering with judicial independence, and that there were concerns about the extent to which it was appropriate to seek to restrict, control and direct the exercise of judgments. Do you want to respond to that?

Kenny MacAskill: As I said, this is a complex area of law, but the bill focuses on matters that, although they are few in number, are significant, such as Petch and Foye.

The bill addresses the position that has come about through a variety of matters, including the European Court decision on security aspects and the fact that we have to deal with matters in our jurisdiction to get an element of comparative justice between discretionary life sentences and determinate sentences. We think that the bill will restore the ability of the judiciary to deal with the issues. The public were concerned when, as a result of the Petch and Foye appeal, there was a significant reduction in the punishment part. The ability to impose between 50 and 100 per cent of the remaining sentence as the punishment part restores discretion for the judge. It ensures that there is comparative justice with someone who is on a determinate sentence and that factors such as the gravity of the offence and any previous convictions that the accused has are taken into account. The High Court sought to introduce that through its interpretation of the rules, but it was taken away as a result of the Petch and Foye case. The bill restores the ability of the judiciary to impose non-mandatory life sentences in which the punishment part is not less than the period that would be served under the determinate sentence that could have been given.

Alison McInnes: I understand what you are saying, but are we not becoming rather formulaic and therefore tying the hands of judges?

Kenny MacAskill: We have to do that because, if we did not, the situation might be worse. If we simply told judges that they could impose whatever sentence they liked, within a matter of months there would be lots of appeals from people saying, "This is not the right tariff." After all, those matters are not laid out specifically in legislation—they are dealt with by the High Court. If a judge simply gave a certain period of time for a heinous offence, but without being able to give a rationale for that, that would cause greater problems. We think that the bill gives judges the ability to strip out what is viewed as the security period and then, on the basis of previous convictions, the nature of the offence and the danger to the public, to impose a punishment part that gets up to at least parity with, if not beyond, the period that the person would have served under a determinate sentence, but with the protection of the public element that goes with a non-mandatory life sentence. Those sentences should be few and far between but, when they are given, the individuals who are involved will usually be a huge and

significant risk. We must give the judiciary the power to give the appropriate sentence and tariff.

Jenny Marra (North East Scotland) (Lab): The bill is framed within the strictures of the European convention on human rights. Is the complexity of the bill primarily down to the constraints of the ECHR or the way in which Scots law has evolved?

Kenny MacAskill: It is both. We must accept that ECHR law makes it clear that the security aspect is separate from the punishment part and should not be included in it. We formally accept that. Non-mandatory life sentences are not given routinely, as is shown by the fact that there have been 75 in six years. It is necessary to take account of the ECHR. Equally, we have to look at our domestic law and consider how to get an element of parity between a non-mandatory life sentence and the determinate sentence that would be given. It is not an either/or situation—it is both. We need to take the ECHR into account but, equally, we need to ensure that, in our judicial system, the punishment part properly reflects what a judge thinks is appropriate in the circumstances when a non-mandatory life sentence is given. That could include the nature of the offence, which in many instances can be heinous, the danger that is posed to the public and any previous convictions.

Jenny Marra: Do other legal jurisdictions that are subject to the ECHR have a sentencing mechanism that is more understandable to the public?

Kenny MacAskill: I cannot necessarily answer that. Other systems operate on a codification basis, and I do not know what the equivalent is for a non-mandatory life sentence. There are whole-life tariffs south of the border and they exist here.

The bill is about sorting out a problem that has arisen in Scots law, partly because of the strictures of the ECHR, although we do not blame that. We and the courts think that the European Court has taken a reasonable position. The bill is about ensuring that our courts are fit for purpose when we must deal with circumstances in which people are given a whole-life sentence for the public's safety, albeit that such people can apply for parole. Before they apply for parole, we must ensure that they are seen to have served an appropriate period as punishment.

10:30

Under the current legislation, the difficulty is that—as in the Petch and Foye case—it is likely, if not inevitable, that such people would get a lesser punishment part and would be seen by the public as serving a shorter sentence before being eligible for parole than they would have served with a fixed determinate sentence, although the court thought that such people should be kept on a whole-life licence.

It is not a matter of contrasting the situation with anywhere else or complaining about any other jurisdiction; it is about doing what is right, so that our judges have the power to impose whole-life sentences without the unintended consequence that the punishment part is less than that under a determinate sentence.

The Convener: I think that I have understood. I will hold that thought. I call Roderick Campbell, but I might not listen to him if he is going to confuse me.

Roderick Campbell (North East Fife) (SNP): That will probably happen.

I will put one point from page 3 of the Faculty of Advocates submission, which says:

> "if the Court has already, in fixing the notional determinate sentence, stripped out the element of public protection, the period required to satisfy the requirements of retribution and deterrence (as the judge perceives them) should be the same as the notional determinate sentence, and—as a matter of internal consistency—the Court should fix the part at 100% of the notional determinate sentence. Whether this is in fact the way the amended legislation would be interpreted and applied by the Court remains to be seen."

Do you have any comments on that?

Kenny MacAskill: Our view is that, as is clear in the bill, the court will be able to set the percentage at between 50 and 100 per cent. Given the nature of the individuals involved, the court might often go to 100 per cent, but we do not wish to fetter judicial discretion. We will leave the question to judges, because such matters are based on the facts and circumstances. The facts can be individual or collective—they can concern the nature of the offence, previous convictions or the risk that is posed. Judges would consider all such issues. As I said, the court might go to the maximum—that would be a matter for it and we would not wish to fetter its discretion. That is why the percentage is between 50 and 100 per cent.

Roderick Campbell: I have a smaller point about unintended consequences. I know that your view is that the bill is not that complex, but a lot of witnesses have suggested that it is complex. One of their concerns is that that complexity might give rise to unintended consequences. Do you have any thoughts on that?

Kenny MacAskill: Our view is that if we do not legislate the public will be aghast at what they perceive as unacceptable punishment parts of sentences and appeals, and the judiciary will see sentences reduced, as in the Petch and Foye case. That will cause great concern.

If we left it up to each judge to impose the punishment part as they saw fit, the problem of the

lack of comparative justice with determinate sentences would remain. If a judge could not detail the basis on which he set a sentence by stripping out, there might be a challenge on the tariff. The challenge would be on the basis that Mr A, who appeared one week, was given 10 years, whereas Mr B, who appeared the following week, was given only six years, after which the position would have to be clarified.

The bill provides a basis on which to set the tariff and on which the judge can lay down the reasons why he is imposing the particular punishment part, such as previous convictions or the nature of the offence.

Humza Yousaf: I will raise a brief point of process. If we assume that the bill passes all its legislative hurdles, how will the complexity of the new sentencing regime be explained to the judiciary and to sentencing sheriffs?

Kenny MacAskill: Through the Judicial Studies Committee. Correctly, the judges and sheriffs have their own body to separate them from influence from Government or anywhere else. The Judicial Studies Committee will work through the process of how that is detailed. Whether Sheriff Tom Welsh, the Lord Justice General or the Lord Justice Clerk deals with that, you can rest assured that the judiciary will ensure that everyone who deals with those matters is cognisant with the new regime.

The Convener: This would be quite a good subject for law students to study in their tutorials if and when the bill is enacted.

Jenny Marra: Given that the process of sentencing is about public confidence in punishment and in justice being done, is there any avenue open to you for giving the public more confidence in the sentencing structure and at least a bit of understanding of how the process works?

Kenny MacAskill: There is no such avenue without primary legislation. That relates to Graeme Pearson's point. There are matters that could be dealt with through the courts, which we are discussing with the judiciary. I welcome the fact that the judiciary have been making it quite clear in pronouncing sentence what part is the punishment part, so that people are in no doubt about the sentence that is imposed. We are discussing those matters with the judiciary.

The issue is about preserving judicial discretion and judicial independence, except where that is properly legislated for, and encouraging judges to do what is good practice among many on the bench, which is to make it quite clear what the sentence means. Often, the accused, the defence, the prosecution and the person who is presiding know what the sentence will mean in terms of the period of imprisonment; it is simply members of the public who do not.

We are working on that, but I am not aware of any way in which we could deal with the matter without primary legislation or without building on the positive discussions that I have had with the Lord President.

The Convener: It would surely be open for the Crown Office to speak to the victim—who might be sitting in court or who might be the primary witness—to explain what the sentence means. There should be some management of victims in court process.

Kenny MacAskill: I think that there is. I have experience of having to meet victims and I know that the Lord Advocate does that. To be fair, in my experience, advocate deputes will frequently seek to do that. Recently, we have had tragic cases in which it seems to me that the victims' families have welcomed the court making it quite clear how it viewed the devastation that they had been caused and being quite specific about what the punishment part of the sentence would be, with the result that they were quite clear about what the sentence meant in terms of the period of imprisonment.

The Convener: Perhaps there will need to be longer explanations if and when the bill is enacted.

Kenny MacAskill: That might be the case. I am happy to discuss such matters with the Lord President, the Lord Justice Clerk and the Judicial Studies Committee. As Mr Pearson has said today and previously, there is more that can be done. We will seek to work with the judiciary to reach a common solution. There are issues that cause difficulties for them. It is not that there is a reluctance on their part. It is a matter of making it clear how best we proceed to ensure that we keep both sides of the scales of justice balanced.

Graeme Pearson: I have two points. On the matter that you have just alluded to, is it feasible that some form of aide-mémoire could be created for witnesses and victims so that in the cold light of day, after the event, they would have the chance to read things over? I do not think that many families in such circumstances are in a fit state to take in the complexities of what you have explained. The committee certainly struggled hard to do so for some weeks and no sooner had it grasped the concept than it lost it again, so an aide-mémoire might be helpful.

My second point is about the perceived injustice that arises when someone pleads guilty in circumstances in which they could be described as having been caught redhanded. On the strength of that plea, they benefit from the automatic application of the process of discount. Is there any way in which that could be re-examined? From a

public viewpoint, it can cause great distress for families, who perceive that a discount is being offered to someone who had no alternative—as many people would see it—but to plead guilty. I understand the complexities around that issue, but I wonder whether there are any thoughts about how to resolve it.

Kenny MacAskill: Your first question relates to the issue of good practice. The Crown operates the victim information service, but I can assure you that we will review the procedures as we progress our proposed victims and witnesses bill. Those matters were part of our discussions with all the stakeholders; indeed, I attended a Victim Support Scotland event yesterday.

We recognise that progress has been made, but we do not underestimate the journey that has still to be travelled. I am happy to enter into discussions with the Crown on that point, although I understand that, in accordance with current good practice, a lot of that information would be available.

I am happy to discuss with the judiciary the second issue that you mentioned. However, the Lord Justice Clerk recently pronounced that he did not see the discount as necessarily being automatically available.

The Convener: Before I move on to part 2 of the bill, you mentioned the proposed victims and witnesses bill. I take it that that bill will deal with liaising with victims and witnesses in the court process. When might it come before the committee?

Kenny MacAskill: I do not think that it will come before the committee this year. There is a European Union directive coming in that states that those matters must become statutory. I had the benefit of attending the Victim Support Scotland conference yesterday, and I know that Scotland has a remarkably good system and victim support service. That is not uniform throughout Europe, and we should be proud of what Victim Support Scotland does, especially given the number of volunteers that it has.

There are glitches, and although we have made great progress on victims, the Lord Advocate wants us to make greater progress on witnesses. The EU directive says that we must have a legislative basis for what we do with victims and witnesses.

As a Government, we believe that we should positively embrace that directive and make a virtue out of a necessity. We are seeking to begin a consultation to ensure that we get matters as correct as we can, which is why we are speaking to the Crown, to Victim Support Scotland and to all the agencies such as Rape Crisis Scotland and Women's Aid. We will consult on what goes into the bill, which is likely to be introduced in the third year of the current parliamentary session; it will not be introduced this year.

The Convener: Thank you for that, cabinet secretary—I asked just because you mentioned it.

We will move to part 2 of the bill. I will kick off, if no one else wants to come in. The Justice for Megrahi campaign believes that we do not need that part of the bill, and that the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 could simply be amended to remove the requirement for the consent of persons who provided information to the Scottish Criminal Cases Review Commission. The commission could then publish the report undoctored and unedited, as it were, and not redacted in any way. What is your comment on that?

Kenny MacAskill: We do not accept that—obviously, there is conflicting legal argument in that regard. We have always been committed to being as open as possible on the al-Megrahi case. The bill clearly goes beyond that case and deals with other situations, although those are relatively few in number.

We want to ensure that the bill provides for a full parliamentary role, and we are seeking to assist the commission with that. We can say, in analysing the position, that we must take account of the general limits on competence that are placed on ministers in the Scottish Parliament under the Scotland Act 1998.

Under section 54 of the Scotland Act 1998, those limits apply equally to subordinate legislation and primary legislation. The limits cover reserved matters such as the subject matter of the Data Protection Act 1998 and the European convention on human rights. We therefore disagree with the notion that it would be possible for Scottish ministers to have wider powers under subordinate legislation than those that exist under primary legislation—indeed, subordinate legislation is restricted further than primary legislation by the statutory powers that enable it to be made.

Therefore, it is our position that the bill is the most appropriate vehicle to achieve our policy intention, in providing a framework for the Scottish Criminal Cases Review Commission to consider whether it is appropriate to disclose information—or not, as it might decide.

10:45

Graeme Pearson: We are told that a book will be published later in the year, which, by all accounts, will rehearse many of the issues to do with disclosure that you are struggling with. Do you have a view on the Government's current

inability to release information, given that a private individual will do that work on your behalf in a book that is published for profit?

Kenny MacAskill: It is not for me to hypothesise about what might be in the book, nor will I speculate about what is in the statement of reasons, which neither I nor the Government has seen. I have given the legislative position. We are doing what we think is appropriate, to show the willingness that we have always had to be as open as we can be. It is not appropriate for me to comment on or speculate about what other people might write.

The Convener: No, and the issue is not relevant to the bill. Let us accept your arguments about subordinate legislation and amending the 2009 order. Section 3(3) of the bill will insert into the Criminal Procedure (Scotland) Act 1995 new section 194M, "Further exception to section 194J", under subsection (1)(b) of which there will be an exception if

"the Commission have determined that it is appropriate in the whole circumstances for the information to be disclosed."

We heard evidence that replacing the word "appropriate" with "necessary" would overcome data protection prohibitions that might be in place. What is your view on that?

Kenny MacAskill: We are aware of the comments of the assistant commissioner for Scotland and Northern Ireland in the Information Commissioner's Office, which do not reflect our understanding. We understand that the assistant commissioner will meet the Scottish Criminal Cases Review Commission. The committee might want to take more evidence on the issue or seek further clarification. We stand by our position, which is that what you suggest would not be possible. When the assistant commissioner has had the discussion with the commission you might find that the position has changed.

The Convener: I infer from what you said that it has changed. We can follow that up.

Is it the case that the United Kingdom Government could make an order that was specifically applicable to the Megrahi case, which would allow data protection to fly off—as it were—in circumstances in which it would not otherwise do so, in relation to the statement of reasons?

Kenny MacAskill: I understand that the answer is yes. I have had a brief discussion with Ken Clarke, the purpose of which was simply to open the door to discussions between his office and the Scottish Criminal Cases Review Commission. I understand that those discussions are going on. Our understanding is that what you described is possible. Arguments might be put forward south of the border as to why such an approach would be inappropriate, but our advice is that it is possible, in theory.

The Convener: I am sorry, I was slightly distracted then. Did you say that discussions are going on between the UK Government and the commission, rather than with you?

Kenny MacAskill: Yes, because it is not for me to publish—

The Convener: No, I meant discussions on the order that the UK Government could make, which would lift prohibitions on the publication of data in the statement of reasons.

Kenny MacAskill: Those are ultimately matters for the commission to address with the Lord Chancellor. The Scottish Government raised the issue with him—I spoke to him at a meeting and I wrote to him—but given that the information would be published by the commission, and given that the commission has the information at its fingertips, whereas neither I nor anyone else in the Government is aware of it, it seems appropriate that the discussions should be between the people who have the power and the people who have the knowledge.

The Convener: How favourable is the Westminster Secretary of State for Justice, Ken Clarke, to such an approach?

Kenny MacAskill: He indicated a willingness to look at it; beyond that I cannot speculate. You would need to ask him.

The Convener: We have not done that, which I think was remiss of us. I think that the committee would want to know Ken Clarke's view. Do members agree?

Members *indicated agreement.*

The Convener: We should pursue the matter in evidence.

Roderick Campbell: When Dr Swire gave evidence on 7 February, he said:

"The professional advice that I have received is that it would be perfectly possible for other individuals affected by the case to approach the SCCRC to request that a further appeal be granted. In that event, I understand that number 1 in the pecking order, as it were, would be Megrahi's family".—[*Official Report*, *Justice Committee*, 7 February 2012; c 907.]

The committee has received some advice that suggests that there is a possibility of a further appeal. If Mr Megrahi is no longer on the scene, some of the data protection issues fall away. I know that this is a difficult area to comment on, but do you have any comments on that?

Kenny MacAskill: It would be open to Mr al-Megrahi or any other party to ask the commission to consider making a further reference to the High Court under section 194B of the Criminal

Procedure (Scotland) Act 1995. The commission would then apply the statutory requirements in assessing whether it was in the interests of justice to make a further reference. It would not matter whether Mr al-Megrahi was in Scotland or Libya or, indeed, if other matters applied. It is quite clearly a matter for the courts, and it would be inappropriate for me, as the Cabinet Secretary for Justice, to comment further.

Roderick Campbell: All that I am suggesting is that, to some degree, part 2 of the bill is dealing with a specific issue and, if we take the comments of Justice for Megrahi at face value, it might be possible for this specific issue to proceed through the courts, rather than being something that the Scottish Government would deal with.

Kenny MacAskill: There is a lacuna in the law; that is why we have made the bill general rather than specific. Although the number of cases in which an appeal is subsequently abandoned are relatively few, it is felt that there should be the ability for information to be published, except in specific circumstances, which is why we have rights for the Crown.

Nobody would deny that the bill affects Mr al-Megrahi, but it is worth having that legislative right, in any event, because there might be other instances further down the road—one would hope that they would not be as high profile or capable of causing as much devastation as Mr al-Megrahi's case—in relation to which there should be an opportunity to have the information published. The Government is acting to put that legislative process in place, as well as ensuring that, with regard to Mr al-Megrahi, we do what we can to be as open and transparent as possible.

The Convener: In relation to the prospect of the reactivation of the appeal, there was a piece of emergency legislation—I cannot remember its name—that meant that there was a double test for the Scottish Criminal Cases Review Commission. The two tests were that there had probably been a miscarriage of justice and that it was in the interests of justice that there be a referral to the High Court. There was another part to that, which was that the High Court could refuse a referral from the commission on the basis that the appeal was not in the interests of justice.

Lord Carloway has recommended that that hurdle be removed. When might that be legislated on? If, in a year's time, someone has stepped into the shoes of the deceased al-Megrahi and asked for a referral, and the commission has said that the request passes the double test, the High Court could still refuse it, if that provision is still on the books.

Kenny MacAskill: I recently sent a letter to this committee and other stakeholders indicating our intention to consult on Lord Carloway's review. We have made it clear that we are not minded to accept the position of the Faculty of Advocates on a royal commission. We anticipate that we will perhaps come back to the committee with greater detail on the issues around the Carloway review at the end of this year or the beginning of next year.

The Convener: I would like to pursue this. You do not have to accept all Lord Carloway's recommendations; you need implement only some of them. With respect, the issue that I am talking about is one recommendation that could be implemented quite quickly. I take it that it is an amendment to primary legislation. Are you minded to accept that particular recommendation on the High Court? If you are so minded, when might you introduce legislation to amend the primary legislation?

Kenny MacAskill: I have made it clear that Lord Carloway's review is a welcome contribution to updating the law of Scotland to deal with not just Cadder but other matters, from detention or arrest through to final appeal. The review has a coherent logic in that regard, and that is why it is important that we consult on it. Lord Carloway has told me that he does not regard it necessarily as a package, but I think that it is an A to Z review of the law in Scotland, if I can put it that way. We will consult on the review and I would prefer not to cherry pick aspects of it. We are intent on bringing its proposals into legislation as soon as we can. They do not fall within the procedures for emergency legislation—I think that Lord Carloway accepted that the emergency legislation that we introduced in the previous parliamentary session has provided us with sufficient security as we go forward. That said, and given where we are, it is incumbent on us to proceed as expeditiously as we can. That is why, after we consult on the issue, we intend to legislate at the end of this year or the beginning of next year, depending on the time available for the legislative process.

The Convener: I just want to be clear about the position in cases in which the double test has been passed and the Scottish Criminal Cases Review Commission has made a referral to the High Court. Are you minded to remove the High Court's test of whether it is in the interests of justice that the appeal proceed, so that the High Court must take a referral from the SCCRC?

Kenny MacAskill: I have to take the matter out to consultation, but I can be quite clear that there is nothing in Lord Carloway's review that causes me concern. I welcome the review and believe that it will significantly advance the law of Scotland. It is a coherent and logical review of the legal process from arrest through to final appeal. I am comfortable with everything that Lord Carloway has proposed in that regard.

The Convener: I think that there may be different views in the committee about the proposals on corroboration, majority verdicts and so on, which gave us some concern. However, that debate is for another time.

Alison McInnes: Part 2 of the bill is well intentioned, but I do not think that it will achieve what most people want, given that it is quite clear that consent will not be forthcoming due to the complexity of the Megrahi case. Surely it would be more productive to pursue an order with United Kingdom ministers. Would that not be more effective?

Kenny MacAskill: Well, we are doing both. As I said to the convener, I have spoken to Ken Clarke about the issue and have formally written to him about it. Given that those with the power and those with the knowledge should be involved, discussions should take place between Ken Clarke and the SCCRC; if either wishes me to intercede in any shape or form, I am happy to do so. However, Ken Clarke has shown a willingness to engage and the SCCRC is happy to do so on its own volition. I think that that deals with the second aspect of your question.

On the first aspect, I have always said that I cannot speculate about what is in the statement of reasons or about what people might or might not do; all I can do is stand by the Government's position, which is that in all matters relating to al-Megrahi and Lockerbie we have sought to be as open and transparent as we can be. We have reached a position whereby we require the bill's provisions. It is clear that there will be difficulties to be surmounted thereafter, but we believe that the bill confirms our commitment to be as open and transparent as possible. Moreover, we are taking the twin-track approach that you have suggested.

Alison McInnes: I am just a little puzzled, because you thought that the matter was important enough to draft a bill to address it, but your relationship with and approaches to Ken Clarke seem quite tentative—you seem quite willing to take a back seat and leave it to the SCCRC. I feel that it would be more helpful if you were able to be more proactive in that regard.

Kenny MacAskill: With respect, I do not think that I can be, because I do not know what is in the statement of reasons and I cannot speculate on what may or may not have to be redacted. I can go to Ken Clarke on behalf of the SCCRC, as I have done, and indicate that it has reservations about the matter. He has shown willingness to engage on the issue both verbally with me and in response to a written offer of a meeting with the SCCRC to discuss the issue with it. The SCCRC must discuss the matter with Ken Clarke because it knows what is in the statement of reasons, as do a few others—eight people, I think—but I certainly do not, nor does any other member of the Government. I cannot possibly have a meaningful discussion with Ken Clarke about a document that I have never seen and information that—I do not know—I might have to redact. I cannot have a worthwhile discussion with Ken Clarke in that regard.

I can give you an assurance that, if the SCCRC told me that Ken Clarke was not showing willing, or if Ken Clarke told me that the SCCRC was being unnecessarily obstructive, I would seek to intercede. However, neither of those things has happened. Ken Clarke, to his credit, and the SCCRC are entering into discussions. The reason why it has to be done by the SCCRC is that it knows what is in the document. I do not know and I cannot have a meaningful discussion about something that I have never seen. I cannot speculate on something of such size and complexity.

11:00

Jenny Marra: I want to return to the evidence that we heard from the assistant information commissioner that data protection could be overridden. Given the commitment that your Government has expressed on many occasions to openness and transparency on the Lockerbie bombing and conviction, which you have just reiterated, is not what the assistant information commissioner said about data protection being overridden music to your ears?

Kenny MacAskill: If only it were true that, simply through subordinate legislation, the Scottish Government could override primary legislation. You might find that I would bring statutory instruments before the Parliament on a variety of matters to provide us with the opportunity to become an independent land; to avoid becoming involved in foreign wars that cause huge damage; and to disassociate us from the huge pain and suffering that cuts in social security are causing to those who suffer from disabilities. However, that is not so. The committee might want to see the outcome of the discussion between the assistant information commissioner and the SCCRC. If I could, I would in many instances seek to subvert the Scotland Act 1998—if I can put it that way—through subordinate legislation, but I cannot.

The Convener: That was impassioned. I thank the cabinet secretary for his evidence.

I suggest that we write to Ken Clarke to ask whether he is minded to make such an order, if requested, and to the assistant information commissioner and the SCCRC to ask about the outcome of their discussions. Do members agree to do that?

Members *indicated agreement.*

11:02

Meeting suspended.

11:11

On resuming—

Subordinate Legislation

Advice and Assistance (Assistance By Way of Representation) (Scotland) Amendment Regulations 2012 [Draft]

The Convener: There is one affirmative instrument for the committee's consideration. Agenda item 3 is an opportunity to take evidence from the Cabinet Secretary for Justice and his officials before we formally debate the motion on the regulations under agenda item 4. In the first part of the process, it is possible for officials to speak, if the cabinet secretary wishes. I say that simply to inform the committee—I do not anticipate thrusting the officials into the limelight. We have with us James How, head of the Scottish Government's access to justice team, and Felicity Cullen, solicitor with the Scottish Government. I welcome back the cabinet secretary, whom I believe has a short opening statement.

Kenny MacAskill: The regulations amend the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 to make assistance by way of representation available for application proceedings under the Double Jeopardy (Scotland) Act 2011. That act reformed and restated the rule on double jeopardy, which prohibits a person from being placed in jeopardy of criminal prosecution twice for the same offence. The act also set out certain exceptions to the rule and made a number of related and consequential reforms.

Before the Crown can bring a double jeopardy prosecution under sections 2, 3 or 4 of the 2011 act, the High Court must first set aside the original acquittal and grant authority to bring a new prosecution. Section 5 of the act envisages that the High Court will hear the parties before doing so. That will be done by means of the application proceedings that are established by sections 2(2), 3(3)(b), 4(3)(b), 11(3) and 12(3) of the act. The regulations that are before us will ensure that legal representation is available for those proceedings for a person who is subject to those proceedings, provided that the person's application meets the statutory test for assistance by way of representation.

The Convener: Yes. What a morning we are having.

As members have no questions, we move to agenda item 4, which is the formal debate on motion S4M-01901.

Motion moved,

That the Justice Committee recommends that the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2012 [draft] be approved.—[*Kenny MacAskill*.]

Motion agreed to.

The Convener: I thank the cabinet secretary for attending.

The committee will have to make a short formal report on the regulations. The deadlines are tight, and the clerks will set to work on the draft immediately. Are members content to delegate to me the authority for the final wording of the report, which relates to a simple and technical piece of legislation?

Members *indicated agreement.*

Act of Sederunt (Fees of Sheriff Officers) (Amendment) 2012 (SSI 2012/7)

The Convener: We have one negative instrument for consideration under agenda item 5. The Subordinate Legislation Committee has drawn the Parliament's attention to the instrument on the ground that there was a failure to lay it at least 28 days before it came into force, as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. That committee nevertheless found the explanation for the failure that was provided by the Lord President's office to be acceptable. As members have no comments, are we content to make no recommendation in relation to the instrument?

Members *indicated agreement.*

Act of Sederunt (Fees of Messengers-at-Arms) (Amendment) 2012 (SSI 2012/8)

Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (Commencement) Order 2012 (SSI 2012/20)

The Convener: Agenda item 6 is consideration of two instruments that are not subject to any parliamentary procedure. The Subordinate Legislation Committee has not drawn either of the instruments to the Parliament's attention on any grounds within its remit. Do members have any comments on either of the instruments?

Alison McInnes: In relation to the commencement order for the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, I would like it to be noted that I voted against that act. I remain of the view that it is unnecessary and unworkable and I fear that we will find over time that it has far-reaching implications.

Graeme Pearson: I will not repeat all that Alison McInnes has just said, but I concur with it.

Jenny Marra: I, too, associate myself with Alison McInnes's comments.

The Convener: That is now on the record.

Having made those comments, do members agree simply to note the instruments?

Members *indicated agreement.*

11:15

Meeting continued in private until 12:03.

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