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Official Report

JUSTICE COMMITTEE

Tuesday 8 October 2013

Session 4

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JUSTICE COMMITTEE
27th Meeting 2013, Session 4

CONVENER

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

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Colin Keir (Edinburgh Western) (SNP)
*Alison McInnes (North East Scotland) (LD)
Margaret Mitchell (Central Scotland) (Con)
*John Pentland (Motherwell and Wishaw) (Lab)
*Sandra White (Glasgow Kelvin) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Tam Baillie (Scotland's Commissioner for Children and Young People)
Mark Ballard (Barnardo's Scotland)
Professor James Chalmers (University of Glasgow)
Morag Driscoll (Scottish Child Law Centre)
Professor Fiona Leverick (University of Glasgow)
Shelagh McCall (Scottish Human Rights Commission)
Rachel Stewart (Scottish Association for Mental Health)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 8 October 2013

[The Convener *opened the meeting at 09:31*]

Decisions on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the 27th meeting in 2013 of the Justice Committee. I ask everyone to switch off mobile phones and other electronic devices completely as they interfere with the broadcasting system even when they are switched to silent. We have received apologies from Margaret Mitchell.

I invite members to agree to take items 3 and 5 in private. Item 3 is a review of the evidence that we have received to date on the Criminal Justice (Scotland) Bill at stage 1, and item 5 is consideration of our work programme. We have already agreed to consider our draft stage 1 report on the Tribunals (Scotland) Bill in private, and we will do that under item 4.

Do members agree to take items 3 and 5 in private?

Members *indicated agreement.*

Criminal Justice (Scotland) Bill: Stage 1

09:31

The Convener: Item 2 is our third evidence session on the Criminal Justice (Scotland) Bill. As was the case last week, we will look only at part 1, which is on police powers to arrest, hold in custody and question suspects. We will hear from two panels of witnesses today. I welcome our first panel. Shelagh McCall is a commissioner at the Scottish Human Rights Commission, and Professor James Chalmers and Professor Fiona Leverick are from the University of Glasgow—I think that you were in a starring role last week. Thank you for your written submissions.

We begin the questions right away.

John Finnie (Highlands and Islands) (Ind): Good morning, panel. I have a question for Ms McCall. I am interested in the references that you make in your submission to the alterations that were made post-Cadder. You state:

> "The notion that some sort of 'rebalancing exercise' requires to be carried out in the form of removal of other procedural safeguards, such as corroboration"—

which we are not covering today—

> "is mistaken and the provisions abolishing corroboration without providing an adequate alternative safeguard are of considerable concern to the Commission."

Will you expand on that, please?

Shelagh McCall (Scottish Human Rights Commission): Certainly. I thank the committee for inviting the commission to give evidence.

One of the misunderstandings of the Cadder decision, as the commission sees it, was the notion that it gave suspects some added advantage and that, therefore, there required to be some recalibration of the system in favour of victims and witnesses. In fact, Cadder brought Scotland into line with the minimum measures that were necessary to comply with article 6 of the European convention on human rights, on the right to legal assistance.

From the commission's perspective, there was a fundamental misconception about the starting point for the Carloway review and, indeed, the emergency legislation, which was the idea that there needed to be some tipping of the scales the other way. The most obvious tipping of the scales has been in the proposal to abolish corroboration. Following Lord Carloway putting forward that proposal, which now appears in the bill, there has not been—in the commission's view—enough scrutiny of the implications of doing that without putting in another safeguard.

The Convener: We are not looking at corroboration today.

Shelagh McCall: I understand that.

The Convener: I know that it is terribly hard to keep off the subject and that you are itching to discuss it, but we can do that on another day. Please try to keep to the topic of people being arrested but not—what is the expression, team?

Elaine Murray (Dumfriesshire) (Lab): Not officially accused.

The Convener: Please try to keep to that stuff, if you can.

I say to the other panellists—I meant to say this at the beginning—that if you want to come in after someone has been asked a question, just indicate to me and I will call you.

I am sorry, Ms McCall. Please continue.

Shelagh McCall: I am sorry, convener. I felt that the need to refer to corroboration arose from the way in which Mr Finnie framed his question, but I will stick to part 1.

The Convener: Do not pay any attention to the questions that members ask—or rather, temper what they say.

Shelagh McCall: Looking at the question from the perspective of part 1, the commission broadly welcomes the general approach, which is in favour of a presumption of liberty, but there are a number of ways in which the bill could be strengthened. At the moment, there is a danger—we highlighted it at the time of Cadder, too—of creating grey areas in which suspects may fall between the provisions in relation to legal assistance and so on.

For example, when the police have grounds to arrest someone but they choose not to do so and, instead, they interview the person in their house, that person will not get legal assistance. That will simply be down to how the police decide to exercise their powers, rather than being anything to do with the person's status and the consequence of answering questions.

John Finnie: In relation to that, the commission states that it

"would encourage a statutory definition of the reason for arrest and subsequent detention"

and

"a statutory definition of who is a suspect."

Would that address those issues?

Shelagh McCall: It would start to address them, but it would not address them fully. For them to be addressed fully, when a suspect is initially cautioned, he should be told of his right to legal assistance, and that should be enshrined in statute. Secondly, when a suspect is not to be taken to the police station but is to be questioned, he should be offered the opportunity of legal assistance and that should be facilitated in the way that it would be if he was at the police station.

John Finnie: If that was not the case, is there a danger that it would taint the whole system?

Shelagh McCall: If that was not the case, there would be a danger that suspects would not be made fully aware of their rights at the initial point of interaction with the police. There would also be a danger that, when people were interviewed outwith a police station and they gave incriminating answers, that would be in breach of their right to legal assistance under article 6 and might render the trial unfair.

There is also a flip-side. The ability to facilitate legal assistance outwith a police station would avoid the unnecessary interference with people's private lives that is caused by taking them to a police station when it is not otherwise necessary.

The Convener: John Finnie will know about this. Is it not tricky for a police officer to know when the questioning has slipped into their saying, "I think you may have committed an offence"? A police officer might start off by just asking questions about an incident but, in the course of asking those questions, become aware that the person may be involved in another way that could reasonably be suspected to be criminal. I am thinking about the practicalities for the officer on the ground.

Shelagh McCall: That is one of the reasons why we say that the bill should attempt to define what a suspect is. If there is a definition of a suspect that states which people need to be given a caution, a right to legal assistance and all the things that follow from that, a policeman will know whether someone falls within that definition and it will give clarity for both the suspect and the police officer.

I appreciate what the convener says. There is obviously a middle ground. For instance, if a policeman comes across a scene in the street in which someone is dead on the floor and there are 10 people standing around, the policeman will ask, "What happened?", and some people may answer that. At that stage, the policeman will not know whether a crime has been committed, never mind whether any of those people is a suspect. There is a spectrum.

However, a statutory definition of what a suspect is and what triggers their rights would assist police officers in such situations.

The Convener: Do you have one?

Shelagh McCall: I do not have a written definition in front of me. I am not a parliamentary draftsman.

The Convener: It will help the committee if, in due course, someone proposes an amendment on that, in the event that the Government does not, because it will enable us to test how useful a definition would be.

Sandra White (Glasgow Kelvin) (SNP): Good morning, everyone.

My question follows on from John Finnie's question about the reformed powers of arrest. The SHRC raised the issue, but any of the witnesses can answer. The Carloway report expressed concern that the

"marking of a person as a suspect could be given undue weight by the public and media, to the detriment of the suspect and subsequent criminal proceedings".

Do you have any thoughts on that? You put forward your thoughts on the Carloway report, but will you expand on them?

Shelagh McCall: In the situation in which someone is released under what will be called investigative liberation—in other words, when they are essentially bailed to be brought back by the police at a later stage—our position is that, to ensure proper respect for their rights to private life under article 8 of ECHR, which include the right to reputation, and given that they will not be officially accused of anything at that time, they ought to have a right to anonymity, and that ought to be built into the bill.

An example of how that can go terribly wrong was in the Joanna Yeates investigation in England, when Christopher Jefferies, a former teacher who was her landlord, was named as having been arrested.

The Convener: We went through that previously, so we are well aware of that tale and the trial by newspaper and so on.

Shelagh McCall: That is an example of precisely the situation that one would seek to avoid. While someone is not officially accused, a lot of their private rights will be at stake, including their employment rights, and they ought to be protected at that stage.

Sandra White: Does anyone else have thoughts on that?

The Convener: The witnesses are not nominating themselves to answer, so I would just leave it.

Sandra White: Okay.

The Convener: You are doing a Margaret Mitchell on me, now. That is what I call inviting other witnesses to speak. I am sure that the witnesses are perfectly able to tell me when they want to say something.

Professor Fiona Leverick (University of Glasgow): We will jump in if we need to.

Sandra White: Can I ask a quick supplementary question, convener?

The Convener: Of course.

Sandra White: Other people might come in on the liberation aspect, but I want to talk about the suspect aspect. Concerns have been raised in evidence about the issue of being detained and arrested, which is obviously connected to somebody being a suspect. Are you concerned about the use of the wording "detained" and "arrested"?

Shelagh McCall: I do not think that the wording is the problem. That is a conceptual issue. It is what is actually happening that is the issue in terms of people's rights. We think that the bill would be greatly improved if, at the beginning, a principle for interpreting the provisions was inserted that sets out the presumption of liberty. That would mean that, when officers wonder whether they should arrest a person at all, keep a person in custody or put conditions on a person's liberation, that could be informed by the guiding principle of being in favour of liberty unless it is necessary to do otherwise. As we set out in our written submission, perhaps a dozen or so sections of the bill could be improved by having that principle at the start.

Sandra White: Thank you.

The Convener: You referred to anonymity, Ms McCall, but if somebody is arrested without being officially suspected and they are then released on investigative terms, the condition might be that they do not approach other people because they could corrupt or intimidate possible witnesses. How could there be anonymity in that situation? Other people would have to be told that the person had been arrested and that, although they had been released, the police were continuing to investigate them. Surely some people would have to be told that.

Shelagh McCall: The police will obviously know what the conditions are. It is similar to the bail situation—

The Convener: But some members of the public will have to know.

Shelagh McCall: I suppose that it might be argued that, if there is a complainer who is the direct victim of the alleged offence, there might be a duty to protect them from potential harm. However, we have seen that for the police to publicise someone's name in such a situation can be extremely problematic.

The Convener: So there should be anonymity in the sense of the police not publicising the person's name, but you concede that there could be circumstances in which some people would have to be informed that somebody was out on investigative release.

Shelagh McCall: There could be such circumstances, because the police have a positive duty to protect people from breaches of their rights under articles 2 and 3, which are the right to life and the right to be protected from cruel treatment and so on.

Roderick Campbell (North East Fife) (SNP): Good morning, panel. Last week, we heard a variety of views on the concept of bringing detention and arrest together. Given that "arrest" is not defined in the bill, I referred the various panels of witnesses at last week's meeting to Lord Carloway's recommendation in his report that

"arrest should be defined as meaning the restraining of the person and, when necessary, taking him/her to a police station".

Chief Superintendent O'Connor said that his understanding of arrest

"is that the person is no longer free to go about their lawful business, or has not been advised that they are free to do so."—[*Official Report, Justice Committee*, 1 October 2013; c 3293.]

That was generally considered to be, in many respects, just a redefinition of the current position in relation to detention. I heard what Shelagh McCall said earlier about the difficulties in merging the concepts of detention and arrest without having a definition of "arrest". Do you have any thoughts on that?

09:45

Professor James Chalmers (University of Glasgow): I do not see any difficulty in merging the two concepts. In fact, I think that doing so will give us a much more rational and sensible system than the one that we have. One of the difficulties with defining "arrest" is that existing law is quite unclear on it. The committee heard evidence from a previous witness who quoted from Renton and Brown's "Criminal Procedure", the standard textbook in the area, which starts with the statement that it is "difficult to state clearly" the law of Scotland on "arrest". The bill does not provide a comprehensive scheme for regulating arrest but simply sets out the circumstances in which that power might be exercised.

I am not sure that the bill is the place to define arrest comprehensively or that the Carloway review gives us a good basis for doing that. It might be valuable to define arrest, but I am not sure that it can be done in the bill.

Roderick Campbell: Where would it be done?

The Convener: Sorry, but I want to let Professor Leverick in.

Professor Leverick: I agree with Professor Chalmers. The important point is that the bill clarifies what was previously quite a confusing situation in which both detention terminology and arrest terminology were used. What is in the bill is a vast improvement on that because it simplifies the structure.

The Convener: Do any committee members disagree with that point? Professor Leverick is thinking in terms of the accuracy of the process, but as politicians we are probably thinking about perception, which is a huge factor not only for politicians but for a person who has been arrested but "not officially accused" of an offence. The concern is that we will have situations like the Yeates case, in which somebody is arrested and given investigative release, and the press then run stories about the person's arrest.

I do not know why the bill is changing the use of the terms "detention" and "arrest". I understand the distinction between being detained and being arrested, which are different situations. Frankly, I do not understand why the bill uses the term "arrest" for both situations. You solidly support the bill's change in that respect, Professor Leverick. You can tell me whether I am misguided in my view. I am happy to be told that I am misguided, because I am told that all the time.

Professor Leverick: I do not think that the terminology is as problematic as you think it is. I do not believe that there is much distinction between the term "arrest" and the term "detention". For one thing, we cannot guarantee that the press will report the terminology accurately anyway. The important point is that we have a real protection here that is not available in other jurisdictions, which is that the detention period—it is the period of "arrest" under the bill—is very short. There is perhaps more of a problem with investigative liberation, which can be a lengthy period. However, I honestly do not think that the term that is used, whether it is "arrest" or "detention", is important. If it concerns you that much, you could just swap "arrest" for "detention", because that would not really make any difference to the bill.

The Convener: That is what I am asking about. The terminology does not make any difference to what is done. I think that it is just the different label that is the issue. Do committee members feel the same as me about that?

Roderick Campbell: I do not. I am interested in following up Professor Chalmers's point about where one would seek to clarify the terminology. What priority should the committee give to doing that?

Professor Chalmers: I do not think that that is a priority, because the general term "arrest" has been used successfully for quite some time, despite the fact that nobody can state exactly what the law in that area is. The area could be reviewed by the Scottish Law Commission or an ad hoc working group to try to bring some clarity to it. However, I do not think that that is a priority, because the present system appears to be workable.

I will pick up briefly on some other points that have just been made. The current position in England is that arrest involves reasonable suspicion that somebody has committed an offence, and detention in Scotland involves reasonable suspicion that somebody has committed an offence, so in effect the terms serve the same purpose. I am not sure that the distinction between arrest and detention is well understood by the general public; they both involve largely the same thing, which is somebody being taken into custody.

I take the point about the media coverage that has occurred in England on a number of occasions, but there are two important differences to note. First, the lengthy periods of detention that are permissible in England allow a head of steam to build up in a way that would not be possible in Scotland, particularly if the Criminal Justice (Scotland) Bill is passed in its current form. The second difference is the rather stricter approach of the Scottish courts to contempt of court, which might affect the way in which Scottish newspapers choose to report cases. I would be surprised if a change in terminology in itself made a difference to the reporting of cases.

Shelagh McCall: I will throw something into the mix. I do not think that the words that we use to describe it really matter. We have to think about what the function is. One function is to tell the police what powers they have, so that they are clear that what they are doing is lawful. The flip-side of that is what, from a suspect's point of view, flows from the decision to arrest, detain or whatever it is.

In rights terms, the Strasbourg court is moving towards talking about curtailment of freedom of action rather than being deprived of liberty. The curtailment of freedom of action is what triggers, for example, the right to legal assistance. The committee needs to be aware that, whatever we call the power, there will be circumstances in which people's freedom of action is sufficiently curtailed that they ought to have legal assistance even though they are not being taken to the police station.

We saw an example of that in the G case in the Supreme Court last year, when someone who was present during a search under section 23 of the Misuse of Drugs Act 1971 was not given legal assistance because they were not in a police station. The Supreme Court said that, as the person was essentially handcuffed and not free to leave, they should have had a lawyer. That is the difficulty; it is a functional question rather than a question of description.

Elaine Murray: The problem is that, although the words may mean the same thing, the public think that, when someone has been arrested, the police have sufficient evidence that they may have committed a crime. There is a difference between a situation in which the police have a suspicion and want to know what is going on, so the person is taken in to find out what is going on and what they know about it, and one in which there is sufficient evidence that the person may have committed an offence to trigger an arrest.

Professor Leverick: I am not sure that the word "detained" would not also carry that implication. I am not sure that one word is necessarily any better or worse than the other.

Professor Chalmers: Your question seems to rest on the premise that, first, the public do not know what detention means—that may be true—and, secondly, that that might be a good thing. I am not sure that that is true at all.

The Convener: They know that detention is different from arrest. They may not know the technical things that lawyers know, but they know that it is different from being arrested.

Professor Leverick: But they might not necessarily see it as being better or worse. We are all casting around and making claims, but we just do not know. If somebody wishes to do a public survey of what is generally understood by the two different terms, we could have the discussion on an informed basis, but until that happens this matter is a bit of a red herring.

Professor Chalmers: I am reasonably confident that the public know that there is a difference between being detained and being charged with a criminal offence. However, I am not sure that there is a public understanding that detention and arrest are different things. Arrest is normally combined with a charge, and that is understood as being a different stage, but that is not quite the same point.

Professor Leverick: We could be wrong. Nobody will know the answer until somebody does some sort of survey.

The Convener: Or until the first press reports come out after the law changes and somebody says, "So much for the restraint of the press. I see that they've arrested that man", because the press have not put a bit in parentheses in the report to say that the man has not yet been—what is it?—

officially accused. I struggle to remember that phrase. Maybe we, as politicians, are just a bit prickly about those things and about perceptions. Who knows?

Elaine Murray: What are your views on the reduction in the time period from 24 hours to 12 hours? Some witnesses, particularly those from the police, have said that on occasion a bit more than 12 hours will be needed to complete an investigation. Should there be a provision on exceptional circumstances? Under what circumstances should an exception be granted?

Professor Leverick: I do not have the operational understanding of police matters to be able to say whether exceptional circumstances would justify a 24-hour period. That may be the case; it is something that the police would be able to advise you on.

I would be happy with the 12-hour limit. You have to remember that, if we extended it to 24 hours in exceptional circumstances, the police would not necessarily get 24 hours in which to question the suspect because there would probably have to be a break period within the additional time. It would not be compatible with ECHR to question someone continuously for 24 hours. In England and Wales, where an extension is permitted, a provision in the code of practice states that suspects must have—I think—an eight-hour break from questioning.

In effect, if you extended the time period in exceptional circumstances, you might gain an additional four hours or so, at most. The police might be able to give convincing evidence on cases where that would be justified, but I am not in a position to do so. Until I have seen such evidence, I would be inclined to stick with the 12-hour limit.

Shelagh McCall: The commission has a completely different view. Taking someone into custody engages their rights under article 8, which contains their right to a private life, as it interferes with their private life. Under article 8(2), the state must justify that, and part of the justification must be that it is necessary. The Strasbourg court has said that that must be based on evidence and not anecdote. There is no evidence that a 12-hour period is necessary for the purposes of detaining someone or keeping them in custody. In fact, when the data was collected during the Carloway review, it showed that 83 per cent of people were released in fewer than six hours.

Going back to Mr Finnie's question about the commission's comments after Cadder and the emergency legislation, we said at that time that there was no justification for increasing the period to 12 hours, and certainly none for increasing it to 24 hours. That remains our position because the evidence has not changed. The bill should be amended to reintroduce the six-hour period, because that should be the norm, with the possibility of extending it to 12 hours should there be a particular reason why that is necessary. However, the reasons must relate to the provision of article 6 rights, such as the right to legal assistance, the right to an interpreter, the requirement for medical treatment, or something of that nature. It is not about the police being allowed to go and do X while someone is sitting in the cells.

Colin Keir (Edinburgh Western) (SNP): I want to ask about the 83 per cent figure that Shelagh McCall mentioned. I have not seen the figures, but perhaps you could let us know about the 17 per cent who were not released in fewer than six hours. Do you have any idea how many people in that 17 per cent ended up being convicted?

Shelagh McCall: I have absolutely no idea because the data was not collected by the Association of Chief Police Officers in Scotland and Lord Carloway.

Colin Keir: It would be interesting to know whether the extensions were justified in those cases.

Alison McInnes (North East Scotland) (LD): I want to follow up Elaine Murray's point about the custody hours that are available. Could I hear the panel's views on the impact on children and vulnerable adults, and whether the six-hour limit that is proposed by the SHRC should ever be extended in particular cases?

Shelagh McCall: We state in our written response that the committee and the Parliament should think carefully about whether it is ever appropriate to hold a child or a vulnerable adult for more than six hours. I know that the committee will hear from the children's commissioner later, and I am sure that he is better informed than I am. One of our recommendations is that the bill should state that taking a child into custody is a measure of last resort because it really ought not to happen unless it is absolutely necessary.

Alison McInnes: Does Professor Chalmers have a different view?

Professor Chalmers: One protection that will remain is that the admission of any statement that is made in police custody is subject to a test of fairness when the prosecution seeks to lead it in court. In applying that test, the court will be able to take into account whether someone who is vulnerable has been held in circumstances that made it difficult for them to exercise their right to silence and made it more likely that they would confess to acts that they did not commit, and so on. The court could take those facts into account and could decide not to admit a statement

regardless of the fact that the legal maximum had been complied with. The police would have to be careful about holding a vulnerable adult or child right up to the wire.

10:00

The Convener: I refer to your article in *The Modern Law Review* at page 849. You state:

> "Lord Carloway states that 'there are very strong arguments that a child under the age of 16 should not be able to waive the right of access to a lawyer' but does not set out explicitly what these are, other than alluding to the serious nature of cases involving children that are likely to end up in court."

You might want to comment on that.

Secondly, you state:

> "these proposals go beyond the equivalent provisions in England and Wales, where an appropriate adult can request legal assistance for a child who has indicated he does not want it, but a child 'cannot be forced to see the solicitor if he is adamant that he does not wish to do so'. They also go beyond what is necessary under the ECHR, as the European Court of Human Rights has never suggested that children cannot waive procedural rights, although for waiver to be valid, the assistance of a legal adviser or appropriate adult may be required."

I would like you to comment on that.

We have talked about the difference between 16 and 18-year-olds and whether we should just move the bar to 18 anyway. Will you comment on that, too, please?

Will you comment and elaborate on what you put in the article? Do the proposals go too far? Should we say no?

Professor Leverick: What is in the article is not particularly a statement of opinion by us. The things that we put in the article are correct.

The Convener: Indeed, but do we require to say that absolutely no child of 16 or under can waive their rights?

Professor Leverick: I do not think that we require to do that. There is certainly no legal reason why that is required. If I had to offer a personal opinion, I would probably say that the bill has got it about right. Under-16s probably should not be permitted to waive the right to legal assistance, but imposing legal assistance on all 16 and 17-year-olds even if they are adamant that they do not want it and are capable of understanding the implications of that decision may well be disproportionate in respect of the costs involved.

The Convener: So you would keep the distinction in the bill.

Professor Leverick: I think that the bill has got it about right. Having said that, I cannot claim to be a great expert on child psychology.

The Convener: I do not know what to say to that. None of us claims that. We try to do our best with the information that is in front of us.

Professor Chalmers: Our statement that the proposals

> "go beyond what is necessary under the ECHR"

is not meant as a criticism in any way; it is simply an observation. I know that the committee has been concerned about the idea of future proofing the criminal justice system against ECHR developments. None of us can give guarantees on how ECHR case law might develop in the future, but the views of the European Court of Human Rights might change in the area, and it would certainly be advantageous for the system to offer more protection than the bare minimum that is required by the convention.

The Convener: Ms McCall, do you want to comment on the distinctions in the bill? Are you content with them?

Shelagh McCall: The Scottish Human Rights Commission's view is that the bill is right to say that children under 16 should not be allowed to waive legal representation. As Professor Chalmers has said, that is not because Strasbourg says that children cannot waive their rights—they can—but Strasbourg looks extremely critically at the circumstances in which that happens, because one of the important things about a waiver of rights is that it has to be exercised with full information about the facts and the consequences of waiving rights. Whether children, in the absence of a lawyer to tell them about the consequences, can properly make that decision, given their lesser maturity and capacity compared with adults, is a real issue.

In the commission's view, it is not appropriate to substitute parents as the decision makers for children, who are the holders of their own rights. It is not a parent's or an appropriate adult's job to do that. There is a danger that the parent may be just as ill informed or misinformed about the importance of legal representation as the child may be. That is why we say that the bill has got it right in that respect.

Alison McInnes: To remain on children's rights, what are the panellists' views on whether the bill is a missed opportunity to raise the age of criminal responsibility to 12 and on other Committee on the Rights of the Child requirements?

Shelagh McCall: The commission's view is that it is a missed opportunity, and this committee ought to take the opportunity to recommend that. It is clear that Scotland has an extremely low age of criminal responsibility and that the international trend is upwards from where we are. There is a

real opportunity in the bill to do something about that, and that opportunity ought to be taken.

The Convener: I was just checking whether that would fit under the purposes of the bill in any event.

Professor Leverick: I do not necessarily disagree with Shelagh McCall, but I think that there is already an awful lot in the bill. Relatively recently, a long consultation process on the age of criminal responsibility was carried out by the Scottish Law Commission and I am not sure that the bill is necessarily the best place to revisit that.

Alison McInnes: When and where would be best?

Professor Leverick: I am not sure that the issue needs to be revisited at all. If it does, the bill is possibly not the right place to do that, given that there is already an awful lot in it.

Alison McInnes: We want to make sure that our bills have an awful lot of the right stuff in them rather than an awful lot of things that we are not sure are necessary.

The Convener: I do not know whether you are agreeing or disagreeing, Alison—you are having a bit of a mumble to yourself. That is allowed, though—mumbles are allowed.

Roderick Campbell: I would like to address the issue of people receiving legal advice by telephone. Section 36(3) describes a person's right to consultation with a solicitor when they are in police custody. It states that

"'consultation' means consultation by such means as may be appropriate in the circumstances and includes (for example) consultation by means of telephone."

What is the panel's view on that provision?

Shelagh McCall: The commission's view is that there will be circumstances in which a telephone consultation is inadequate. The purpose of legal assistance is twofold: first, it is to protect the right against self-incrimination; and, secondly, it is to provide a check on conditions of detention and to ensure against ill treatment. In that second respect, it is difficult to assess over the telephone someone's vulnerability when they are in custody.

Also in relation to section 36, the choice of the method of consultation with a solicitor belongs to the suspect, and the bill ought to make that clear. The police may say—as I think that they do at the moment—that the suspect can first have a chat on the phone with a solicitor. However, if the solicitor and the suspect decide that the solicitor should come to the police station and be present, that choice should belong to the suspect, not the police.

Professor Chalmers: It is important to read that provision together with section 24, which creates the right for the suspect to have a solicitor present during the interview. However, as Ms McCall has said, that is not the only function of a solicitor. I agree that it would be useful if the bill made it clear that the choice must be that of the suspect, not that of the police.

Professor Leverick: The point about one of the solicitor's functions being the ability to check the conditions of detention is important. The European directive on the right of access to a lawyer in criminal proceedings sets out that that is one of the solicitor's functions in that situation. Therefore, we must ensure that the bill complies with that. That means that, if somebody wants their solicitor to visit them outside the interview situation, we probably have to allow that.

The Convener: Have you finished, Roddy?

Roderick Campbell: I have finished, but Colin Keir wants to ask a question.

The Convener: You cannot bring him in, because John Pentland is waiting.

John Pentland (Motherwell and Wishaw) (Lab): Yes, I have a question.

The Convener: I wondered whether you were going to ask about vulnerable witnesses, but that is fine. Were you going to ask about that, Colin?

Colin Keir: I want some clarification of what has just been said. What if people up in the darkest Highlands engage a Glasgow solicitor? How would that affect the process?

The Convener: I do not know whether we will let you talk about the darkest Highlands—they might be gloriously sunny autumnal Highlands. However, I will let you ask about that, and I will then bring in John Pentland.

Colin Keir: That was basically my question. How would it affect proceedings if someone was somewhere up in the Highlands and Islands that was not terribly accessible and, following the telephone call, it was decided that a solicitor had to travel from Glasgow, Edinburgh or Dundee? There would be a delay. How would that progress in a practical sense?

Professor Leverick: I am probably not the best person to answer that question, as I do not have the practical experience.

The Convener: There you are, Colin—there is your answer.

Shelagh McCall: I can answer the question. Under article 6 of the ECHR, the state ought to respect an individual's choice of legal representative in so far as that is possible. If an individual who is in custody in the islands says that

they want to speak to Mr Smith in Glasgow, that should and can be facilitated. However, if an appearance in person by the solicitor is required, it may be legitimate to say that the person's choice of solicitor cannot be respected because it would take the solicitor nine hours to get there, whereas Mr Y from just down the road could come and provide legal assistance. It may be legitimate, on such an occasion, to depart from respecting someone's choice of representative. Nevertheless, the state must have measures in place to ensure that solicitors can be brought to the police station to perform that very important function.

The Convener: There would need to be a bit of common sense about it.

Colin Keir: Sometimes that has been sadly missing, convener.

The Convener: John Finnie's face was a picture when you referred to the "darkest Highlands".

John Finnie: I was thinking that it was an interesting geographic term.

The Convener: Absolutely, but we will have no violence, John—no violence.

John Pentland: Would the panel care to expand on their views with regard to vulnerable adult suspects? The SHRC reckons that the bill might be too narrow in focusing only on people with a mental disorder. Professor Leverick and Professor Chalmers have stated that it is notoriously difficult to identify vulnerable adult suspects.

Shelagh McCall: There is a real challenge in identifying vulnerable people, and the police must be properly trained to do so. It is good to have an understanding that mental disorder, as defined in the Mental Health (Care and Treatment) (Scotland) Act 2003, gives rise to vulnerability. That is encouraging. However, that definition misses people who do not suffer from a mental disorder but who appear, for whatever reason, not to understand what is going on. That may be because they have taken some intoxicant, because they are medically unwell rather than mentally disordered, or because there is a language or communication issue. There are all kinds of reasons why people's vulnerability can be increased in custody. At the moment, the bill does not allow the police the flexibility to deal appropriately with people who are not evidently mentally disordered, and we would encourage some amendment in that respect.

Professor Leverick: I agree entirely. We do not have to follow slavishly what happens in England and Wales, but the equivalent terminology used in the legislation in England and Wales refers to mentally vulnerable suspects, which does not necessitate any mental disorder as such.

Professor Chalmers: The provision on support for vulnerable people refers to someone who, "owing to mental disorder", is

"unable to understand sufficiently what is happening or to communicate effectively with the police."

It might seem slightly odd that somebody who is

"unable to understand sufficiently what is happening or to communicate effectively"

for another reason does not fall within the scope of section 33. If somebody met that criterion, support would have to be provided, otherwise the court would hold as inadmissible any incriminating statements—or any statements—that they made, because the fairness test would not be met.

The Convener: That is a fair point to make about section 33.

John Pentland: Shelagh McCall said that one of the measures that we could put in place would be proper training for the police. Do you think that any other measures may be necessary?

Shelagh McCall: In our written submission, we raised some concerns about funding for appropriate adults. The state has an obligation to put in place a proper system, so there must be a conversation and a decision about how appropriate adults are going to be paid for. In addition, appropriate adults must be properly trained. I know that there is provision for regulations to be made about that, but the training will be critical. We must also ensure that appropriate adults are used in the right way, not the wrong way. They cannot be substitute decision makers; they are just there to facilitate communication and to use their expertise for that purpose. That is why we welcome the view that vulnerable persons should not be able to waive their right to legal assistance. There must be someone present who is capable of advising properly on decisions to be made by a vulnerable suspect.

The Convener: There would also be a protection, in that any statement would be inadmissible in court if the solicitor were able to show that, in taking evidence, the police had been oppressive or whatever to somebody who was vulnerable.

Roddy, do you still have a question on vulnerable people?

10:15

Roderick Campbell: No.

The Convener: Right. It is not you next; it is Elaine Murray, who is not on vulnerable people.

Elaine Murray: No, I am not on vulnerable people today.

Lord Carloway expressed some concern about the period after someone has been officially accused, when they can be released, liberated on an undertaking or detained prior to going to court. He was concerned about the period that could elapse between being a person being officially accused and getting to court, which is not addressed in the bill. Are you concerned about that? I presume that resource issues are part of the reason why that has not been addressed in the bill, but ought it to have been?

The Convener: Ms Leverick, you are nodding.

Professor Leverick: I agree entirely with Lord Carloway's sentiments. I think that the period could be unacceptably long. I am not sure whether that ought to have been addressed in the bill, although it is addressed in the equivalent legislation in England and Wales.

We probably have to make some provision for weekend and perhaps holiday court sittings, which obviously has a resource implication. Whether that needs to be addressed specifically in the bill, I do not know. If practice does not change without legislative intervention, there might have to be such intervention.

Shelagh McCall: For some time, we in Scotland have been at the outer reaches of breaching article 5 of the ECHR—article 5 being the right to liberty—which is why Lord Carloway recommended in his review the introduction of a 36-hour period. He identified situations in which a suspect may be held for four days or so before appearing in court, which is pushing at the boundaries of a human rights breach.

Elaine Murray is right to observe that the bill does nothing to address Lord Carloway's concern. The commission's position is that the rule has been the same for many years but the situation has not improved and working practices have not changed, so a legislative solution is necessary. Lord Carloway's original recommendation would be an appropriate way to solve the problem.

Elaine Murray: Do you have any concerns about people being questioned after charge, which is a new development in the bill?

Professor Chalmers: It is not something about which I have any concerns, given the safeguards that are in place—in particular, the requirement for an application to be made to the court before such questioning happens.

Professor Leverick: I agree with that. If those safeguards were not in place, I might be concerned about repeated harassment of people who were being held in custody. However, with the safeguards that are in place, including the fact that the accused person will be notified of an application being made to the court—it will not come as a terrible surprise to them—and able to make representations as to why that might be inappropriate, I do not have any particular concerns about it.

Shelagh McCall: The commission has concerns. In European human rights case law, there is nothing that prohibits questioning after someone is officially accused, but one has to think about what the purpose is. If the sole purpose is to overcome someone's right to silence—in other words, to get them to incriminate themselves—that may breach article 6 and the right against self-incrimination.

I thought about this before coming to the committee today, and it is very hard to think of situations in which the questioning would be designed for any purpose other than to try to get someone to say something against their interests when confronted with, for example, DNA evidence, closed-circuit television footage or something of that nature.

There is a danger that such questioning might fall foul of article 6 because of its purpose. As a matter of principle, there is not a difficulty with it, but I am just not sure that the protections of judicial oversight are sufficiently robust.

The Convener: If the sheriff consents to post-charge questioning and the accused refuses to say anything, would that be held against them in proceedings? They might maintain their right to silence, if you will, and when questioned say, "I am not going to say anything."

Shelagh McCall: It should be made explicit in the bill that, if the person chooses not to say anything, no adverse inference can be drawn, because Strasbourg is moving towards saying that drawing an adverse inference from silence is a breach of article 6. It is not there yet but, in our view, it is likely to start to go there. We see a withdrawal and a backing off from that position in England, and it would be very foolish for this Parliament to introduce a bill that walked into that situation.

The Convener: So, at the moment, adverse inference can be drawn from silence.

Shelagh McCall: It is not clear, because the method of questioning has never been allowed before. Our recommendation is that the bill should be amended to include no adverse inference.

The Convener: Do you want to comment on that, Professor Chalmers?

Professor Chalmers: I would be surprised if, on the basis of the bill, the courts felt able to draw adverse inferences from failure to answer questions in such situations, but there would be no

harm in making it explicit that none should be drawn.

The Convener: Is that what you would wish to see in the bill?

Professor Chalmers: I certainly agree that there should be no possibility of adverse inferences being drawn in such situations.

Professor Leverick: I suspect that it would not happen anyway, but there would be no harm in putting in a specific provision to that effect.

The Convener: At stage 1, we are looking at points to raise in debate and on which to have responses, so it is important to tease the matter out.

Roderick Campbell: Lord Carloway referred to the possibility of having Saturday courts to reduce long delays in court appearances. Do the witnesses have a view on whether the bill adequately ensures that suspects are not held in custody for too long before a court appearance, or could it do better?

Professor Chalmers: I endorse what Ms McCall already said on that point. It could be dealt with without legislative intervention, but we are at risk of eventually falling foul of article 5 of the ECHR, which may require Saturday courts.

Professor Leverick: I suspect that we need Saturday courts. Whether we need legislation to bring them about I am not sure.

The Convener: Are there issues with court closures if we try to have Saturday courts but the courts do not exist?

Professor Chalmers: We have plenty of space in courts on Saturdays, so I suspect that that is not the issue. The issue is the people to put in them.

Professor Leverick: I guess that I would not be terribly happy if I was the one who had to work in the Saturday courts; unfortunately, we need to introduce them, with all the implications that that has for the people who then have to work on Saturdays and for resources. Sadly, it is necessary.

The Convener: I might have to open up a local court again. I might have to take the key and let them in on the Saturday, or get the jannie to open it specially.

Sandra White: Section 4 of the bill says that an arrested person should be taken

"as quickly as is reasonably practicable to a police station."

Do the witnesses have any concerns or comments about how that would affect the police or the suspect?

Professor Leverick: In what sense?

Sandra White: Would it have an adverse effect on the suspect or the police, or could it be a good thing? There is a concern that, because of the provision in section 4 that a suspect should be taken

"as quickly as is reasonably practicable to a police station",

the police might act too quickly.

Professor Chalmers: There might be an argument that, in some circumstances, the police would arrest someone too quickly, but I am not sure that that can be addressed in the bill. No concerns have occurred to me about the section.

Shelagh McCall: The decision to arrest someone is the critical decision in terms of interfering with a person's private life and liberty. If the consequence of arrest is that certain rights, such as legal assistance, need to be facilitated, the quicker that is done, the better, because it means that, ultimately, someone might spend less time in custody.

The question is interesting in relation to the grey area before the decision is taken to arrest somebody. In our view, that is properly addressed by the police facilitating legal assistance wherever they are and not having to go to the police station for that purpose. The concern is not about taking people too quickly to the police station, but about unnecessarily taking them there.

The Convener: On the other hand, if you are taken to the police station, you know that you are in trouble. If you are questioned in your house, you might not be aware of that, but if you are taken to the police station, the whole agenda has changed.

Shelagh McCall: However, if you are given a proper and full caution when the police arrive at your door—for example, "We have grounds to suspect that you have committed the offence of blah, you need not say anything and you are entitled to a lawyer"—the caution will bring home to you that you need to be aware that you are in trouble and that you have certain rights.

The Convener: Thank you.

Do the witnesses have anything else that they wish to say to us, other than what a lovely panel we are?

Professor Leverick: You are a lovely panel.

The Convener: You can compliment us on that, but is there anything that you wish we had asked that we have not asked?

Shelagh McCall: The only thing that I will say—this follows on from Sandra White's question—is that the reasons why someone may be taken to the police station ought to be defined in the statute. For example, they should be told, "We are taking you there to question you", "We are taking

you there to recover evidence that we could not recover otherwise", or, "We are taking you there because we think that you might destroy evidence that we need to get." Providing specific reasons for arresting someone and taking them to the station would provide clarity both for the police officers and for those being arrested.

John Finnie: I have a question that I do not think has been covered—please forgive me if it has. On the investigative liberation provisions in sections 14 and 17, the SHRC refers to the implications for

"a suspect's work and family commitments"

and the implications in terms of article 8. Can you expand on that, please?

Shelagh McCall: As I understand it, under the investigative liberation provisions, the bill envisages that someone may be released on the condition that, for example, they need to come back to the police station at a particular time. That time may not be convenient for them due to their caring commitments or important work commitments or, indeed, their solicitor's commitments, so there may be some issues there.

If a person is released under conditions such as a curfew, that is a serious interference with their private life and may in fact interfere with their right to liberty. The bill does not build in enough limitations around the reasons why people might be released under such conditions, what the limits of those would be and when those would be appropriate. As we say in our written submission, we think that the investigative liberation provisions could be improved by a bit more scrutiny of such issues.

John Finnie: Is your concern that we would have a situation in which the police would consider the full range of options—curfews, timings and so on—and then de-escalate them due to the level of compliance by the accused, rather than a situation in which evidence would escalate the conditions?

Shelagh McCall: Exactly. In interfering with someone's private life, it is for the state to justify how far that goes, and it should go only the minimum distance necessary to secure the aim that is being pursued, such as the proper investigation and detection of crime.

John Finnie: How would a curfew-like condition be recorded? Would the report that ultimately goes to the Procurator Fiscal Service record the reason why liberation with a curfew was suggested?

Shelagh McCall: Similar to the bail provisions that exist at the moment, there could be standard conditions, such as that the person will be of good behaviour and that they will not interfere with witnesses. The application of additional or extra conditions such as a curfew should be done only to secure compliance with those standard conditions. In other words, is a curfew necessary to ensure that the person is of good behaviour and does not interfere with a particular witness or behave in a particular way? All of that should be recorded in the police report, so that there is a proper record of why things were done. There would be an opportunity for the fiscal and the sheriff to scrutinise that, so it needs to be properly recorded at that stage.

John Finnie: What would be the implications for the system if disproportionate liberation conditions were applied to an accused person?

Shelagh McCall: The implications for the system would be that the accused might have some claim for breach of his rights, sheriffs might be unnecessarily burdened with reviewing investigative liberation conditions and the fiscal's time might be clogged up with reviewing and remedying inappropriate conditions.

The Convener: Sorry—we are not at the end, because John Pentland wants to ask a question. I thought that we had finished, but there is a postscript.

John Pentland: Convener, I tried to catch your eye, but you turned your head.

The Convener: Dearie me. I will make a point of not doing so from now on, John.

John Pentland: Thank you very much.

It is often said that prevention is better than cure. Police witnesses have argued that section 1 of the bill should be amended so that constables are clearly empowered to arrest a person in order to prevent crime. Can I have your comments on that?

10:30

Professor Chalmers: Let me make two comments. First, I know that the witnesses last week suggested that, because the Police and Fire Reform (Scotland) Act 2012 imposes on the police a statutory duty to prevent crime, they might therefore need the power to arrest people to prevent crime. I find that slightly surprising, as that is not, presumably, a new duty for the police. For some time, the police have had a duty actively to prevent crime. I am not sure that that legislation creates the need for a new power.

Secondly, I can see an argument for a power to arrest to prevent crime, but I would want more detail on how the police would envisage exercising that power. I am not entirely clear what would be done with someone who was arrested solely for the purpose of preventing a crime. If someone is suspected of attempting to commit a crime or conspiring to commit a crime, they can be arrested

because they have already committed a criminal offence and they can be brought before a court. If someone has not committed a crime of any sort, I am not sure what would be done with them once they were arrested. If a power of that sort was to be created, I would like some clarity on that from the police, who suggested it.

Professor Leverick: Under the equivalent legislation in England and Wales, there is a power to arrest if there are reasonable grounds to suspect that someone is about to commit an offence. Like Professor Chalmers, I would like to know a bit more about how that would actually work. If someone has not committed an offence and you have arrested them, what do you do with them next?

Shelagh McCall: Following the exercise of that power in England, there have been some European cases that have not gone in the police's favour. We would be extremely concerned about the idea that the police could arrest someone who had done nothing contrary to the criminal law. Section 1(3) of the bill sets out reasons why a constable may arrest someone for a non-imprisonable offence, one of which is that the person would "continue committing the offence". That would seem to cover the situation where someone had begun to commit an offence, the situation was going to escalate and the police wanted to intervene. We suggest that the list in section 1(3) is probably adequate to assist the police in that situation.

Professor Chalmers: This may echo some of the evidence that the committee received last week, but I think that it is worth noting that the Scottish law of attempt and conspiracy is rather broad. A conspiracy is committed at the time that any two people agree to commit a criminal offence; an attempt to commit a crime is committed not at the last minute before a crime takes place but at the point when the accused moves from planning a crime to perpetrating the crime. Both those devices would allow the police to intervene at a very early stage. As Ms McCall says, the idea that someone could be arrested without having done anything contrary to the criminal law is quite disturbing. It is not clear why that would be necessary.

The Convener: I am looking in John Pentland's direction now very carefully and will make a point of doing so.

Rather than say that there are no further questions—someone is bound to put their hand up if I do—let me just say thank you very much for your evidence.

I suspend the meeting for five minutes.

10:32

Meeting suspended.

10:37

On resuming—

The Convener: I welcome to the meeting our second panel: Tam Baillie, Scotland's Commissioner for Children and Young People; Rachel Stewart, policy and campaigns manager at the Scottish Association for Mental Health; Morag Driscoll, director of the Scottish Child Law Centre; and Mark Ballard, head of policy at Barnardo's Scotland. Welcome, Mark—we will be gentle with you; no, we will not. I thank you all very much for your written submissions. I know that you sat through much of the previous evidence session, so thank you for that, too—that is helpful.

Can I have questions from members, please? I am looking to my left in case there is a question from John Pentland.

John Pentland: Thank you, convener.

In the previous session, the witnesses probably heard me ask questions about vulnerable adult suspects. Without going through the whole gamut again, could I have views on that?

The Convener: The witnesses should let me know if they want to answer and their microphone will come on. Ms Driscoll, do you want come in on that?

Morag Driscoll (Scottish Child Law Centre): I did not hear all the earlier evidence.

The Convener: Ms Stewart, perhaps?

Rachel Stewart (Scottish Association for Mental Health): Morag Driscoll and I arrived at the same time so I, too, missed the earlier evidence session.

The Convener: I think that the question was about the narrowness of the definition in section—where is it, John?

John Pentland: I think that Mark Ballard is going to help us here by answering the question.

Mark Ballard (Barnardo's Scotland): Barnardo's Scotland very much agrees with the position taken by the commissioner, Shelagh McCall, that vulnerability includes not only mental disorders but physical disorders, language difficulties, intoxication and—crucially for Barnardo's, as I think is recognised in section 42 of the bill—age and stage of development. Confusion is caused by the fact that vulnerability in the rest of the bill seems to rest on the person having a mental disorder.

The policy memorandum says:

"if the 16 or 17 year old is considered vulnerable (i.e. they have a mental disorder and cannot communicate effectively or understand what is happening to them) then they will not be able to waive their right to legal advice."

We must be clear that vulnerability for a 16 or 17-year-old may be due to their age and stage of development and not a mental disorder. The problem is that the multiple definitions of vulnerability that exist are not properly drawn out. In particular, the reliance on mental disorder as the determinant of vulnerability is unhelpful, because there are many more reasons why adults, children and young people can be vulnerable and require support specifically to deal with that vulnerability.

Tam Baillie (Scotland's Commissioner for Children and Young People): Trying to define vulnerability is a thankless task. The policy memorandum has made a stab at it. We could suggest improvements, but, at the end of the day, it will come down to judgment, which will have to be exercised on the basis of experience, training and guidance.

We cannot just have blanket coverage. There are certain times when we want to identify those who are vulnerable as opposed to those who are not. We will come on to talk about our views on the waiver, which is really where the vulnerability provision comes in.

Vulnerability is really difficult to define. I have experience of running hostels for children and young people, where we took in the most vulnerable. We ended up trying not to define vulnerability too tightly because, at the end of the day, it came down to individual judgment. However, that judgment will need to be backed up by one of the key things in the bill, which is the training and guidance that will be offered as a result of the bill's implementation.

The Convener: I take the panellists to section 33(1)(c), which I think is what John Pentland was looking at. The expression "owing to mental disorder" is the bogey phrase there. I was going to ask you about that, Ms Stewart, because I think that your submission explained the complexities of defining vulnerability.

Rachel Stewart: From SAMH's point of view, the mental disorder definition, which comes from the Mental Health (Care and Treatment) (Scotland) Act 2003, encompasses quite a wide range of mental health problems, learning disabilities, personality disorders and autistic spectrum disorders. Each of those conditions requires a different response, different training and different support. Although, as has been said, it is narrow and it takes just one condition or disorder, it does not set out how people would need to be treated. Sorry—I am not being very clear.

The Convener: That is all right.

Rachel Stewart: You could argue that anyone in custody is vulnerable. It is a stressful and anxious environment for people to be in, and police need support and training to be able to support people who are in that situation.

The Convener: There might be some right toughies in custody, though—people who are not that vulnerable. We might have a dispute about that.

John, do you want to go back to that issue?

John Pentland: Tam Baillie mentioned that training is essential. Rachel Stewart's organisation goes a step further and recommends that we set up a stand-alone appropriate adults service. I ask her to expand on that. I think that the SAMH submission also mentions that the relationship between the national health service and Police Scotland should be strengthened. Is there a weakness there at the moment?

Rachel Stewart: To take the appropriate adult provisions first, we welcome their inclusion in the statute but we note that there are no plans in the policy memorandum to set up any back-up for existing services and schemes. Those are run in different guises across Scotland: some of them are funded, and some of them rely on social worker extraction. We think that, to improve the patchy nature of the service, it would be better to resource it to ensure that appropriate adults receive training and support, that they are retained and that they have assistance to deal with some of the issues that they will face and improve their own mental health.

Some people get a good appropriate adult service because there is that back-up. Others wait for several hours before getting a social worker who might not have training in a certain area. Those people might not be facilitated in the same way and their rights could be affected.

The second point was about links between the NHS and the police.

10:45

John Pentland: Yes. Your written submission says that those links need to be strengthened. Have you identified a weakness?

Rachel Stewart: A lot of people who enter custody are in crisis, and there are some pilot schemes in Scotland in which the NHS and the police work together on alcohol issues. If someone in a custody suite had severe anxiety or depression, they might not need an appropriate adult to help them to communicate, but they might need a nurse present who could say whether they needed to see a doctor and ask when they last

took some medication. For such issues, we would like to see that level of support. There is a bit of a precedent, in that the NHS provides treatment in prisons nowadays, so the links between the justice system and the health service are closer. We think that that should be taken to its logical conclusion.

Mark Ballard: Aberdeen City Council's appropriate adults service highlighted in its written submission the issues around the fact that section 33 provides statutory support only to those aged over 18 who are deemed to have a mental disorder and that there is a gap in the legislation regarding 16 and 17-year-olds. The policy memorandum states:

"The Scottish Government ... expects that the police will still be able to request the support of an Appropriate Adult for vulnerable suspects, and accused persons aged 16 and 17 years old, and also for victims and witnesses aged 16 and over, through the current non-statutory route."

We have concerns that, if it is not a statutory requirement to provide that service, local authorities that are under severe financial pressure may not support the provision of the service. It is not clear how that support will be guaranteed unless its provision is made statutory in the bill.

The Convener: I am a bit confused. I am talking about the appropriate person rather than an "appropriate adult". The term that the bill uses is "appropriate person". Is that right?

Mark Ballard: Yes.

The Convener: Section 31(5) defines "an appropriate person", and it seems to me that they do not have to be provided by the state, the voluntary sector or anybody else. Section 31(5)(b) states that,

"if a constable believes that the person in custody is 16 or 17 years of age, an adult who is named by the person in custody and to whom a constable is willing to send intimation"

could be "an appropriate person". Am I right, or am I misunderstanding the issue? I am all for granny being the appropriate person.

Tam Baillie: You are talking about the "appropriate person" for 16 and 17-year-olds, but the policy memorandum talks about a "responsible person". The Convention of Scottish Local Authorities has already made representations that if the assumption is that the "responsible person" for a 16 or 17-year-old will be a social worker in cases in which that role is not filled by a parent or carer, that will put additional pressure on local authorities. There are resource implications and representations have already been made to the committee in that regard.

The Convener: That phrase does not appear in the bill—it is just in the policy memorandum.

Tam Baillie: Yes.

The Convener: I appreciate what you say, but it is the bill as finalised at stage 3 that will become the letter of the law. Are you saying that we need to clarify that area, or can we leave it as it is?

Tam Baillie: I think that you need to be assured that the resources will be available to fulfil whatever statutory duties are in the bill.

I want to make an additional point about vulnerability. You might want to look at the additional support for learning legislation, which made a reasonable attempt to define vulnerability in terms of those children for whom additional support for learning would be appropriate. It is a complex issue and, especially if there is discretion built into the bill on the basis of vulnerability, you do not want to have to reinvent how vulnerability has been approached previously. The 2004 act may be helpful to you.

The Convener: Thank you. John, do you have any more questions?

John Pentland: No.

The Convener: I do not want to offend you, so I am now coming back to you so often that you are actually being preferred. I will bring in Sandra White, followed by—I must look to my right now, in case there is somebody on my right who wants to come in—Alison McInnes and Elaine Murray.

Sandra White: Good morning. We have already received answers to some of the questions that I was going to ask, but I will push on anyway. Some people on the first panel were quite happy with the proposed ability of 16 and 17-year-olds to waive their right to access to legal representation as long as there was proper representation present. Mr Baillie said that that should be a legal representative. I would like the witnesses' thoughts on the proposed ability of 16 and 17-year-olds to waive their right to access to legal representation and on whether a parent, guardian, social worker or legal representative would be the best person to be present.

Tam Baillie: First, we must recognise that the bill defines a child as someone under the age of 18. I give that a big welcome, as that is consistent with the United Nations Convention on the Rights of the Child. It is also consistent with some other discussions that have taken place in the committee on the Victims and Witnesses (Scotland) Bill.

Secondly, we must think about whether the view or voice of a child should be taken into consideration. There is a judgment to be made, and Lord Carloway has made the judgment that some cognisance should be given to the views of 16 and 17-year-olds, in that they should be able to waive their right to legal representation. They

would still be able to have a responsible person present, but they could waive their right to legal representation. However, I understand that, if they did not have a responsible person present, they would have to have legal representation. Also, there may well be vulnerable young people for whom you would want legal representation to be present. Therefore, it is a judgment call.

In my estimation, the bill strikes just about the right balance, but I recognise that there may be pressures. People may say that there should be blanket legal provision, but that would have resource implications. I am mindful of the representations that have been made to the committee about the need to be careful if children aged 16 or 17 waive their right to legal representation. Therefore, there is a judgment to be made.

Morag Driscoll: We have some real concerns about the issue. As Tam Baillie correctly points out, the age of majority is 18, and a young person who is believed to have committed an offence will normally be dealt with through the children's hearings system. However, we get calls to our advice line about the issue. Last year, we received 3,800 calls and a substantial number of those dealt with criminal matters.

We find that young people waive their right to a solicitor when they should have one present because they do not understand the situation. One autistic youngster was offered a lawyer and when his father, who was not allowed to be with him at that stage, asked why he had declined, the youngster said, "What's a lawyer?" Some young people's parents will also tell them, "You don't need a lawyer because you're innocent." The young man who did not know what a lawyer was had a social worker with him.

There are so many stresses that a young person can be under and assumptions that they can make—they can be frightened or feel that they do not need a lawyer—that I worry about their having the ability to waive the right to legal representation. Having somebody with them is no guarantee that the right decision will be made. I would rather that we erred on the side of providing legal representation for all people who are vulnerable enough not to be considered full adults.

Having a parent present is not necessarily appropriate, as parents no longer have the right to direct once the child is over 16; they have only the right to guide. If the young person wants their parent to be with them, that is great and a sign of a healthy relationship. However, they may not have a healthy relationship with their parent—it may be fraught with difficulties or the parent may be involved in the crime. Therefore, I would favour the young person having the choice or, by default, a professional being brought in when necessary.

The Convener: The parent could be the victim, too.

Morag Driscoll: Yes, or a sibling could be the victim. All sorts of conflict could be set up. I worry about saying that, because somebody is 16 or 17, we will recognise their autonomy in the way that is proposed. It is great to recognise their autonomy, but protections must be built in, in case the child is a high-functioning sufferer of an autistic spectrum disorder, for example, and nobody has realised. For somebody who is in care, it may be more appropriate that they have their foster parent with them.

The Convener: Do we not then come back to the judgment of what is vulnerable? There is an issue about evidence. If a vulnerable person does not get protection, the evidence could be disallowed.

Morag Driscoll: Perhaps we should presume that someone who is under 18 is vulnerable, unless we are sure that they are not. We should not be saying that someone is not vulnerable until we are sure that they are.

The Convener: I would have difficulty with that, but I am just mumbling away to myself. Can an 18-year-old who has two kids be presumed to be vulnerable?

Morag Driscoll: No. It is about 16 and 17-year-olds.

The Convener: Can a 17-year-old with two kids be presumed to be vulnerable?

Tam Baillie: I am not going to go to the wire on that one. The bill has just about got it right. I recognise some of Morag Driscoll's reservations. If the committee feels strongly that there should be no discretion as a matter of course, it will need to satisfy itself that that is manageable and that it will achieve the right result, which is proper safeguards for children and young people. At some point, we will have to look at the definition of vulnerability.

Morag Driscoll: I am not suggesting that there should be no discretion at the ages of 16 and 17, but we need to be satisfied that a young person understands the right that they are waiving.

Mark Ballard: Barnardo's Scotland entirely shares Morag Driscoll's concerns.

Section 42 says that when constables are deciding whether to hold a child in custody or interview a child about an offence, the wellbeing of the child should be of primary concern. That is directed at everyone under the age of 18. However, section 30(2) says that intimation must be sent if the child is under 16, but may be sent if the child is over 16; section 30(3) says that intimation is to be sent to the parent if the child is

under 16, but can be sent to any person who is "reasonably named" by a child who is over 16; and section 31(5) says that an "appropriate person" for the under 16s means any person who the constable considers to be appropriate, but for 16 and 17-year-olds, it can be any adult who is reasonably named by the young person.

It seems to us that there is an inconsistency between the blanket position described in section 42, which is that someone who is under 18 is a child and their wellbeing should be the primary concern, and the way in which sections 30 and 31 treat 16 and 17-year-olds as if they are adults and in the same category as adults. There seems to be a disconnect between different sections in the bill.

Tam Baillie is quite right to say that a judgment needs to be made, but from Barnardo's Scotland's point of view, there is a disconnect between whether we consider those who are under 18 to be children, as in section 42, or adults, as is effectively done in relation to intimations in section 30(2).

The Convener: I should say to Tam Baillie that shrugging or making faces is not recorded—you have to say something.

Tam Baillie: I do not have a problem with increased protection for young people up to the age of 18, at the same time as there is increased recognition of the capacity of children as they reach the age of 18 to know their voice, their views and their opinions. I do not think that that is a contradiction.

The Convener: That is an interesting point, and the committee will probably reflect on it in its stage 1 report. There are conflicting views about the differences between under 16s, and 16 and 17-year-olds.

Elaine Murray wanted to draw attention to something.

Elaine Murray: Yes. Section 25 is about consent to interview without a solicitor. Sub-paragraphs 25(2)(b)(i) and (ii) provide for someone who is unable to

"understand sufficiently what is happening".

Surely the young person who does not understand what a solicitor is or thinks that they do not need one because they are innocent would be caught by that provision.

Morag Driscoll: You are relying on the police who are doing the interview to spot that, and they might not necessarily spot it in someone who is apparently high functioning. You are asking front-line police officers to have a lot of expertise in spotting these things. That is worrying, particularly when so many of these kids appear to be confident and to know what is going on; in fact, they are not confident and do not know what is going on. They can be very reluctant to say, "I don't get it," and just retire into saying, "No comment," or, as some young people have said, "It was easier to say that I had done it".

11:00

The Convener: Okay. You have made that point.

Alison McInnes: I turn to the length of time that suspects can be held in custody. The bill reduces the current 24-hour maximum detention period, but we heard from the SHRC representative on the previous panel that it would like the period to be reduced to six hours. In particular, the SHRC questioned whether it was ever right for vulnerable or young people to be held in custody for longer than six hours. What is the panel's view on that issue?

Morag Driscoll: The Child Law Centre feels strongly that consideration should be given to how long a child should be held and whether a child should ever be held in a police station. There are protections in the Children's Hearings (Scotland) Act 2011 in relation to children not being held in police stations unless absolutely necessary, in which case they should be held for the minimum time possible.

Vulnerable witnesses can be interviewed in much more relaxed surroundings, such as the amethyst room; perhaps we could look at options along those lines. If a child has to be held because of their behaviour, could we look at alternatives? Children could be held in units or other places. We must also look at the length of time for which a child is held. Is it appropriate for a child to be held for the same length of time as an adult? We have some concerns.

There is the idea that children could be questioned at home. That sounds wonderful, but we are getting too many calls about situations in which children have not had solicitors because the police have told the family, "We could talk to you at home. You can have a lawyer, but you will have to go to the police station for that." Children are being done, because the parent is torn between taking their child down to a place that they have seen on television, or keeping them at home, in which case the child will not have a solicitor. There are real tensions around where children are interviewed and held. Sometimes it is necessary to hold a child who is really going off the scale or has been accused of something that is very dangerous, but we still have to look at the appropriateness of the practice. Such an approach is taken elsewhere in legislation.

Alison McInnes: Can you explain what an amethyst room is?

The Convener: What room?

Alison McInnes: I think that Morag Driscoll mentioned the amethyst room, where children could be interviewed.

Morag Driscoll: Child witnesses or young people who are allegedly victims of a sexual offence are usually interviewed by a specialist police squad called the amethyst squad. The interview room tends to be very comfortable—it is a sitting room with padded chairs and a camera that can record the interview. They are interviewed in an environment that is much more comfortable than a normal police interview room, which has hard furniture that is stuck down, and which usually does not smell very nice.

The Convener: I do not always have an image of someone under 17 who is taken in by the police being a sensitive flower. Without prejudging them, some of them can be gey tough.

Morag Driscoll: Yes, they can be, but I am talking about children from 13 up to maybe 16 or 17. They are not all tough. If they were all that tough, we would not send them through the children's hearings system.

The Convener: I never said that they are all tough, but they are not all shrinking violets. I am balancing it with what the public see.

Morag Driscoll: That is my point. I am saying that there must be a balance between the vulnerable accused—the police might get better information from an interview in a less intimidating environment—and the tough nut who has been there lots of times before and is quite proud of that because they come from a family that regards it as a rite of passage. A balance must be struck. However, I would always question whether we should automatically hold children in a police station, and there are already protections in the Children's Hearings (Scotland) Act 2011.

Tam Baillie: I said that I warmly welcome the bill's definition of a child as someone under the age of 18, because that is consonant with the UNCRC. In fact, it is quite clear that, to be in line with the UNCRC, a child should be held or detained as a last result and for the minimum possible period. That approach should be adopted in the bill. If a child is detained for longer than six hours, there should be stringent safeguards around why that is the case. We already attend to the issue diligently in the children's hearings system, as there are very strict rules about children being held in secure accommodation. There is an opportunity to bring in a similar discipline under the bill, on the basis that people under the age of 18 are children.

Mark Ballard: I agree entirely with that. Again, I draw the committee's attention to section 42. The stringent safeguards that Tam Baillie talked about should be built into the early parts of the bill that deal with arrest, for example. At the moment, no clear link is drawn between the different treatment of children outlined in section 42 and the early parts of the bill that, as Alison McInnes pointed out, deal with matters such as six-hour and 12-hour stays in a police station. That needs to be drawn out more fully to enable the police to understand how to take into account their responsibilities under section 42.

Rachel Stewart: It is up to the police to determine within six hours whether suspects who may have a mental disorder are vulnerable and require assistance with communication. Getting an appropriate adult, social worker or someone else who can help to facilitate the information transfer between police, solicitor and the individual can take a lot of time, especially in rural areas, especially if the scheme that the local authority operates is not well resourced and especially if a social worker has to be extracted from their day job or the person is needed in the middle of the night. That is something to consider.

Alison McInnes: Has an opportunity been missed in the bill to tackle the requirements of the United Nations Convention on the Rights of the Child and raise the age of criminal responsibility to 12?

Tam Baillie: Yes.

Alison McInnes: Would you urge us to raise the age?

Tam Baillie: Yes. The Government has already made a commitment to consider the matter. The issue is whether the bill is the way to do it. In the absence of any indication that there will be another criminal justice bill, the matter must at least be raised to get some clarity on how the Government will give effect to its commitment to raise the age of criminal responsibility, which I welcome.

Mark Ballard: I completely agree with what Tam Baillie has just said. I draw the committee's attention to the commitment that the Scottish Government made in the "Do the Right Thing Progress Report 2012" on its progress on advancing the rights of the child and the UNCRC. It said that it would

"give fresh consideration to raising the age of criminal responsibility from 8 to 12 with a view to bringing forward any legislative change in the lifetime of this Parliament."

As Tam Baillie says, in the absence of any other legislation that could do that

"in the lifetime of this Parliament",

it would seem entirely appropriate for the Scottish Government to do it in the bill. That would be in

line with the commitment that it made in the progress report.

Barnardo's sees situations in which children who are referred to children's hearings on offence grounds accept the grounds because their parents say, "Just say aye. It'll save time. It'll get it sorted", not realising that, by accepting the grounds or if grounds are proven at a proof hearing, the child can end up with a criminal record that will appear in protection of vulnerable groups checks in future and may bar them from certain professions or from visiting certain countries. That decision, which is taken when the child is eight, nine, 10 or 11, may have consequences for the rest of their life. That situation does not happen frequently, but the loophole needs to be closed.

The Scottish Government made a commitment to raise the age of criminal responsibility, and the bill is an excellent opportunity to close the gap between an age of criminal prosecution of 12 and an age of criminal responsibility of eight.

The Convener: Do you accept the point that the previous panel of witnesses made on that? They were sympathetic to the idea, but they said that it is a biggie. It would be a really big thing to do in the bill at this stage. We would have to go out to consultation and have more witnesses before the committee at stage 1. We are already on our fourth panel, I think. Although the previous witnesses were sympathetic—I am not pre-empting how members of the committee might feel about the idea—they felt that it is too big a thing to plump in now. It might be better to put it in another bill.

Mark Ballard: In response to that, I again highlight the commitment that the Scottish Government made in the "Do the Right Thing Progress Report 2012"—

The Convener: It is nothing to do with commitment.

Mark Ballard: —that it would consider introducing such legislative change

"in the lifetime of this Parliament."

The substantive change was delivered through the Criminal Justice and Licensing (Scotland) Act 2010, under which the age of criminal prosecution was raised to 12. From our point of view, we are talking about a loophole that needs to be closed. The substantive decision has been made.

The Convener: I am talking not about principle but about process. The Government and the committee ought to test such propositions. It is doubtful whether, at this stage, we and the Government would have the mechanism or the time to test the proposition thoroughly so that we could get it right, so I am not sure that it would be appropriate to insert it at this stage. That is the only point that I am making. The members of the previous panel were quite sympathetic to the idea of raising the age, but they doubted whether it could be done in the bill.

Alison McInnes: In the evidence that it gave as part of the previous panel, the Scottish Human Rights Commission made it clear that the bill is absolutely the right vehicle for raising the age.

The Convener: It did. Forgive me—it was the two professors who had doubts.

Alison McInnes: The point is that raising the age is unfinished business from the 2010 act.

The Convener: I misrepresented the SHRC, but the two professors were of the view that there is already enough going on.

Morag Driscoll: The Children and Young People (Scotland) Bill, which is also going through the Parliament, deals with getting it right for every child, talks about supporting young people and puts emphasis on the UNCRC. The proposed change is unfinished business. As my colleague said, it is not a major change but a leftover change. It would stop us having the youngest age of criminal responsibility in Europe, which is something to be ashamed of. In other countries that do not criminalise the under-12s, the sky has not fallen in, and we have other ways of dealing with the issue. Let us finish the job. Last time, we did only half the job; in fact, we did three quarters of it. This is the last bit, and the bill is the perfect opportunity to do it.

The Convener: You have made the case powerfully. Does anyone else wish to comment?

Tam Baillie: At the very least, the committee should raise the issue in its report.

The Convener: I think that we will. The matter has been raised in our evidence sessions. Members will have views on whether the issue ought to be included, but it is certainly a good point to raise.

I will take John Finnie next, because he has not been in yet. I have to watch my Johns.

John Finnie: You are very kind, convener.

I go straight to section 42, which is entitled "Duty to consider child's best interests". There is engagement between the public sector, the police and the local authorities, all of which signed up to the GIRFEC principles with regard to joint investigations. I understand that, despite the fact that great improvements have been made, there is still a tension to do with whose interests are being served and what objectives the different sides have to achieve. Section 42(2) states:

"In taking the decision, the constable must treat the need to safeguard and promote the well-being of the child as a primary consideration."

On one level, that may seem a laudable concern, but I am sure that many cops would say, "My job is to investigate crime."

My question is twofold. The bill states that

"the well-being of the child"

should be

"a primary consideration",

but the SHRC says that it should be the paramount consideration. Would you like to comment on the existing tension? How will training—I imagine that considerable training will be required—address the implementation of that provision? I ask that as someone who used to be a representative of police officers, who would see their obligation as being to investigate crime.

Tam Baillie: I warmly welcome the fact that the phrase "child's best interests" is in the bill, but I suggest that we should be consistent in our use of terminology, because "best interests" turns into "well-being" in section 42(2). I think that it would be wise to have "best interests" in section 42(2).

This discussion has a resonance with some of the debate that will unfold as part of the consideration of the Children and Young People (Scotland) Bill, where, in my estimation, "best interests" will become one of the central things that we look at. I take the point that we are asking a lot of our police. To consider a child's best interests is challenging, but we have a good opportunity to make sure that we have something in our legislation that resonates with the UNCRC.

On how police officers perceive their role, I think—

John Finnie: I stress that I was not speaking for police officers.

11:15

The Convener: He speaks for the Highlands.

Tam Baillie: For Highland police officers? [*Laughter*.]

Getting it right for every child is changing the way in which our professions operate locally, and the bill will help to push things in a similar direction. People in many professions do not see their role as being narrowly defined as a police officer, teacher or social worker. The integrated approach to services is beginning to change the way in which people engage, and they see their roles much more holistically rather than through a narrow lens. They still have a job of work to do, but there is a much better shared responsibility. We still have a long way to go, but I am hopeful, and to frame legislation with the child's "best interests" as part of the police's responsibility will help with that.

The Convener: I might be wrong, but is the phrase not usually "the welfare of the child"? Has that been switched to "best interests"?

Tam Baillie: The Children and Young People (Scotland) Bill talks about the "wellbeing" of children and young people. Certain pieces of legislation already mention "best interests", such as the Children (Scotland) Act 1995, and I welcome the fact that it is in the Criminal Justice (Scotland) Bill. We need to bring some consistency to the application of the phrases that are used.

The Convener: Was it "the welfare of the child" previously?

Tam Baillie: Yes. "Welfare" is well understood and there is case law on it, but we have case law on "best interests" as well. We are in a place where we should consider how consistent we are with regard to those obligations.

Mark Ballard: I strongly agree with everything that Tam Baillie said in supporting having "best interests" in the bill and on the challenge that police officers will face in making the transition. As he said, it is part of a wider transition that is driven by the getting it right for every child agenda.

I also agree with the points that the convener and Tam Baillie made about wellbeing. As defined in the Children and Young People (Scotland) Bill, it is a multifaceted term that covers all the articles of the UNCRC. The more usual use, as the convener pointed out, is that the best interests or the welfare of the child are paramount, which is in accordance with article 3 of the UNCRC.

The different rights in the UNCRC that are translated into the GIRFEC wellbeing indicators might be in conflict; there might be a conflict between the right to privacy and the best interests of the child. It is important to us that welfare has paramouncy over all other rights and considerations. I am uncertain how wellbeing, which is multifaceted, could be primary, but I can entirely see how best interests can be treated as paramount. As Tam Baillie said, there is case law on that and on how a child's welfare can be treated as a paramount consideration. I am not sure whether "wellbeing" is the right term. As has been pointed out, the title of section 42 contains the phrase "best interests", which is not quite the same as wellbeing. It would be more helpful for police officers and consistent with things such as the Children and Young People (Scotland) Bill if "welfare" or "best interests" were used as the primary consideration.

We fully support the principle that "best interests" should be in the bill and that GIRFEC will require change. We have seen that change happening in police forces, particularly in Highland.

The Convener: The darkest Highlands. [*Laughter.*]

Mark Ballard: Highland has been the GIRFEC pathfinder area.

John Finnie: Well said, Mr Ballard.

Morag Driscoll: There is a great degree of unanimity here. I endorse what both Tam Baillie and Mr Ballard have said. Wellbeing is a difficult concept to define in a legal context, whereas best interests and welfare have a long history, are well understood and are consistent across the legislation. The Faculty of Advocates has spoken strongly about the matter, as has the Law Society of Scotland, in relation to the Children and Young People (Scotland) Bill. We need that consistency in relation to the Criminal Justice (Scotland) Bill as well.

In respect of young people who offend or are dangerous to themselves and others, the Children's Hearings (Scotland) Act 2011 already allows us to override the child's best interests. It may not be in the child's best interests for them to go into secure accommodation, but that may be necessary in the interests of the safety of the child or other people. When it comes to investigation, if the police are required to regard the best interests of the child as paramount, there may still be times when that needs to be overridden because things are dangerous or extreme. Such times are, mercifully, rare.

The Convener: I understood that. It is not your fault—it was mine for not understanding the explanations.

Tam Baillie: It is not clear to me from section 14, on investigative liberation, whether, in the exercise of that provision, the best interests of the child must be considered. That may be a drafting issue or it could be down to the fact that I have not quite understood it. However, I can imagine circumstances in which the imposition of a curfew would have a significant impact on a child's best interests—for example, if the thing that kept them off the streets was the youth club that they attended and the curfew cut across that. It would be worth seeking reassurances on that.

My reading of the bill is that the intention is that consideration of the child's best interests will ribbon its way through every stage of the process and will be taken into account particularly in relation to investigative liberation. If that is not the case, it should be, in order to make section 14 consistent with the other sections.

Mark Ballard: I offer clarification of the position of Barnardo's on wellbeing. In relation to the Children and Young People (Scotland) Bill, we believe that wellbeing is the appropriate term to use in planning children's services, which needs to be done in the round, and in conducting a needs assessment, when the breadth of the child's needs must be considered. We are concerned with wellbeing as a primary consideration and think that there are situations when, in relation to the Children and Young People (Scotland) Bill, wellbeing is the appropriate standard. However, we do not see it as the appropriate terminology for the Criminal Justice (Scotland) Bill, for the reasons that we have discussed.

The Convener: I foresee a long debate at stage 1 about the drafting of the bill and that word.

I thank you all for your evidence. Is there anything that you want to add that we have not asked about?

Mark Ballard: I want to highlight issues where children are affected by the justice system through parental imprisonment. There is evidence to show that up to a third of prisoners' children are present when their parent—

The Convener: Sorry, but where does that appear in the bill?

Mark Ballard: It is not in the bill, but we would like to see recognition of it in the bill. We talked about section 42 and the duty to consider the child's best interests. Consideration should also be given to the impact of the imprisonment, detention and arrest of a parent on children and young people. We would like the committee to think about that as the bill goes forward.

The Convener: Thank you for putting that on the record.

Rachel Stewart: The training in supporting vulnerable persons that is specified in the policy memorandum, which will be dealt with in regulations, is very much for the appropriate adults. There might be a missed opportunity to ensure that the police, who are the gatekeepers for support for vulnerable people, are given appropriate training. As my colleagues have discussed, it is sometimes difficult to ascertain someone's vulnerability.

The Convener: To give the police their due, in the past few years they have got a lot better at recognising the subtleties of autistic spectrum disorders and so on. I understand that they now undergo training in that.

Rachel Stewart: I agree. However, the custody sign-in sheet asks whether the person has a mental disorder or an illness and whether they have ever attempted suicide.

The Convener: We are not happy with the use of the phrase “mental disorder” in the bill, which would be reflected on forms and so on. The evidence to date has certainly not made us happy with that.

Alison McInnes: Is Ms Stewart’s point not that it is not sufficient to give someone a form and ask them to identify whether they are vulnerable? Are you not looking for more in-depth training?

Rachel Stewart: The questions that the police ask people when they enter custody might not catch somebody with a learning disability, as they might not say that they have a mental disorder. Also, some people who have a mental health problem and who have had a bad experience previously with the police might not want to disclose the fact.

The Convener: The point is that we are not happy with the use of that expression in the bill in general.

Tam Baillie: I offer a point of clarity following Mark Ballard’s point about children who are affected by their parents being arrested, detained or sentenced. If consideration of the best interests of the child is going to ribbon its way through the bill, it would be advisable to look at the sections that deal with arrest, detention and investigative liberation to ensure that they take account of the best interests of a child who may be affected by decisions on any of those things. That is the point of reference that you were looking for when you asked where the issue appears in the bill.

The Convener: Home might not be a good place to be sent back to, or it might be a good place.

Tam Baillie: Yes. It cuts both ways, but as long as it is in the bill, it will be a consideration.

The Convener: Thank you all very much for your evidence.

11:26

Meeting continued in private until 12:36.

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