The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 1 October 2013

Session 4

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JUSTICE COMMITTEE
26th 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:

Stevie Diamond (Unison)
John Gillies (Police Scotland)
Assistant Chief Constable Malcolm Graham (Police Scotland)
David Harvie (Crown Office and Procurator Fiscal Service)
Murdo Macleod QC (Faculty of Advocates)
Chief Superintendent David O'Connor (Association of Scottish Police Superintendents)
Ann Ritchie (Glasgow Bar Association)
Grazia Robertson (Law Society of Scotland)
Calum Steele (Scottish Police Federation)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 4

Scottish Parliament

Justice Committee

Tuesday 1 October 2013

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the 26th meeting of the Justice Committee in 2013. I ask everyone to switch off their mobile phones and other electronic devices completely, as they interfere with the broadcasting system even when they are switched to silent.

No apologies have been received.

I invite the committee to agree to consider a draft stage 1 report on the Tribunals (Scotland) Bill, under item 6 today and at future meetings, in private. Is that agreed?

Members *indicated agreement.*

Criminal Justice (Scotland) Bill: Stage 1

10:00

The Convener: Item 2 is our second evidence-taking session on the Criminal Justice (Scotland) Bill at stage 1. We have two panels of witnesses today and we will consider part 1 of the bill, on arrest and custody, with both panels. In addition, we will explore the establishment of a police negotiating board for Scotland with the first panel. That is in part 6 of the bill.

I welcome our first panel—some more people who have season tickets for the committee. I will not call them the usual suspects, although that might be appropriate in the circumstances. With us are Assistant Chief Constable Malcolm Graham; John Gillies, who is director of human resources at Police Scotland; Chief Superintendent David O'Connor, who is president of the Association of Scottish Police Superintendents; Calum Steele, who is general secretary of the Scottish Police Federation; and Stevie Diamond from the police staff Scotland branch of Unison.

Thank you all for your written submissions. We move straight to questions.

Alison McInnes (North East Scotland) (LD): Before we start, I draw members' attention to my entry in the register of interests. I am a council member of Justice Scotland.

The Convener: Thank you. Do you want to ask a question?

Alison McInnes: No. [*Laughter*.]

The Convener: Not yet, anyway.

Alison McInnes: That's right.

The Convener: You should have qualified that. I call John Finnie, to be followed by Margaret Mitchell, Roderick Campbell and Elaine Murray. We are off to a flying start. Look how alert they are—they must have had their porridge.

John Finnie (Highlands and Islands) (Ind): I will start with a question about an operational matter. The Law Society of Scotland and the Scottish Human Rights Commission have questioned whether the need for the change from "detention" to "arrest" has been demonstrated. Will the panel express their views on that, please?

Calum Steele (Scottish Police Federation): I am not entirely convinced that that need has been demonstrated. It seems to me that, beyond the statement that it will be more easily understood by the general public, there is no real reason why we should move from the current provisions of "detention" to "arrest on suspicion". It seems to be

unnecessary to create a new set of statutory provisions that are almost identical to an old set of statutory provisions, with just a change in terminology.

Assistant Chief Constable Malcolm Graham (Police Scotland): We believe that the case has been well made and that the changes are required. As members will be aware, the previous arrangements were designed in the late 1970s, when the justice system was entirely different and society was a different place.

The case that Lord Carloway laid out in his report for why the changes need to take place—and why the recodification should be made as one complete set of circumstances as opposed to changes being made piecemeal—is overwhelming. The move to consistent terminology around arrest as opposed to arrest and detention is welcome. The current terminology persistently causes confusion because the term "detention" is used for somebody who is remaining in custody prior to court, rather than for a means of temporary arrest.

Chief Superintendent David O'Connor (Association of Scottish Police Superintendents): Bringing the concepts of detention and arrest together may simplify the process in some respects. I tend to agree with what Malcolm Graham and Calum Steele said.

I add that although the change appears, on the surface, to be relatively simple, there will be significant training issues for Police Scotland in ensuring that everyone fully understands what the change from "detention" to "arrest on suspicion" means.

The Convener: I saw heads nodding when training issues were mentioned. Does anybody want to come in on that? John Gillies was nodding and so was Calum Steele.

John Gillies (Police Scotland): The need for training and re-education of the service in relation to the provisions would be considerable. We would have to take a view on that being done alongside the current change within Police Scotland and reform towards the new organisation. It is difficult to say now what impact such an abstraction would have across the board. We would have to give due consideration to how the training would be rolled out.

It is difficult to put a cost on such training, but it is fair to say that it would be quite a distraction to the service. If the provision is to be implemented, we will need to take a view on when it should be implemented, based on the on-going changes to the service.

Calum Steele: There is also the reality that you cannot not know what you know, and police officers, whether they joined in the 1970s or whenever, know detention and know the process of detention from beginning to end. Unlearning that and learning something else, as with any type of human behaviour, will result in inadvertent misapplication of the wrong pieces of legislation and recording of the wrong pieces of information in notebooks and so on. I have yet to hear a cogent argument for why it makes something better to change terminology largely without changing content, and I fear that the consequence of the wrong information being recorded because officers are dealing with a new set of processes, even if the general principles of fairness are applied, could lead to cases being thrown out of court.

John Finnie: I would like to follow up with Mr Graham. We have evidence from the Scottish Human Rights Commission, which says of evidence supporting the change:

"Unless such evidence is produced, the greater interference with individual's private lives involved in longer detention periods may not be justified."

That follows from the statement:

"The Commission is unaware of any evidence which suggested that prior to October 2010 the police were systematically hampered in their efforts to investigate crime by the limits of the 6 hour detention period."

Is that incorrect?

Assistant Chief Constable Graham: I would say that that is very incorrect. We have produced evidence in the past and in our written submission on why the six-hour period was woefully inadequate. That had become clear to operational officers, even in basic cases at times.

Members will also be aware that we previously made a written submission about proportionate and judicious use of the extensions that have come in since 2010. We were very clear at the time that we needed a system that could be expanded and was flexible. In most cases detentions could be dealt with in six hours, and the vast majority are still dealt with in under 12 hours. In the small proportion of cases for which we have sought extensions from 12 to 24 hours, that extension has absolutely been required. We have provided evidence of such cases in the appendices to our written submissions, and I argue strongly that without those extensions the ends of justice might well not have been served, because we would not have been able to gather evidence in those serious crime cases.

The Convener: I would like you to clarify that, because the Police Scotland submission states that

"0.4% of all persons detained require to be extended beyond 12 hours",

but we do not have a percentage for the extension beyond six hours. Can you give us that?

Assistant Chief Constable Graham: I apologise if the data are not in there. We have data and I will ensure that they are submitted. Of course, there is no extension from six to 12 hours in the current system, but we have data showing the times for which people have been kept, and that the vast majority of cases are still dealt with in under six hours. Of course, the vast majority of cases are less serious cases, so I am keen to get across the point about scalability. The number of cases for which we would need to go for an extension beyond 12 hours is very small, but they are the most critical cases—rapes, murders and other complex cases in which the criticality of not having that additional time would hamper our ability to keep people safe and could hamper the ends of justice being met.

Chief Superintendent O'Connor: In addition to what has been said, we can track the matter back to 1979, when the Thomson committee first looked at powers of detention and timescales for detention. The options at that time were six hours, 12 hours or 24 hours, and the service certainly had a view back in 1979—as many people round the table will remember—that the 12-hour detention period would be the most appropriate. The world has moved on considerably, and the six-hour detention period is not suitable in some instances, particularly for complex and difficult investigations.

The Convener: Are you disputing that, Calum?

Calum Steele: I am disputing the idea that I have that recollection of 1979. I was six years old.

The Convener: Now you are just showing off. I am not bothering about that.

It is important for us to know the figures, because if we are asking about the bill's provision for detention for up to 12 hours, we need to know whether the limit needs to be fixed. One of the arguments is about whether it needs to be changed from six hours, so evidence on that would be very helpful.

John Finnie: I am slightly changing the subject, but I would like to ask about custody.

The Convener: Before we move on, does anybody have a supplementary question on the issue that we have been discussing?

Margaret Mitchell (Central Scotland) (Con): My question is on arrest.

Roderick Campbell (North East Fife) (SNP): My question is also on arrest.

The Convener: Is it on the terminology? I would like a question on that.

John Finnie: My question is connected with the power of arrest and detention in custody.

The Convener: Given your previous on this, I will let you proceed.

John Finnie: In the context of the discussion around moving away from the notion that arrest is a form of punishment that is administered by the police, Lord Carloway refers to the purpose of arrest. There has been an altered police response to detaining people in custody for domestic abuse and drink-driving. How does present practice in that regard square with Lord Carloway's proposals? Perhaps Mr O'Connor might respond to that.

Chief Superintendent O'Connor: While the bill is being discussed, we would be looking for guidelines from the Lord Advocate on interpreting the bill's provisions and how they should be applied by the police in a variety of circumstances. We will need a set of guidelines that the police service can draw on.

John Finnie: Do any other members of the panel have a comment on that?

Calum Steele: I do not disagree with what Chief Superintendent O'Connor said.

John Finnie: What do you see the purpose of the Lord Advocate's guidelines being? There are Lord Advocate's guidelines at the moment on detaining people in custody.

Chief Superintendent O'Connor: There are. A number of different parts are laid out in the Lord Advocate's guidance. I suppose that a key part is that the officers in charge of the station might decide to detain a person in custody and that that would not subject an officer to any claim whatever. I think that we should discuss that as part of the discussion on the bill.

The Convener: I will let John Finnie back in afterwards, but I want to let other members in at this point.

Margaret Mitchell: Good morning, panel. I wonder whether you can comment on the written submission from the ASPS. Perhaps Mr O'Connor could do so first. The submission states that the powers of arrest in the bill

"lack an explicit power to arrest to prevent a crime",

which is set out in the

"general duties of a constable defined in the Police and Fire Reform (Scotland) Act 2012".

Chief Superintendent O'Connor: We were looking for clarification in relation to that because there will be circumstances in which the police come across somebody who is a threat to themselves and to the public. An arrest might be necessary in order to take that person to a police

station to get them access to the services that they need. We posed the question in our submission for clarification that that power will still exist.

Margaret Mitchell: That is an important point. It would be a huge concern if the bill was to mean that the police could not deter and prevent crime. Would the other panel members like to comment? Perhaps the representative of Police Scotland could do so.

Assistant Chief Constable Graham: I agree with David O'Connor. We had concerns about that issue at an early stage of drafting. We made representations on it and sought reassurance that the common-law powers that David O'Connor described would be retained. That aspect is not included in the bill in a statutory sense; all that we have at the moment is what is described as a "letter of comfort" from those who are drafting the bill. To be frank, it does not give us huge comfort, at the moment.

There are other issues around arrest. For example, at the moment there is a power to arrest when a crime has not been committed but there is a breach of a civil order that has a power of arrest attached to it. We must ensure that that power is included for things such as matrimonial homes interdicts, which we would routinely deal with. We also have a concern around the absolute requirement to take a person to a police station when they have been arrested, which we argue does not retain sufficient flexibility in the system for circumstances in which we might wish, in effect, to de-arrest somebody. Lord Carloway's recommendation was less rigorous than that; he recommended that people should be taken to a police station when necessary.

Margaret Mitchell: I want to go on to that as soon as is practicably possible. However, would your preference be that the bill include an explicit power to arrest in order to prevent a crime?

Assistant Chief Constable Graham: I think that that would be very helpful.

10:15

Margaret Mitchell: Could I have the view of the other panellists?

The Convener: I am glad you are taking over from me, Margaret. I want an easy day—I locked myself out of the house. I am thrilled to be here. [*Laughter*.]

Margaret Mitchell: You asked me to ask the questions, convener. What can I do?

The Convener: Go for it, Margaret.

Witnesses should indicate when they want to come in, but do not feel obliged if you have nothing to add. I am sure that Calum Steele has something to add.

Calum Steele: The only thing that I have to add is that I have nothing to add.

Margaret Mitchell: Do you agree that the bill should include such a power?

Calum Steele: I agree.

Margaret Mitchell: Does Unison have a view?

Stevie Diamond (Unison): We do not have a view on that, I am afraid.

Margaret Mitchell: I like to give everyone a shot, convener.

The Convener: I know, but I am feeling peeved. Do not make me peeved. I am feeling very vulnerable today.

Margaret Mitchell: Do you want me to leave "as soon as practically possible"?

The Convener: Certainly not. I do not want to exercise an arrest on a person who is not officially accused.

One thing has not yet been addressed, although I had hoped that John Finnie would have covered it. On detention and arrest, to say "arrested and under suspicion" to the public makes them think that the person has done it. Are you telling me that the understanding of the public will be clearer? To me, that is not the case because the wording is unclear. If a person is detained and it is reported in the newspaper that that man or woman "has been detained" for something, that is one thing, but if it is reported that they have been arrested, people will not notice the words "not officially accused"? Could you comment on the language—which I had thought John Finnie was going on to discuss?

Calum Steele: That gets to the very nub of the matter. I have yet to see anywhere evidence that the wording is more easily understood. I look at some of the recent examples south of the border. I know that there is civil litigation on-going on this, so I will be mindful about how I phrase this. In the Jo Yeates murder inquiry, the landlord of the building in which she was murdered, who happened to be quite an eccentric-looking gentleman, Christopher Jefferies, was arrested, and it was reported that he had been arrested. I cannot speak for what the general public across the whole United Kingdom thought about it, but my sense from the subsequent furore was that they thought that the man was guilty, because of the terminology that was applied—that he had "been arrested". I do not sense that, when individuals are detained in Scotland and it is then reported that they were subsequently arrested, there is a difficulty in understanding the difference between the two. That is just an observation, however.

Assistant Chief Constable Graham: I have a contrary view. I do not think that the cases from England and Wales bear comparison, because we are in a different system; there, there is a power to detain for up to 72 hours. In the case that was mentioned, that extension was granted—albeit using a judicial submission in relation to that extension. We have a far more limited form of arrest. An arrest on suspicion, as is proposed, would still be for a maximum of 24 hours.

With due respect, convener, in relation to—

The Convener: With respect, on the perception, what you have said is true technically—I think that the case that you mention is not sub judice any more—but the concern that the committee shares is about innocent people being found guilty by the tabloid press, or even by the broadsheets.

Roderick Campbell: "Arrest" is not defined in the bill. In his report, Lord Carloway recommended that

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

I am interested in the panel's thoughts on whether there should be a definition of arrest, and on what Lord Carloway recommended.

Chief Superintendent O'Connor: My 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. That is the sort of definition that we have worked with, and it is a definition that is common throughout the service. That arrest puts controls on the arrested person and allows the police to do a number of things to control the person. I do not have Lord Carloway's definition in front of me; I understand the first part of it, but am not sure about the second. That takes us back to what Malcolm Graham said and the ability to de-arrest in certain circumstances. There will be occasions when it is necessary to arrest somebody at the locus, or some other area in a public place in order to confirm their identity and so on. Once that has been done, the grounds for arrest potentially no longer exist.

Assistant Chief Constable Graham: The very fact that we are discussing terminology and the definition of arrest takes us back to my previous point. The situation that David O'Connor described and Lord Carloway's definition are similar to the current definition of detention, which is that the person is not at liberty to go about their business. I strongly contend that the public notion of that is not influenced by communication or public information from the police, because we do not release information about individuals until they are arrested.

There is less likely to be a distinction in people's thinking between what happens in Scotland and what happens in England and Wales, given that people are probably influenced by United Kingdom media sources, as Calum Steele said. People are less likely to differentiate between the systems in such a way.

It would be helpful if "arrest" were defined in the bill in the way that Lord Carloway set out. As I said, we have great concerns about the absolute requirement in the bill to take a person to a police station when they have been arrested, and we agree with Lord Carloway that the inclusion of "when necessary" will help to ensure that a person's liberty is not taken from them unnecessarily and that they are not detained for any longer than is necessary.

The process of taking someone to a police station and going through their rights must, quite properly, be done thoroughly, so it takes some time. In the appendices to our submission, we set out scenarios in which we think it would be in the interests of justice and of the suspect if we could de-arrest a suspect before they were taken to a police station.

The Convener: I have a funny feeling that "de-arrest" does not have a sexy ring to it. I do not see the banner headline, "That man who was arrested and not accused has now been de-arrested."

Assistant Chief Constable Graham: New legislation inevitably brings up new terms. If I have just made up a word, I apologise.

The Convener: It is in the public domain now.

Calum Steele: I agree almost entirely with David O'Connor. The definition of arrest that the police service uses is well understood and well applied, and I do not think that it causes confusion—unlike the approach that we are about to introduce.

The Convener: We have heard and noted your view. A lot of committee members want to come in on this point. I will bring in Sandra White and take her out of my list.

Sandra White (Glasgow Kelvin) (SNP): We are discussing criminal justice and I am being taken out—that sounds good, at this time of the morning.

Public perception, which the witnesses talked about, is important and should maybe be discussed more. The perception is that if someone is arrested, as opposed to being detained, they are suspected of being guilty of a crime. There is no getting away from that, whether we are talking about the tabloids here, down south or wherever.

I want to look a wee bit beyond that. If someone is detained at their place of employment, their

employer might understand that, but if they are arrested and not charged with a crime, and they have to say to their employer, "Under this new legislation I have been arrested," how will that work for them?

I have a lot of concern about the definition of the terms "detention" and "arrest". I understand that six hours might not be long enough for someone to get a lawyer and so on. However, we need a definition in the bill, so that people completely understand what is meant. The police understand what is meant, but the public take a different view of what "arrested" means. How will that work for someone who is in employment?

Assistant Chief Constable Graham: I take the point. Perhaps what we need in whatever is passed into legislation is a fairly sophisticated piece of communication that will inform people about the changes that have been made. I have worked extensively with some of the legislation in England and Wales and I am not aware that the perception is vastly different there, or that people there have a wider perception that being arrested on suspicion makes them guilty of a crime. People largely understand that one of the key tenets of the justice system across the UK, and particularly in Scotland, is that you are innocent until proven guilty and that, whether you are detained or arrested, your guilt or innocence is decided at the point when you go to court, not because the police have either detained or arrested you.

I have not seen or heard any evidence of a difference in perception in England and Wales, where they do not have the concept of detention. Indeed, I now find the terminology confusing, as Lord Carloway throughout his report uses the term "detention" to mean when somebody is to be kept in police custody after arrest, and that is fundamentally confusing now.

Chief Superintendent O'Connor: The key part concerns detention as arrest. We currently have detention on suspicion and we are moving to arrest on suspicion. The key words are "on suspicion". That is the part that we need to focus on.

The Convener: I am afraid that I think that the key word for the public will be "arrest". That is the issue. As politicians, we know that perception is a huge part of anything and, although I can see the technical arguments, I remain unconvinced at the moment that changing that terminology is helpful. The issues raised by Sandra White about the perception—whether or not employers do anything about it—among other employees if someone is arrested on suspicion are pertinent. It is very hard to shake that mud off you if it has been thrown in such cases. You said that you did not think that people in England had taken that view, but your argument is undermined by the Yeates case, where they did. That man was convicted, hung, drawn and quartered because he looked odd and the press ran the story, and he was arrested. My take on it is that that very case undermines your argument, but I shall ask other committee members for their views.

John Finnie: I would like to read an extract from Lord Carloway's report, which says:

> "The Review considers that the opportunity should be taken to simplify, modernise and clarify the circumstances in which, where an individual is under suspicion of having committed a crime, the lawful deprivation of his/her liberty can take place."

Perception is important and the committee has an obligation to provide good law for the Police Service to follow.

I would like to press Mr Graham on the difference between arrest and detention. I share my colleagues' concern that the public will take the view that arrest is something more definitive. As you have said, the trigger point for publicity is when someone has been arrested, and I wonder whether one of the unintended consequences of that may be people's unwillingness thereafter to come forward with information: they will think that the police have all the information that they need to arrest a person, and a person is in custody, so they will not bother to go along with their snippet of information. Of course, the police rely on public engagement at that level.

Assistant Chief Constable Graham: To clarify, do you mean the point at which somebody would currently be detained prior to them being arrested?

John Finnie: You are saying that someone being arrested would be the trigger for information to be released. If Joe Bloggs is now in custody, a member of the public may say, "Well, they've obviously got the wherewithal to have that person there, so I don't need to come forward with this bit of information that may or may not be helpful," even though their information could be crucial.

Assistant Chief Constable Graham: When I used that as an example, I meant that, when somebody is arrested under the current scheme, that is the likely trigger for us to release information to the public, but that information would not include the details of an individual until they appeared at court. It appears sensible for that to remain under the proposed legislation. There would not be any release of information until somebody was arrested and could be charged under the current system, so I do not see that that would change because we had moved to a position of arrest under suspicion. I do not think that that would come into the public domain in the way that you have described, and it would not change the public perception.

10:30

I take the point that the term "arrest" has a different feel for the public from "detention". Therefore, we should focus on the idea of arrest under suspicion. However, it is not my understanding that there is currently a huge amount of information around when people are detained in that short period prior to being released or, in many cases, arrested. I do not have the figures to hand, but perhaps it would be helpful if we produced some information—assuming that it is available—about the number of people who are detained and subsequently released where grounds no longer exist, as opposed to the number of people who are arrested and charged. That might give you a sense of the situation.

The Convener: Data is always helpful.

Calum Steele: I do not doubt that, in general, the position narrated by Mr Graham is correct. When press releases are put out, they will come on the back of the police arresting a person and reporting to the procurator fiscal. That is not true in all cases, however. I hesitate to give any just now, but I can say with some degree of certainty that there are examples, usually in the higher-profile cases and where there is awareness and a significant media interest, where the police will notify the press that individuals have been detained and are helping the police with their inquiries. As a general provision, the notion that that is done only when the police make an arrest and charging takes place is not 100 per cent accurate. There are other examples, usually in the higher-profile cases, where, in a bid to provide some information to those who are interested, a notification of detention is given.

Chief Superintendent O'Connor: I pose a question, which the Justice Committee may wish to consider. We have been talking about arrest and detention and the potential impact on the arrested persons, but perhaps the question should be asked how victims or complainers would feel about the matter. Groups and organisations representing victims may well have a particular view on the issue, and we cannot lose sight of that. What is their perception of it?

The Convener: The question should be what is just. The perception is that such a notification may be unjust to someone who has been taken in under detention.

Elaine Murray (Dumfriesshire) (Lab): I wish to ask about investigative liberation. There is a suggestion that a person should be released on conditions, which may be applied for a period of up to 28 days. The Faculty of Advocates and the Law Society of Scotland believe that the courts should be able to review the period. Police Scotland and the SPF suggest that 28 days is too short a maximum period for that. Scottish Women's Aid believes that there should be a requirement that the

"complainer be notified of the suspect's release"

and, presumably, of the conditions of their release.

What are your views on who should be reviewing the period, on whether 28 days is sufficient, on whether the complainer should be notified of the release and on the conditions under which a suspect is released?

Assistant Chief Constable Graham: Investigative liberation is one of the areas that Lord Carloway considered following a number of visits to England and Wales to consider the PACE act—the Police and Criminal Evidence Act 1984—which has now been in place for some 30 years and which has worked well, as we understand it, albeit in a slightly different way from what is now proposed. We welcome the step to introduce investigative liberation although, as has already been said, 28 days would potentially be restrictive as an absolute time limit. On occasion, it may not be sufficient and proportionate in circumstances where we could justify an extension.

We do not make any proposal on what that extension process should be, nor on whether there would be a recourse to the court, a judicial process and reviews within the 28-day period. We have suggested that we would be happy to consider that as an internal process. As with all other custody processes and so on, we normally have guidelines for review that are not necessarily laid out in statute, and we have not made any distinct proposals that they should be in statute.

Calum Steele: My understanding is that the time period relates to the time in which the conditions are applied to the investigation. It does not necessarily mean that the investigation ceases in its own right after 28 days. Indeed, it would be entirely right and proper for investigations to continue, irrespective of whether conditions on interim liberation apply or otherwise.

I wish to move on to some of the additional issues associated with interim liberation, as well as addressing the question whether victims and witnesses should be made aware. The SPF gave a fairly comprehensive response on the matter in relation to the Victims and Witnesses (Scotland) Bill and, even without that in front of me, I am content to note that our view was that as much information as possible should be given to victims and witnesses at key stages of the investigation and inquiry. I have little hesitation supporting the view that they should be made aware when certain conditions apply or cease to apply.

When it comes to the notion of the 28 days and interim liberation, or even interim liberation in its own right, the proposal is probably sensible. However, we have to consider the mechanics of how such things happen. We must consider the availability of solicitors, of police officers and of the suspects. I am mindful about how day-to-day policing takes place, and the fact is that traffic can prevent someone from being at a place at the particular time when they were meant to be there. I fear that there is significant potential for police officers, solicitors and those suspected of offences to miss each other. An interim liberation might be set for a particular place and time, such as midday. The police officer might get there at midday, the solicitor might have got there at 10 to midday, but the suspect might not turn up until a quarter past, by which time the police officer has concluded that they are not going to show up, and they go off to deal with something else. Then, the suspect turns up, but we find ourselves talking about whether or not we are going to arrest the person for breaching their bail conditions.

There is potential to complicate the criminal justice landscape with sets of circumstances that could, in their own right, be explained away by timing. Because of the dynamic nature of police work, the suspect could well be there at the appointed time, date and place but, as a consequence of being held up dealing with an incident, which they might have attended in good faith with the reasonable expectation of being clear of it in a proper timeframe, the police officer might be unable to get back to the police station. Furthermore, someone has to be standing at the appointed place with a stopwatch—metaphorically—switching it on and off to ensure that the overall time has not been exceeded.

That means having an awful lot of administration, or using a lot of information technology. Whichever it is, it means a lot of expense. At a time when police budgets, and indeed budgets across the whole public sector, are under massive pressures, I am not necessarily convinced that proper consideration has been made of the expense that will be associated with the administration of the process, however right and proper it is—and I do think that it is right and proper to have the ability to continue an investigation after the formal period of arrest or detention, or whatever it will be called, comes to an end.

Chief Superintendent O'Connor: I am a little bit confused as to whether we are talking about investigative liberation or interim liberation. Investigative liberation is where somebody is suspected of a crime, the 28-day period applies and various conditions can be applied; interim liberation, as I understand it, is where somebody has been charged and conditions can be imposed on the accused until they appear in court. Interim liberation is perhaps worthy of further discussion.

The Convener: Now—at this moment? Yes, please.

Chief Superintendent O'Connor: If that is okay.

The Convener: Yes, otherwise it will be left hanging in the air.

Chief Superintendent O'Connor: Currently, police officers have the power to grant an unconditional undertaking or undertaking with standard conditions when releasing accused persons from custody. Those can include not committing a crime, not interfering with witnesses, not behaving in a manner that causes or is likely to cause alarm, and complying with any other special conditions.

Under the bill, the thresholds that are associated with the application of the conditions to a written undertaking have been revised. Police officers continue to be allowed to grant unconditional undertakings to appear in court. Beyond that, an inspector or an officer of the rank of inspector can apply an additional condition where it is necessary and proportionate only for the purpose of ensuring that the accused does not obstruct the course of justice in relation to the offence for which he is being investigated. That moves on from the police powers that we currently have to prevent further crimes being committed. We can apply the standard and additional conditions, but the bill proposes having an inspector applying a condition only in relation to the charge that is under investigation.

The Convener: I understand—you are talking about investigative liberation as opposed to interim liberation.

Chief Superintendent O'Connor: I am talking about interim liberation.

The Convener: Okay, but investigative liberation can spread its tentacles further.

Chief Superintendent O'Connor: Yes, it can. It is very confusing.

The Convener: Yes, I have just been confused.

Assistant Chief Constable Graham: With your permission, I will try my best—as the whole bill is trying to do—to simplify things. I am grateful to David O'Connor for moving us on.

The Convener: I will give you points out of 10.

Assistant Chief Constable Graham: I think that release on undertaking is the term that is used for interim liberation—that is certainly the term that we would use.

With your leave, convener, I will come back to the point that was made about investigative liberation. We welcome the proposal and support the intent behind it, which is to minimise the time that people should be kept in custody, whether they are detained, arrested on suspicion or arrested subsequently. However, I agree with Calum Steele about its complexity and the systems that will have to be put in place. We have outlined the complexity and the detail of some of the costs of the systems. Like many provisions in the bill, it would require an information and communication technology system upgrade. There is complexity in managing that—complexity for people and a complexity of systems that will undoubtedly come with a cost—but we welcome the intent.

The Convener: What happens if, when investigative liberation has been granted in relation to a specific offence, you turn something else up that leads you to think that a different crime is also being committed?

Assistant Chief Constable Graham: That is not an unlikely scenario. Currently, when we are dealing with people for one crime, we may encounter another.

The Convener: What happens in those circumstances?

Assistant Chief Constable Graham: If the circumstances were connected with the crime that we were investigating, we would have to take it as a whole. In other words—

The Convener: Let us say that it was not; let us say that it was completely different.

Assistant Chief Constable Graham: We would deal with it separately and it may be that we would deal with it at that time within the constraints. We would not be able to add another 28 days on, as it were, and say, "We will take 56 days, because we have found another crime." That would clearly not be in the interests of justice or fairness, if that is the point that you were making.

Currently, if we have six hours and we uncover another crime, either we would deal with it later—we would come back and detain somebody at a separate time—or we would need to deal with it within the constraints of the other matter that we were already dealing with. In the same way, if we find a gun when we are out searching a house under a warrant that has been issued on suspicion of drugs, we might go and get a warrant to search further for firearms, because we now have that suspicion, so we would carry on and do that.

The Convener: But you cannot have a fishing warrant.

Assistant Chief Constable Graham: Absolutely. I imagine that it would be the same in these circumstances. I do not think that there is any detail of how such situations would be dealt with as a concurrent process under investigative liberation.

The Convener: My deputy convener does not understand this either, so she might make me not feel so foolish.

Elaine Murray: Under investigative liberation, what happens when we come to the end of the 28 days? Is it the case that the conditions are lifted but you can continue investigating? Or do you have to drop the case?

Assistant Chief Constable Graham: My understanding is that the conditions would fall but the investigation could continue. The period of 28 days has no doubt been chosen based on a judgment about proportionality. However, our concern is that, although that period is absolutely fine for a large number of cases, it would not be fine for a number of longer-running more complex cases. We have laid out the details of some of those cases in an appendix to our written submission. We would therefore contend that to put in place a system whereby we can extend the 28 days would mean that the conditions could be extended. Otherwise, it becomes a cliff edge that you fall off. The investigation continues but the—

Elaine Murray: The suspect would still be at liberty and the conditions—for example, there might be a curfew or they might be told not to go anywhere near the complainer or whatever—would fall after 28 days.

Assistant Chief Constable Graham: Arguably, the conditions would fall in a rather arbitrary way.

The Convener: John Finnie wants in. You have a look on your face that suggests that you disagree.

John Finnie: I am never sure when enough is enough. Will six months be enough, Mr Graham? Will a year be enough? For how long do you see that cliff being on the horizon?

Assistant Chief Constable Graham: We have not sought to put in a period for which the 28 days could be extended. Clearly, there would have to be a limit, but it would be reasonable for there to be a period beyond 28 days for the exceptional circumstances that we have highlighted in the appendix. Perhaps it would be another 28 days.

10:45

John Finnie: Would a judge, rather than a chief police officer, grant the extension?

Assistant Chief Constable Graham: It could be done either way. Different measures are in place for various sections in the bill and in various other pieces of legislation. Some decisions have to

go back to a court; sometimes a specific rank in the police is specified; sometimes it is a matter of guidance from the Lord Advocate; and sometimes it is for the police to make a decision about the matter. We have not made a specific recommendation, but we could work with either approach.

The Convener: I will go back to investigative liberation. Somebody has been arrested but—I have forgotten the term already—has not been officially charged although they are under suspicion and you have sent them out with conditions for 28 days. That relates to what you think they did, but what happens if, in the middle of that, you find something completely different that they might have done? The 28 days and the conditions apply to the first thing; what happens to the second? Do you have to bring the person back in, arrest them on suspicion of having done it and set another 28 days running because of the separate matter, which has nothing to do with the first job?

Assistant Chief Constable Graham: There might be circumstances in which it would be reasonable to do that.

The Convener: That is what I was trying to work out. It would not be connected at all. We could have two or three cases all with this technical stuff running.

Assistant Chief Constable Graham: That would be the same under the current system when somebody is detained, albeit that the timescales are far shorter. Clearly, the test of the fairness to the accused person when we get to court would have to be met. Therefore, if the circumstances were part of the same course of conduct, the police would not seek to commence a separate process.

The Convener: I appreciate that. I am being clear that I am asking about a completely separate matter—something never occurred to you and, "Oh, whoops, this has turned up." I just want to understand how it would operate.

Margaret Mitchell: The Faculty of Advocates and the Law Society of Scotland believe that the period of investigative liberation should be reviewed by the courts. Would you like that to be explicit in the bill?

Assistant Chief Constable Graham: We would be satisfied if the period could be reviewed, depending on the timescale and the extension, by a senior police officer, but we could work with either system.

Margaret Mitchell: Does anyone else have a view on that?

Calum Steele: It never surprises me when the legal profession wants to have more work.

Margaret Mitchell: How cynical.

The Convener: Dearie me. I hope that you are never up on anything yourself, Mr Steele.

Margaret Mitchell: Elaine Murray mentioned Scottish Women's Aid. It specifically wants there to be a requirement for the complainant to be notified of the suspect's release on investigative liberation and of whether any conditions have been attached to the liberation. Do you have views on that request?

Assistant Chief Constable Graham: I would be happy if that was the case.

The Convener: It is a bit like bail conditions.

Margaret Mitchell: It would not be overly onerous but quite reasonable to do.

Assistant Chief Constable Graham: Yes, definitely.

Chief Superintendent O'Connor: To go back to a point that Calum Steele made, the impact of investigative liberation on police resources should not be understated. In addition, we will clearly need some form of technology for custody management to support the measure and track all the different investigative liberations throughout Scotland. Police Scotland needs to work towards that as we go forward.

Margaret Mitchell: Would you expect that to be built into the information technology system that Police Scotland is currently considering?

Assistant Chief Constable Graham: Absolutely.

John Pentland (Motherwell and Wishaw) (Lab): I have a supplementary question to the one that Margaret Mitchell asked about police resources. Calum Steele made a general comment that, sometimes, the cost and the resource will not be worth the benefits that we will draw from the bill. Does he believe that what David O'Connor asked for would be a waste of money?

Calum Steele: That is a loose paraphrasing of what I said. I am saying that the police service has little money at this moment, like every other public service. We might not necessarily suddenly materialise or magic up the money that will be required to develop the necessary IT systems, to bring about the changes and training that will be required and to put in place the staffing—the police officers or police staff—to manage the clocks or the times and to ensure that the timescales that apply to an investigation are not breached overall.

Taking a piecemeal approach would be a waste of time. Whenever anything is done piecemeal, it never works. By the time that the rest of the

service catches up with what is a very low common denominator many years on from the start, much of what is being used is invariably antiquated and further out of date than it was to begin with.

I make it perfectly clear that the practice of investigative liberation is a good thing in its own right. However, significant resources are required to make it happen smoothly—not just in a way that is effective for the police service but in a way that causes minimum disruption for the legal profession and for suspects. There is no indication of where those resources will come from.

John Pentland: You have given the example of investigative liberation. Do you have other examples of where danger might arise if the resource does not follow the bill? What will be the practical challenges after the bill is implemented?

Calum Steele: There are simple things. I go back to where we started, with arrest and detention. I am sure that Stevie Diamond will talk about this shortly, because he has intimate knowledge of the subject. Some computer systems that are used across the police service still require floppy disks. They are not just 3.5 inch floppy disks but 5.25 inch floppy disks—disks that are genuinely floppy. The notion that we could simply replace that just because we have to change the terminology and the process approach to arresting someone on suspicion rather than detaining them is fanciful.

Where such computer systems are not used—that is largely in more rural areas—and where we have paperwork and correspondence to go through, that is done methodically and logically. The notion that we will destroy stocks of paperwork just because of different terminology is nonsense. We are expecting to train people in what are essentially the same provisions in new clothes, which does not make sense either.

When the service has the least amount of cash resources, adding something that seems to deliver the least benefit seems particularly burdensome. That is difficult to justify when whatever resources are available could be used to deal with the on-going challenges that the service faces.

The Convener: I see that Malcolm Graham and Stevie Diamond want to contribute. We will eventually come to John Gillies's bit, which is the police negotiating board—we should bear it in mind that we have another part of the bill to ask about. Does John Gillies want to respond to John Pentland, too?

John Gillies: Yes, if I could.

The Convener: Has Mr Diamond spoken yet?

Stevie Diamond: Yes—once. I made a short comment.

The Convener: I will give you the opportunity to speak first.

Stevie Diamond: I back up what Calum Steele said in response to Mr Pentland. I will give a couple of examples of the administration that happens at the moment. The new rights for solicitors to access suspects have created a bureaucracy so that the police can make accurate records. As our IT systems are outdated, that is a paper process, no matter where we are in the country. That is particularly burdensome.

We expect the i6 programme, which will come into play in about 2015, to administer the whole process. It is in the definition stage. While the bill is being scrutinised, i6 must go on, because it must be delivered by 2015. We could be looking at rejigging i6 before it starts, to accommodate the provisions in the bill.

The Convener: The Justice Sub-Committee on Policing could return to that, because we have looked at i6.

John Gillies: My observation on what Calum Steele said is that we need to separate the cost and timing of doing something from whether it is right to do it. As the committee has heard from my colleague Malcolm Graham, Police Scotland broadly supports a lot of the recommendations that the bill will implement.

We are indeed challenged as far as resources are concerned, but we are going through a huge process of evolution. If something is going to enhance the service to the public and to victims, we should separate that from the timing of when we implement it and from the cost of implementing it. If it is a priority, we need to consider it strategically, rather than pushing it back because it is in the "difficult to do" box.

The Convener: Do you mean pass the bill and then see if we can afford to implement the legislation?

John Gillies: Pass the bill, and then establish how we are going to implement it to best effect for the people of Scotland, based on other priorities in the service.

Chief Superintendent O'Connor: I go back to Mr Pentland's point. There are various parts of the bill where very robust checks and balances will need to be built in to ensure that all the different parts and conditions are being applied and delivered. The bill will have a significant impact on inspecting ranks. Many of Calum Steele's members have a particular locus and role to perform in reviewing written undertakings and investigative liberation. Extension of detention should not be understated at a time when the service is going through a significant amount of management de-layering. When we talk about

resources, we must make it clear that the issues around checks and balances and review are not insignificant, particularly for inspecting ranks.

Assistant Chief Constable Graham: I agree with much of what has been said. The point about the dependency between the service's ability to deliver an information and communication technology system that is fit for the service, in the shape that we are currently in, and the implementation of the eventual act, is absolutely key. That is a dependency that we have recognised from the outset.

Work is on-going to ensure that the i6 programme can be designed, at the stages that it is at, to encompass as many of the proposals in the bill as possible. Stevie Diamond made an accurate point, however, that we cannot design in those proposals with any degree of certainty until the bill becomes an act. The phasing is critical, and the dependency is clear. We do not want to have to put in place cumbersome and bureaucratic paper systems to service the needs of some of the complexities of the bill if we can design them into the ICT system that will be delivered after the time when, as I understand it, the bill may be enacted.

The Convener: You also have all your duties under the Victims and Witnesses (Scotland) Bill, which is coming up. That will require tracking for all the data and so on. Is too much being asked?

Calum Steele: I do not think that anyone watching this discussion would think that too much is being asked of the Police Service in what it is meant to give the general public. Sometimes, however, the burden, whether it is self-applied or applied by others with regard to how day-to-day policing activity takes place, can seem too much. In much of what is likely to come out of the bill before us, that burden is not insignificant.

Assistant Chief Constable Graham: Without overstating it, the bill is the most significant piece of proposed legislation since the Criminal Justice (Scotland) Act 1980. It is the largest proposed change to criminal justice, with the largest impacts on policing, since that time. The change is required, and we are supportive of what is in the bill, but there needs to be a recognition that a cost will be associated with it.

We have worked hard to assess and capture those costs accurately, as is represented in the financial memorandum accompanying the bill. I agree with everything that has been said and with the point that a lot is being asked, but the bill represents a generational change—it will not be a recurring event every two, four or six years. It is a generational change that we need to commit to for the right reasons, as John Gillies has said. It is about fundamental changes for human rights, for our society and for our legal system, ensuring a fair and equitable balance between the rights of those who are accused or suspected of crimes and the victims. We should commit to doing that properly.

Chief Superintendent O'Connor: It is a matter of timing. We are six months into the transition to Police Scotland, which is the biggest change in policing in Scotland that we have ever seen. On the back of that, we have one of the biggest changes to the criminal law in Scotland in a generation. I know that there is a longer run-in for the bill but, to return to where I started, there has to be the right understanding, knowledge and training for police officers and police staff as we go forward. It is a big ask, but it is doable.

11:00

John Pentland: I become a wee bit concerned knowing that the Scottish Police Authority has to save £72 million next year. We have heard about the bill being implemented successfully, but will its implementation be successful only if the money comes along to make that happen?

Assistant Chief Constable Graham: I can answer that very clearly. We articulated the costs in the way that we did because there are additional costs associated with the bill. As you rightly point out, it will be very hard, and increasingly so, for us to find those costs from within the existing budget that Police Scotland has been offered.

The Convener: Does anybody else wish to comment on costs or on resources in general, such as staffing?

Calum Steele: The question is slightly oversimplified. The bill's success will very much depend on whether the right things are in it. The Police Service of Scotland's ability to deliver on the bill's expectations will absolutely depend on ensuring that the correct amount of money is given to the service to make that happen.

Stevie Diamond: We are already under huge financial constraints over the next two years. We agree that the bill is required and needs to go forward, but there must be a realistic expectation about when and how its provisions will be delivered and whether the funding will come from within the service.

The Convener: Are you disputing the financial memorandum?

Stevie Diamond: Not as such. We are saying that there must be a realistic period of time to deliver what the bill requires.

The Convener: Does anybody else want to comment on resources? This is your chance to tell us.

Chief Superintendent O'Connor: Everything comes at a cost, and we need to look at the bill's value in keeping people safe, improving services to victims, and improving the criminal justice system. There are conflicting priorities and competing demands with—dare I say?—an ever-reducing pot of money. Very difficult decisions have to be made by the chief constable, but for us, the bill has been costed and must be taken forward.

The Convener: I want to move on, because we are running into a long day and there are still questions on the police negotiating board for Scotland, for example.

Alison McInnes: I want to look at section 27 and post-charge questioning. Police Scotland has welcomed the proposal, but others, such as the Edinburgh Bar Association, have urged caution. Justice Scotland said that it

"considers that the perceived value of post-charge questioning is overstated and is unsure of what value it will add in the Scottish context."

Will Police Scotland give its views on why it has welcomed that provision?

Assistant Chief Constable Graham: We have given it a cautious welcome, as you pointed out. We do not have experience of post-charge questioning, but we have experience of wanting to do it on a number of occasions, particularly in serious and complex long-running cases in which the point of charge potentially comes at a stage in the investigation when there is still a large amount of investigative work to do, in fairness to the accused and in the wider interests of justice. To be able to go back with questions would not only further the investigation, but be deemed to be a fair opportunity, should an accused wish to provide more information than we had the opportunity to get at the first point of questioning. We welcome the proposal for those reasons.

Our best guess—this is a professional judgment—is that the approach would be used sparingly; it would not be used routinely in more straightforward summary cases. In all likelihood, we would use the tactic in consultation with the Crown, should the provision become enacted.

Alison McInnes: Is there any conflict with the European convention on human rights?

Assistant Chief Constable Graham: I do not see any conflict, given the way that the courts have laid it out and the argument for there being a proportionate balance in the justice system—on a case-by-case basis, obviously. As is the case with everything that the police do, that would be a test that the court would consider.

Alison McInnes: Is there any benefit in trying to limit and set out more clearly the circumstances in which that questioning could be done—for example, in dealing with evidence that comes to light after the charge is first brought?

Assistant Chief Constable Graham: That is clearly one set of circumstances. We sometimes wish that we had a device or mechanism for doing such questioning. In the first instance, it probably extends beyond such circumstances to more serious and complex cases in which, at times and due to the volume of material, the information might be there but we might not have got to it by the stage at which we require to put other processes in place. I do not think that we would want to be constrained to the specific limitation that you mention, but that would undoubtedly be one of the sets of circumstances in which what you suggest would be relevant.

Roderick Campbell: I want to go back to section 25, which is on consent to interview without a solicitor. Does the panel have views on the suggestion in section 25 that 16 and 17-year-olds who are not suffering from a mental disorder can consent to being interviewed without a solicitor with the agreement of a relevant person? Should they be allowed to waive their right to a solicitor?

Calum Steele: The abilities of 16 and 17-year-olds are a very topical issue. There is a debate on whether they should be allowed to vote. Well, they are allowed to vote, so they should know their own minds in that regard. However, I can understand why the argument can be advanced in both directions. There is, of course, the additional balance that in the criminal justice system there is a definition of when someone becomes an adult. I do not have an answer. I will leave that to the legislators.

Roderick Campbell: Thank you.

Assistant Chief Constable Graham: I share the concerns expressed by the Police Federation, and there is an additional concern about some of the implications. Circumstances might arise in which the police would, in effect, be instructing a solicitor on behalf of a person who had already stated, with questionable competence or otherwise, their desire to waive their right to a solicitor. I am concerned about how that would work in terms of who instructs the solicitor. I say that from the perspective of seeking to achieve the same aims as the bill seeks to achieve; indeed, they are the same as Lord Carloway's aspirations. However, a technicality is involved that relates to the services of a solicitor being instructed by the police rather than the individual who rightly should be giving such instructions.

The Convener: Is there some confusion here? We have just completed stage 1 scrutiny of the Victims and Witnesses (Scotland) Bill and the age

at which young people can be treated differently is 18. Why are we sticking with 16 here? A witness or an accused can also be a victim. Why are we not tidying this up?

Calum Steele: I think that that is a question for Lord Carloway. [*Laughter*.]

The Convener: Let me rephrase the question, Mr Steele, as you are being awkward with me. Do you want the age to be 18 or over so that it ties in with other legislation that we are putting through? Would that be sensible?

Assistant Chief Constable Graham: That is my point. As a result of the passage of time, there is now a mix of ages. European case law is fairly clear on the age of a child and some of our legislation differs from that because of history. Things would be clearer and operations would be simpler for sure if there was consistency around the age of a child.

There is a connected issue around the rights of suspects, whether children or adults, while they are in custody and the use of the appropriate adult scheme. The bill requires the police to ensure that an appropriate adult is made available for certain vulnerable suspects. I know that others have expressed a concern about that in their written submissions, and I emphasise our concern that, although that is absolutely the right thing to do and it is consistent with common practice, we have seen a huge increase in the number of requests for appropriate adults because of an enhanced understanding of the circumstances in which that is fair and proportionate. However, different schemes are in place in different local authority areas, and they are creaking at the seams. To impose such a condition on the police without any statutory requirement for there to be a scheme in every area could leave the police in a difficult position. It should not be our responsibility to supply that independent person.

The Convener: I am aware of the time and the fact that we have another panel of witnesses.

John Finnie: Can I ask a very brief supplementary on that point? Setting aside the bill, are there not huge challenges for the police service in identifying vulnerable people, with people sometimes coming forward after the event and identifying themselves as vulnerable?

Assistant Chief Constable Graham: That could undoubtedly be the case. However, we have never had more checks and balances at the point when somebody is questioned or detained, to ensure that we do everything that we can to identify whether we need to call on the services of somebody to offer support and independent advice.

The Convener: Is what is in the bill on the proposed police negotiating board for Scotland all absolutely fine and no problem? Do you have any comments about that? Is there anything that you are happy—or unhappy—about on that, Mr Gillies?

John Gillies: Police Scotland welcomes the creation of the PNBS. We are certainly pro collective consultation, with the opportunity for staff associations to get round the table to negotiate on key matters, as set out in the legislation. We have made submissions on elements of the detail that we think can be developed. For example, special constables are not included in the bill at this point. We have asked why, if specials are afforded the same equipment and clothing as regular officers, there is no specific reference to them. However, we are generally very supportive of the proposals. The Police Negotiating Board operates informally in Scotland, so it is just a case of taking that forward.

Calum Steele: The SPF and, indeed, the wider staff side of the existing PNB standing committees welcome the creation of a new police negotiating board for Scotland in its own right. However, in our view, the disbanding of the UK PNB is abhorrent and does a fundamental disservice to the fine women and men of the police service in England and Wales—and, indeed, in Northern Ireland, whose position currently remains unclear.

We submitted a fairly comprehensive response to the separate consultation on the PNB for Scotland, which closed on Friday of last week. I appreciate that most committee members have probably not got our response in front of them. We have some issues with the proposals.

This is not a point of debate between John Gillies and me, but in our view the issue of uniforms and equipment should not be negotiable: uniforms and equipment are either provided or not. Special constables are not covered because this is about terms and conditions—in effect, pay and rations. Unless a decision is taken to have salaried special constables, we see no reason why they should be covered by the proposed police negotiating board for Scotland.

The cabinet secretary has made some helpful comments about the shortcomings that currently exist in terms of the ability of the respective secretaries of state or, indeed, the Home Secretary to overturn the decision of an arbiter or an arbitration tribunal. An arbitration tribunal decision is binding on one side only: the staff side. We consider that to be manifestly unfair. The cabinet secretary has indicated that he would be willing to have binding pay decisions. However, although the legislation is structured in such a way that future cabinet secretaries can be bound, it does not necessarily bind Parliament. We need to

ensure that that is addressed in the bill, because although we might have confidence in an individual cabinet secretary's ability to do the job, binding that individual to an agreement is not the same as having binding arbitration in its own right.

Although our response has many further lengthy elements, on the whole we are very supportive of the proposals, albeit that we see shortcomings in some areas that can be improved. It would be a massive lost opportunity if we simply took up what has been a broken system—certainly in recent years—that the Home Office has dominated for no purpose other than to ensure that the Government's agenda is not breached. We must not just replicate that model in Scotland without trying to overcome some of its weaknesses.

The Convener: Mr Diamond, do you want to comment from your members' point of view?

Stevie Diamond: We are not covered by the PNB.

The Convener: Right. John Finnie has a question.

John Finnie: Will the chief officers participate in the PNBS?

John Gillies: Our chief officers are covered by the current arrangement. The Scottish Chief Police Officers Staff Association is currently represented on the informal PNB. We envisage the SCPOSA continuing to be represented as one of the three constituent staff groupings in Scotland.

11:15

John Finnie: For the avoidance of any doubt whatsoever, am I right that the terms and conditions of all police officers in Scotland will be dealt with by the PNBS?

John Gillies: The Scottish Chief Police Officers Staff Association, the Association of Scottish Police Superintendents and the Scottish Police Federation are all covered.

Calum Steele: That is absolutely correct in terms of the proposal in the bill. However, it remains unclear whether the Scottish Chief Police Officers Staff Association will take the view that it should fall within the ambit of the Review Body on Senior Salaries. It is certainly the view of my association—David O'Connor will speak for himself—that if that was to happen, it would be a fundamental issue for the proposed police negotiating board for Scotland. If we lose very senior officers' buy-in to the view that the negotiating mechanism is the right way of dealing with pay and conditions across the service, we lose a fundamental link in ensuring that there is a common, negotiated and fair approach to terms and conditions. An elitist approach could be created, from which some could infer that they were better than the rest. We think that that would be particularly damaging.

The Convener: Thank you. Given the pressure of time this morning, please feel free to write to me as committee convener with any points that you think perhaps we should have pursued, which I will then circulate to committee members. I have learned during this session that the expression that I must get into my head is "arrested but not officially accused".

11:16

Meeting suspended.

11:22

On resuming—

The Convener: I welcome our second panel of witnesses: David Harvie, director of serious casework, Crown Office and Procurator Fiscal Service; Grazia Robertson, member of the criminal law committee, Law Society of Scotland; Ann Ritchie, president of the Glasgow Bar Association; and Murdo Macleod QC of the Faculty of Advocates.

Thank you for your written submissions. Again, I invite the committee to ask questions on the same parts of the bill as before. I know that you are all ready with your pencils sharpened.

Margaret Mitchell: One area that we did not cover in the previous evidence session was the authorisation for keeping in custody. The Faculty of Advocates and the Law Society of Scotland's recommendation is that keeping a person in custody should be authorised by an officer of the rank of sergeant, as opposed to a constable. Could you say a little about why you consider that that should be the case?

Murdo Macleod QC (Faculty of Advocates): If I may, I will start by saying that the Faculty of Advocates is grateful for the opportunity to give evidence and to assist the Justice Committee with its scrutiny of the bill. We support the simplification, clarification and modernisation of the law of arrest and detention in Scotland. We have made certain comments in writing, which I hope we can discuss, on 14 of the 56 sections in part 1, but in broad terms the faculty welcomes the thrust of the reforms set out in part 1 and the general direction of travel. Any criticisms will, I hope, be largely constructive.

The Convener: We always view criticism from the faculty as constructive, notwithstanding comments that have been made by other witnesses.

Murdo Macleod: With regard to Mrs Mitchell's question, which I think is directed to section 7 of the bill, I think from recollection that the proposal is that it should be someone of the rank of constable who determines whether an arrestee should be kept in custody.

However, section 9, on "Review after 6 hours", which is another innovation, indicates that continuing detention is to be reviewed by someone

"of the rank of inspector or above".

It is quite a leap from constable to inspector, so we suggest that, rather than having a police constable look at what another police constable is doing, it should be done by a sergeant, who would of course be senior to the rank of police constable.

Margaret Mitchell: There seems to be a certain consistency in that proposal. Do any of the other panel members—

The Convener: Yes. Sorry. I was just going to ask that. Ms Robertson is first.

Grazia Robertson (Law Society of Scotland): The Law Society of Scotland, too, welcomes the opportunity to address the committee today on the Criminal Justice (Scotland) Bill. On Mr Macleod's specific point, the duty sergeant, as he is known, currently takes decisions with regard to keeping people in custody and releasing people on bail undertakings—he has responsibility for those tasks at present. We felt that it would be more appropriate for someone of that rank to have the obligations as stated in the bill.

The Convener: Do other panel members want to comment?

David Harvie (Crown Office and Procurator Fiscal Service): This is obviously a matter directly for Police Scotland, but it is my understanding that, as my colleague said, in respect of primary custody sites decisions are taken by custody sergeants; at secondary sites, which are sometimes opened up if there are large numbers, the most senior officer may be a constable rather than a sergeant, but my understanding is that decisions are referred to a custody sergeant. So, at present, regardless of whether the senior officer is a constable or a sergeant, the decision is always taken at sergeant level. It would be a matter for Police Scotland, but I wonder whether the proposal from the Faculty of Advocates would have any significant impact on Police Scotland's current process. It would appear that in practice the decisions are taken at sergeant level, regardless of whether the person is at the site or not.

Margaret Mitchell: The bill would open the possibility of decisions being made by a constable, which is not the case at present. It is a fair point to have raised.

David Harvie: Indeed.

Ann Ritchie (Glasgow Bar Association): This is perhaps a bit of a notional concept, but I wonder whether a police officer of any rank in a busy police station on a Saturday night would be likely to overrule the investigating officers. It is likely that the officer would take their lead from those who had investigated the case. I wonder how many times the decision of those who bring a person into custody by arresting them on whether the arrestee should be retained in custody is likely to be overruled. I would be surprised if that happened very often.

Margaret Mitchell: Would you nonetheless welcome the proposal that the decision should be taken by a duty sergeant?

Ann Ritchie: I do not think that the decision should be taken by someone of a similar rank; it should be taken by a higher-up sergeant or inspector.

Margaret Mitchell: That is helpful. Thank you.

Elaine Murray: I would like your views on the 12-hour limit. Police Scotland believes that the current capability of extending the limit to 24 hours should be retained for exceptional circumstances, whereas other organisations argue that it should not be retained. Indeed, I believe that the Edinburgh Bar Association suggests that we should reimpose the six-hour limit. I invite reflections on that issue.

Murdo Macleod: The faculty is content with the 12 hours and welcomes Lord Carloway—I think he started this off—reining in the 24 hours, which was the response to the Cadder case in the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. If one looks carefully at the responses, one sees a thread, namely that 12 hours would be sufficient. Of course, that consists of six hours, then a review of six hours. One would imagine that that would be pretty readily granted in the circumstances by a senior officer of the rank of inspector or above.

All that I would say additionally is that they would of course still have the 28 days, during which a person could be released and the police could impose conditions which, if allowed—I am sure that we will come on to discuss them—could be quite stringent. The hours limit is not the end of the road as far as the police are concerned.

Grazia Robertson: The Law Society's position is similar to that of the Edinburgh Bar Association in that we feel that six hours is a sufficient and proportionate time for the police to carry out their tasks, although we acknowledge the arguments in favour of 12 hours.

We welcome the fact that the bill proposes at least to curtail the period of time to 12 hours, as

opposed to extending it further, in recognition of the fact that it is the restriction of someone's liberty. As Lord Carloway said, the measure should be taken only when there is an absolute necessity for it. However, the Law Society echoes the position of the Edinburgh Bar Association and feels that six hours is appropriate.

11:30

David Harvie: The Crown Office's written submission suggests that, given the small number of cases that we are talking about—Police Scotland has indicated that we are looking at only 0.4 per cent of all persons detained—there is an argument, in the most serious cases involving the most complex investigations, for there to be the possibility of the period being longer than 12 hours. Police Scotland's written submission is helpful in providing comparators from other parts of the UK. There is no suggestion that the power that is currently available to the police to detain someone for up to 24 hours in top-end investigations involving only 0.4 per cent of all persons detained—which Police Scotland says equates to one person every two and a half days—is being used excessively. In those instances, they have found that necessary and proportionate to further the investigation.

Roderick Campbell: I refer to my registered interest as a member of the Faculty of Advocates.

My first question is of a general nature. Does the panel think that the bill as drafted is keeping up with the thrust of developments on the European convention in the European Court of Human Rights case law? Are there any respects in which the panel thinks that we might not be up to speed?

Ann Ritchie: I think that it is—the bill is certainly attempting to be up to speed. The Cadder case did not result in suspects being provided with some added advantage of having a right of representation in a police station. I would be concerned if the committee thought that there was anything other than the minimum protection that is required to secure a fair trial and that a rebalancing exercise was required because suspects are obtaining the advantage of a solicitor when they are in custody, resulting in our having to do something like remove the requirement of corroboration, although I appreciate that that is a separate issue. It is not about that. I ask the committee to be aware that the rights of the suspect in the police station are the minimum protections required under the ECHR, rather than something that needs to be offset with, in effect, some disadvantage.

Grazia Robertson: The ECHR provisions were in our minds when we formed our response, and that is indicated in the comments that we have made on the provisions in the bill. I commend to the committee the written submission that you received from the Scottish Human Rights Commission, which focuses on the ECHR provisions. It is useful to see how those fit with the bill as it is drafted.

David Harvie: Rather than look at this as an incremental response to recent case law, it should be regarded as an opportunity to do what Rod Campbell describes, which is to ensure that the system that we are all seeking to operate is a just and fair one that will be convention compliant. We welcome, for example, the phraseology in section 10, which, reading across, makes direct reference to some of the provisions in article 5 regarding the checks and balances that are included in relation to judicial intervention and review at particular stages during the investigation process, which are new.

You asked what I felt about the bill in its entirety, and there is one thing that I would pick up on. I missed the beginning of the conversation involving the earlier panel, but I know that there were issues around the powers of a constable and the fact that, when someone has been arrested, detained or whatever we eventually decide to call it, it will be necessary to take them to a police station.

I wonder whether, in circumstances in which, for example, evidence comes to light prior to getting to the police station that the person in custody may be the wrong individual, the strict terms of the bill as drafted might mean that the person has to be taken to a police station even though at that stage they are no longer under suspicion.

Murdo Macleod: Section 5(3) refers to a European directive. That is about the letter of rights, which the committee will be familiar with. The European directive on rights of access to a lawyer is coming in shortly, although Britain may not opt into it. That is not clear, but there have been indications that we may attempt to follow the majority of implementations. The bill as drafted attempts to fall into line with both those directives and with Cadder and the lessons learned from that.

I agree with Ann Ritchie, who makes an important point. Giving rights to the accused, such as a reduction in the amount of time that they can be in custody, is not a quid pro quo for the abolition of corroboration. Those are standalone provisions that, in the faculty's view, would have had to be enacted in any event.

Roderick Campbell: Do you have any brief, general thoughts on how the letter of rights provisions are working at this early stage?

Murdo Macleod: They came in only in July but, as we have said in our written submissions, we

would direct the committee's attention to section 5(3), which is the Government's attempt to say that the terms of the letter of rights directive must be implemented and that the arrestee

"must be provided as soon as reasonably practicable with such information (verbally or in writing)".

We would say strongly that that information should be given both verbally and in writing.

It is an unfortunate but inevitable consequence of the state of Scottish society that many arrestees or people who are brought into custody have literacy problems. They may also be frightened by what has happened, and it seems only fair to us that, rather than simply being handed a letter with the seven rights on it, the rights are also read out to them. It would not take long, and that is after all what happens when you are cautioned by the police. You do not have to say anything.

The Convener: Is it not the case that you have to understand the process—whether the problems are to do with literacy or language—or the process could be at fault?

Murdo Macleod: Precisely.

Ann Ritchie: There are studies that show that information that is given verbally and in writing is more easily understood, and that is important if we are trying properly to protect the rights of suspects in a meaningful way.

Sandra White: I do not know whether members of this panel heard the evidence of the previous witnesses, but we got into a good discussion about detention and arrest. I note that the Law Society of Scotland is questioning whether the need for change has been demonstrated, and I believe that that is what Calum Steele also said. What are your thoughts on that? I cannot quite get my head around the need for change, either.

Grazia Robertson: I was interested to hear the police officer Calum Steele's comments and also the response from committee members. It is my view that someone who is not officially under suspicion or investigation, or whatever the precise term is—

The Convener: That is it. One cannot remember.

Grazia Robertson: Well, I try to remember it and then I forget it.

If we are trying to simplify and modernise, I find that concept particularly difficult. Lord McCluskey said that law should be kept simple, if only for the benefit of the profession. I know that he was making a joke, but the real point is that we as solicitors have to explain to our clients what it all means. If you tell someone that they are not officially accused, but they then undergo an interview in which questions are put to them that in effect accuse them of various offences, it becomes difficult to know what their status is.

You will see from the Law Society's written submission that I am sympathetic to the points that Calum Steele raised. The Law Society cannot see a reason for the change that makes sense in relation to simplifying things. I can see that it would change things, but not that it would necessarily simplify or modernise them. I suggest that the system, as changed in the light of Cadder, seems to have bedded in well and to be working well.

Ann Ritchie: I agree. I wonder whether it is necessary to legislate or whether changes and improvements could be achieved through recommendations or Lord Advocate's guidelines. The committee should think about the law of unintended consequences. I am concerned that things could be introduced under the bill but then forgotten about. There needs to be some sort of meaningful review. If the bill was enacted in its present form, how its provisions worked would very much depend on the manner in which the police enforced them.

There are a number of consequences to the bill, not least for the legal aid system. My understanding from the Scottish Legal Aid Board's submission is that there is no parallel at present for all the pre-charge work. For the most part, the trigger for legal aid is the service of prosecution papers and, as I understand it, any change to that will require changes to primary legislation. There are many factors that it would be easy simply to overlook in the vigorous move to pass the bill to be ECHR compliant.

The Convener: With respect, I was not about to overlook that. I was looking at section 24 and the provisions about times and the right to have a solicitor and I was going to ask about the issue, but we will come back to it, including the implications for the Scottish Legal Aid Board and firms in terms of costs and resources.

Do others want to comment on whether we need the change in the first place? Are we not better off where we are?

Murdo Macleod: I will strike a different note from that of my two colleagues. First, I should qualify what I say by recognising that they meet clients regularly and discuss things with them, which is one step removed, as it were, from where I and my colleagues come in. However, the Faculty of Advocates believes that the proposed change would simplify matters. My colleagues might have a better take on this, but might it not be the case that, if someone is told that they are not officially accused and then their status changes and they are officially accused of something, that is simpler than our saying to them, "You're

detained under section 14", "You're here by virtue of a statutory warrant" or "You're here by virtue of a common law warrant"? I respectfully suggest that the proposed change will simplify matters.

Following Cadder and the sequelae to that, it seems to me that the distinction between detention and arrest is almost academic anyway, because people are now entitled to have their solicitor present with them during detention as well as afterwards. We are in favour of the adoption of the change.

David Harvie: On whether there is a requirement for simplification, I brought with me a couple of pages from Renton and Brown, which many of you will be familiar with. I pause simply to observe that the first comment under "Common law offences" is:

"It is difficult to state clearly the common law regarding arrest without warrant".

When one looks under "Statutory offences", it starts with:

"It is not clear what common law rights the Scots police have to arrest without warrant for statutory offences."

That is the starting position as far as the main textbook on criminal procedure is concerned.

I welcome, and the Crown welcomes, the attempt to make the procedure more straightforward. I take the point that was raised earlier about perception and the use of language in relation to sections 1 and 2, but the underlying aim of those sections is to provide one system in which, if there is reasonable suspicion, an individual has a particular status. I support the aims of the bill in that endeavour.

Sandra White: For me, Murdo Macleod hit the nail on the head in what he said about perception. He may have heard what the previous panel said about that.

I am interested in something that Ms Robertson said. I keep saying this, but I am not a lawyer and I do not have a legal background. Ms Robertson, you talked about making the law easier for people who are engaged with it, be they witnesses, victims or even accused. I thought that you said something quite interesting—

The Convener: She said many interesting things.

Sandra White: Yes, but the one that caught my interest was that you had to explain to clients their rights and that they might be accused of certain things. Could you expand on what happens at present if someone is detained, and what difference it will make if the bill comes to fruition and people are arrested? What did you mean by what you said?

11:45

Grazia Robertson: I was simply saying that the procedure at the moment is to explain to the client that they are detained, and to advise them of their obligations and what powers the police have in relation to that. There is then a natural change in the person's status after the period of detention: they are either released or charged, or they might be simply released and told that the procurator fiscal will take a decision. That procedure is well established and there is a flow that can be explained to the client.

Under the bill, we will have to say to someone that they are now of the status of being not officially accused, but their power to leave the police station is curtailed and they will be asked questions in the course of a police interview that will necessarily make accusations against them.

At present, at least, the whole purpose of the interview is for the police to say that the person is there in connection with, for example, a charge of assault. Accusations are then presented and he or she is asked to comment on them, although the person can choose whether to comment.

The term "not officially accused" seems clumsy at the least. Does it serve a purpose and does it enhance or progress matters? From the provisions, we cannot see how matters are progressed or how the current system is enhanced, particularly given that the system was changed and improved relatively recently in light of the Cadder decision. Procedures are now in place that in our view seem to work well.

The Convener: Does anyone else wish to comment on the issue? I think that it is troubling the committee.

Ann Ritchie: I appreciate that I might appear to be excessively critical of some provisions of the bill, but I am trying to put forward the perspective of the Glasgow Bar Association and our members, who are at the coalface and who go into police stations on a daily basis—I do that, too.

To answer the question, we could look at section 5, for example, which is called "Information to be given at police station". That is information to be given to a suspect or arrested person. Sections 5(1) and 5(2) are drafted in a way that is excessively complex, bearing in mind that section 5 relates to information that is to be given to an arrested person whose solicitor has not yet arrived at the police station—in effect, it involves telling them that they have the right to a solicitor. I appreciate that not many suspects will go home and read the law but, although the bill is supposed to be an improvement on the present law, what would the man in the street think if he looked at section 5 and was told that those are his rights if he is arrested? If anybody can assist me to explain

in layman's terms what that means, I would be grateful.

I deal with legislation every day, but I find section 5 incredibly and unnecessarily complex. I wonder whether introducing such complex legislation could on any view be deemed to be an improvement. Section 14 of the Criminal Procedure (Scotland) Act 1995 provides fairly straightforward rights on which we can advise clients. At present, detention is for up to 12 hours, and section 14 provides a statutory formulation of a suspect's rights. It is clear that they have to give their name, address and date of birth. Section 5 of the bill sets out the information that is to be given to suspects, but I have to say that I cannot see how it will improve the situation.

The Convener: So how much of the bill would you delete? I mean that seriously: which sections would you suggest?

Ann Ritchie: I do not think that deletion is the right word. The provisions should be rephrased and set out in clear terms. Basically, section 5 needs to lay out that a person has a right not to say anything and a right to access by certain people, and it should name those people. The cross-referencing makes that very difficult. If the section was handed to a member of the public walking past the building today, they would be none the wiser as to their rights.

The Convener: I take it that you would substitute detention for arrest—detention should make a reappearance. From a person's point of view, there is a watershed between detention and arrest. They know that they are moving into a different zone. To talk about arrest with that phrase that none of us can remember, and then change it to arrest with that other phrase, is difficult to follow.

Ann Ritchie: I have perhaps strayed from the original issue, but section 5 is about giving suspects rights. Perhaps someone else here can assist me by explaining how I can put that in a nutshell.

The Convener: Should we perhaps substitute "arrest" with "detention"? The process itself may not be at fault entirely, but perhaps the terminology makes it complicated. If the provision referred to "Information to be given on detention", that would begin to adjust matters a little. I am putting the issue very broadly, but is that the point that you are making?

Ann Ritchie: That is not really the point that I am making. Regarding whether we need to change from the present situation, under which a suspect is "detained" to one in which the suspect is "arrested", Mr Macleod has indicated that the Faculty of Advocates thinks that such a change would be a good move and Mrs Robertson has said that the Law Society takes the view that it is perhaps not necessary. I am suggesting that the change is perhaps not necessary because the detention procedures are fairly clearly understood at present.

Grazia Robertson: One extra point that I want to make relates to our criticism that the bill is full of legalese. Words such as "detained" or "arrested" are quite easy for people to understand. We are always striving for the law to be more understandable.

David Harvie: Without wanting to go back over the definitions of "arrest" and "detention", I want just to clarify the point that was raised about section 5. I appreciate that section 5 has been drafted in such a way that it cross-refers to a number of different sections, but as I read it the person will be told verbally and/or in writing—depending on whether the committee picks up the legitimate point that the Faculty of Advocates has made about how people understand information—that says, "You don't need to say anything. You have the right of access to a solicitor. If you happen to be of a particular age, you can have the right to have another person to assist you."

Regarding section 5(3), those are the kinds of things that I would have thought would be necessary from a convention perspective and from a European Union perspective. If any of us found ourselves in a situation where we were taken to a police station, we would want to know those things. The unobjectionable intent is to say to people before the solicitor even arrives, "This is the basic information that you need to know about what your rights are." Therefore, I do not think that the section needs to be deleted. I think that the section is one of the key foundations that makes the bill convention compliant.

Murdo Macleod: I have some sympathy with my colleague Ms Ritchie on the need to flick through the bill to get to the relevant qualification or section. Unfortunately, however, many pieces of legislation are like that. Even the Criminal Procedure (Scotland) Act 1995, which is our day-to-day guidebook, is full of alterations and amendments.

I will play devil's advocate, if I may. Although we did not make this point in our written submission, I think that the arrestee—or whatever you call the person who has been arrested—will have a letter of rights that sets out all their rights. I am not at the coalface, but I am not sure that an accused would be poring over section 5 in any event. The accused will just want to know what their rights are, and they will derive that knowledge from the letter of rights that they are now given as of two months ago.

The Convener: They will be more worried about what will appear in the local paper, given the terminology.

Margaret Mitchell: I have a question specifically for Mr Macleod and Mr Harvie, who have both indicated that they are in favour of the simplification in the new provisions on the power of arrest.

Do you have any concern that an unintentional consequence of the new powers-of-arrest definitions—I can only assume that this is unintentional—is that the power of arrest to prevent a crime is not explicit in the bill? Do you have a view on that, given that the Police and Fire Reform (Scotland) Act 2012 places a specific duty on constables to prevent crime?

David Harvie: I do not know what the intention is in relation to that and I do not know whether it is an omission. However, from a public interest perspective and a convention perspective in terms of the rights of the public in a broader sense, the power would be a crucial element in enabling the police to intervene at the appropriate time if it is necessary to prevent criminality from taking place.

As we know, there are a number of occasions on which the police might have evidence of conspiracy to commit an offence that has not yet taken place. Therefore, it would seem sensible that the power of arrest or detention—or whatever it is eventually called—applies in those circumstances.

Margaret Mitchell: If it was not included, would you shift your view from being in favour of the simplification to supporting the status quo?

David Harvie: I suppose that as a prosecutor I would seek to argue that, if it was a conspiracy, the people were already committing an offence and, therefore, we could arrest. I would seek to work within the legislation.

Murdo Macleod: Or, indeed, an attempt to commit an offence.

David Harvie: There would be ways of arguing it, but I agree that it is not explicit in the bill.

Margaret Mitchell: Surely the fact that we are even having the debate defeats the argument that it is a simplification.

David Harvie: I said that I supported the intention to simplify. There was some informed discussion earlier about perception and use of terminology but, to go back to the Renton and Brown position that I quoted earlier, the key textbook acknowledges that the overall position on common-law arrest and how it relates not only to common-law offences but to statutory offences is not straightforward. Therefore, the attempt to simplify it is most welcome. The bill goes a long way towards that, but part of the reason why we have this process is because there are opportunities to refine the thinking.

Margaret Mitchell: That is a huge distinction and a welcome one—supporting the attempt to simplify without stating that the bill does that.

Murdo Macleod: It is not something that we had addressed previously but, echoing to some extent what Mr Harvie says, I notice that section 1(1) says that a person can be arrested if they have committed or are committing an offence, so there is a power for the police to stop someone in the process of committing a crime. As Mr Harvie says wearing his prosecutor's hat, if someone is conspiring to commit a crime or even attempting to commit a crime, they could be arrested at that stage. However, I take Ms Mitchell's point.

John Finnie: I have a question about section 23, "Information to be given before the interview". We have received evidence from the Scottish Human Rights Commission, which

"welcomes the requirement for the information to be given on arrest, set out in Section 3."

However, it goes on to say:

"the Commission is of the opinion that the suspect and his solicitor should be informed prior to interview of the content of the 'reasonable grounds for suspicion'."

I concur with that view. Do the witnesses have a view on it?

Murdo Macleod: I concur with it. Considering the coalface, my understanding is that some information can be given to solicitors when they attend at the police station, but I am not sure whether that is codified anywhere.

What the commission suggests seems sensible, but the Faculty of Advocates also finds peculiar subsection (2) of section 23, which concerns the caution and which says that,

"Not more than one hour before"

the commencement of the interview, the person should be cautioned that they need not say anything.

We submit that that should be amended to say, "Not more than one hour before and at the commencement of any interview" because, currently, as you will all be aware, at the beginning of the interview—many are tape-recorded—the arrestee would be cautioned that they need not say anything. Sometimes, that caution is repeated. That should happen at the commencement of the interview as well as

"Not more than one hour before".

Ann Ritchie: It strikes me that the caution that is mentioned in section 23(2)—

"that the person is under no obligation to say anything"—

states only half of the present common-law caution, which is that they are under no obligation to say anything and that anything that they do say may be noted and may be used in evidence.

I do not know whether that is simply an omission but I suggest that, under the present law, if that was the limited nature of the caution—just to advise that they are not under an obligation to say anything—the answers to any questions given in interview would be deemed to be inadmissible as unfair. I wonder whether an addition should be made to the caution to say that any information that is given may be used against the person.

12:00

Grazia Robertson: The Law Society view on the information that is to be given is that, to make the interview with a client meaningful, it is necessary to have a certain amount of information to be able to advise them. It is then that a solicitor's private consultation with their client has some meaning and significance and serves its purpose. If the solicitor has no information, or very little information, the private consultation will be of no great assistance to the client and, to a degree, will not fulfil its purpose of providing legal advice. It is essential that the solicitor has a certain amount of information.

As a practising solicitor, when I go to a police station, I ask police officers for information and I am usually provided with sufficient information to allow me to give some meaningful advice to my client. I do not think that that has been a problem to date.

With regard to cautioning, on a practical level, when a solicitor attends for interview with their client, the caution is repeated on tape, as Murdo Macleod indicated. That is done for the protection of everyone, including the police officers. It ensures that there is evidence that they are performing their function properly, and it is also a reminder to the client of the very important protection that they need say nothing but that, if they do say something, it may be used in evidence. Again, that is working well in practice.

Ann Ritchie: I have found that the practice on how much information is given varies with different police officers. Recently, I have been in situations in which the police officers have simply stated that I would become aware of what evidence they had through the questions that they asked. To my mind, that is pointless. In such situations, as Grazia Robertson indicated, the pre-interview consultation becomes meaningless. My advice to the suspect would have to be that they should make no comment, on the basis that I have not been given any information on what the case against them is. The practice seems to vary. Full disclosure would assist.

Grazia Robertson: I am not trying to jump on the next bandwagon, but if the provision to abolish corroboration were to come in, our advice might well require to change in that pre-interview consultation. There are many factors that, in due course, would indicate that a certain amount of information would be required from the solicitor for him or her to perform their role properly.

The Convener: There will be an opportunity to have a big bite at corroboration at a later stage.

Grazia Robertson: Not by me, but I am sure that my colleagues will be here.

The Convener: I was referring to the various professions as well as others.

Murdo Macleod: I think that the provision of information to arrestees is of crucial importance; in our view, it is, to some extent, neglected. For example, with regard to investigative liberation, it seems to us that when a person is liberated—when they are not officially accused—they should be told, in essence, what Grazia Robertson tells us that she has been told by some police officers. That should be done on a formal basis—the arrestee should be told what it is that he is suspected of having done and what the evidence is. Without that, the appeal to the sheriff that is provided for at two stages would have to be heard in vacuo, with the defence having no understanding of what the evidence was against the arrestee.

Following on from what Mr Finnie said, I believe that the provision of information to the accused at various stages of the process must be catered for.

The Convener: Before we move on, I am minded to drop item 6 on the agenda so that we can have a good cross-examination of the panel that is before us and deal with the other items on our agenda. Next week's meeting will not be too long—we will hear from two panels—so we can consider the draft report on the Tribunals (Scotland) Bill then. I am also mindful of the fact that many committee members will speak in this afternoon's debate, which will probably start at about 10 past 2. Are members happy with that?

Members *indicated agreement.*

The Convener: I just wanted to alert members. "Don't panic," as someone once said.

John Finnie has a supplementary question.

John Finnie: I want to clarify a couple of points with the panel.

Will the issue of the caution require to be dealt with in the bill? Process-wise, could there not be a series of cautions throughout the process?

We have also heard about the Lord Advocate's guidelines on the retention of people in custody. Would your associations have routinely been consulted on such matters or, indeed, would there be any benefit in being consulted on them?

Ann Ritchie: No.

Grazia Robertson: No.

Murdo Macleod: No is the answer to your second question.

Your first question brings us back to the point made, I think, by Grazia Robertson about the on-going process and the fact that the caution is repeated various times. As you will know yourself, Mr Finnie, the caution is repeated when, for example, there is a rest break. However, the bill seems to say just that the caution should be made not more than an hour before the interview, which I am very curious about.

Ann Ritchie: If the bill is to improve the status quo and what we have at present, I see no reason why the full caution should not be stated in it. It seems fairly simple.

John Finnie: Some people might take the jaundiced view that it is down to the involvement of the Scottish Human Rights Commission. Is it your view that the interests of justice are served if there is equitable treatment?

Murdo Macleod: Undoubtedly—and it cuts both ways. If someone is not properly cautioned, is not following the proceedings and is not reminded of their statutory duties, it might lead to an appeal in due course. It is therefore to everyone's benefit that the rights are reiterated.

Ann Ritchie: There is no great advantage in having suspects being acquitted on what the public would deem as technicalities. That is not particularly satisfactory for any party.

Grazia Robertson: I agree.

David Harvie: I did not envisage section 23 as meaning that a caution would be administered off-tape—for want of a better phrase. If that is what is envisaged, it does not help anyone. Given that this is a process in which an individual goes through a number of stages, my reading of the section was that as and when an individual is told that they can have a solicitor they will also be reminded of the current position. Equally, I would expect that, at the commencement of any interview that is being recorded, the person will be reminded of their status and the caution.

Alison McInnes: Scots law has traditionally prohibited any questioning following police charge. However, section 27 introduces the idea of post-charge questioning, and a number of people who have submitted written evidence have questioned the value of such a move and its compatibility with the right to guard against self-incrimination. What are the panel's views on that point?

Murdo Macleod: The faculty is relatively relaxed about that. I think that I am right in saying that an application for further questioning after the person is officially accused must be run past a sheriff. In other words, it must be justified and cannot be done on some spurious basis; given that a solicitor has to be present during any subsequent questioning by the police, we think it unlikely that there is any great scope for miscarriage of justice. It would be a counsel of perfection to say that such questioning should always be done in front of the sheriff.

I came in at the end of the previous evidence session, but I heard one of the police officers who was giving evidence say that it would rarely happen. However, if it was not the norm—one can understand how it would not be the norm, given the pressures that the police are under and the limited time that they have—and if they went through this process in the knowledge that they had more time to do it, it might clog up the courts a bit if it always had to happen in front of a sheriff. We will have to see what happens, but we are satisfied that the checks—namely, that the application has to come before a sheriff or, in the High Court, a judge and that a solicitor will be present and able to advise the arrestee or, indeed, the accused by that stage not to say anything if that is thought appropriate—meet the issues that you have highlighted.

Alison McInnes: You see no need for any further protections or safeguards such as full disclosure.

Murdo Macleod: The reasons for making the application would obviously be ventilated in court and one would expect the defence and the sheriff to ask about the nature of the further inquiries.

Ann Ritchie: I see no need for the provision at all. If exculpatory evidence became available in the course of an inquiry after a person had been charged, it would be disclosed to the defence. Is it being suggested that, if the accused person was questioned formally about that, a prosecution would simply be dropped if they came up with a response to it? I find that very unlikely.

On the other hand, if incriminatory evidence were to be obtained from the accused, there is a question whether that procedure would fall foul of article 6 of the ECHR and the right against self-incrimination after charge. Regardless of the outcome of that questioning, I cannot see how it assists either the prosecution or the defence. In my view, it is unnecessary.

Grazia Robertson: I think that the Law Society's submission sets out our view that we are opposed to post-charge questioning on principle.

There comes a time when the Crown must be put on notice that it is its obligation to prove the case against the accused, and when the accused can no longer be obliged to, as it were, facilitate his own conviction.

However, there is also a pragmatic element to all this. For example, when the police officers were discussing certain aspects of the bill, they mentioned the difficulties of carrying out these procedures and how cumbersome and time consuming they might be. As envisaged, this authorisation will involve an application to the court that states that the person accused has an opportunity for representation. I assume that that would happen by way of a solicitor because it seems unfair to make the person speak on his or her own behalf, but that means that it becomes another hearing. Mr Steele said—very light-heartedly, I am sure—that lawyers are always looking for more business; I would respond equally glibly that police officers are always looking for more power, and there comes a time when that must stop and someone must say, "We will not assist you any further—you are on your own to prove the case and investigate it appropriately."

Both in principle and on a pragmatic level, what is envisaged is cumbersome, will make things somewhat bureaucratic and will result in our being back in a police office with our clients, presumably in a large majority of cases advising them to make no comment.

The Convener: I cannot get my head around the information in the financial memorandum about the costs of all this to the Scottish Legal Aid Board. On page 72 of the memorandum, for example, it is estimated that the additional costs of breach of liberation proceedings will amount to £863,000 per annum.

Grazia Robertson: With regard to the costings, I also heard the police officers say that post-charge questioning would be used in very rare and serious cases, but the bill itself refers to matters before a sheriff or on indictment. In other words, it envisages the power being available for relatively less serious matters. With regard to SLAB, however, we cannot comment on what it has in mind by way of giving assistance.

The Convener: The figures are not from SLAB but from the financial memorandum, which the Government has to produce to let us know what the bill will cost. On page 72, it says that the additional costs of

"police or procurator fiscal liberation"

will be "£863,000 per annum", while on page 74 there is a stream of costs related to the

"financial impact on the Solicitor Contact Line",

the highest of which is nearly £2 million. On another page, there is a table setting out

"costs for SLAB resulting from additional prosecutions",

the high estimate for which is nearly £8 million and the low estimate nearly £1.5 million. Those are big figures.

Grazia Robertson: They are, but they are probably more guesstimates than estimates. Other estimates for other provisions have traditionally been very rough, and I suggest that there might be some caution in those figures.

The Convener: The estimate for one of the costs runs from £1.5 million to £8 million, which is a huge range. My point is that, given the pressures on the criminal legal aid bill in particular, substantial pressure will be embedded in everything that now has to happen for people to have legal representation at the various testing stages in the process that is set out in the bill.

Grazia Robertson: The Law Society represents not only the public but its members, who are solicitors, and we would be very concerned if any pressure was brought to bear on solicitors to effectively have their funding cut to enable them to represent their clients and ensure that they fulfil their obligations under the bill. The Law Society is obviously concerned about how funding is envisaged.

I recall the comments that the police officers made in relation to certain elements. They said that costing should not always be an issue, and I agree. We cannot always decide not to proceed with something simply because it might be expensive. However, there has to be a balance, taking into account whether what you intend to introduce is necessary, proportionate and of value, and whether it assists in the administration of justice. If there is little value in the procedure, it has to be weighed up against the potential costs.

12:15

David Harvie: I will pick up on the point about costs, and then address one or two of the earlier points.

If one considers the costs of the justice system in its entirety, if there were to be some benefit to narrowing down the points at issue for trial in appropriate cases, that in itself might have a knock-on cost saving in relation to the matters that are clearly at dispute at trial, if it has been possible to narrow them down as a result of such a process. In costing terms—this has just occurred to me, so it has not been explored or costed—one has to consider the entirety, as opposed to each individual step. There may be circumstances in which that results in greater amounts of evidence being agreed and so on.

I will explain my view on that—and I take the point that was made earlier about the standard advice being not to say anything. I am not sure that that will always be the case. For example, if the accused has given instruction and has an explanation to give in relation to particular evidence, he or she may take the opportunity to do so at that stage, rather than having to give evidence at trial. That might be a perfectly legitimate tactical decision on the part of the defence—to provide information that gives an explanation or creates a disclosure obligation on the Crown, for instance. There are a number of elements to that, and one should not always assume that the advice will necessarily be to say nothing.

On the point about how regularly or otherwise such an approach may be taken, I have some sympathy with my colleagues regarding the administrative process that might be involved. The same would apply from a Crown perspective or a shrieval perspective. We can safely say that we will not be opening the floodgates to such applications, not least because, when one considers the criteria, it is apparent that there is a certain level of judicial scrutiny—there are appropriate hurdles that need to be crossed. Section 27 sets out the need for the seriousness of the offence to be taken into account, and we must also consider the necessity for the step to be taken.

Even at that stage, the hearing will be an adversarial process, as I understand it, with an opportunity for representations to be made. If the decision is that a further interview can be conducted, the parameters for that interview, including even the time of the interview, can be dictated by the court. All sorts of cross-checks and balances can be used to ensure that such an approach is taken in serious cases, when it is necessary to do so and in controlled circumstances where there is an opportunity for an alternative view to be put.

Assistant Chief Constable Graham highlighted some situations earlier concerning larger-scale investigations, and I think that Ms McInnes raised a point regarding instances in which new information has simply come to light beyond the interview. In very large cases, it may well be that the quantity of information that is available, even from the initial search, is of such a scale that it is not possible exhaustively to examine all that information and understand its import. In some investigations relating to material that has been recovered online, there might be many gigabytes of material. The committee will be familiar with comparisons that are made about printing out that amount of information on sheets of A4, and the paper stretching from here to the moon, or whatever. Such examples are precisely the reason why, in modern investigations, flexibility is needed to allow us to go back and say, “We’ve uncovered this information. Do you have anything to say about it?”

Murdo Macleod: I will respond to what Mr Harvie said and revert to the original question about the accused’s rights in such circumstances. Mr Harvie says that the timeframes will be limited by the judge or sheriff. The faculty has grave concerns about that and feels that they should be fixed periods, like the 12 hours, the six hours and the current 24 hours, rather than left to the whim of sheriffs, who might have different ideas on the matter. That relates to sections 27(6) and 29(2). We say that the maximum period for questioning should be a further six hours and that the maximum period of arrest to facilitate that—perhaps to enable people to travel to a police station—should be 12 hours.

Mr Harvie said that questioning after a charge provides an opportunity for the accused to put his position. Surely we cannot rely on the Crown going through the process of seeking to question after a charge as the opportunity for the accused to give his version of events. The committee will later discuss judicial declarations, which are to be abolished—perhaps that is a more controversial provision in the bill. The arrestee or the accused—we can call them what we like—must be given the opportunity to put forward a defence. They cannot rely on the Crown to give them that facility.

Ann Ritchie: It strikes me that considerable public money could be spent on someone who has not yet been charged, has had access to a solicitor for questioning, has been liberated pending further investigation and is questioned again. That person might never be charged. That public expense might be necessary, but perhaps the bill is introducing solutions that will create problems. I ask the committee to consider that.

The Convener: Does Alison McInnes have a supplementary question?

Alison McInnes: Yes—this was my question.

The Convener: You had been—metaphorically—deleted from my list. I should not have deleted you.

Alison McInnes: Mr Harvie said that we have safeguards because an application would be heard before a sheriff. The test in the bill is the interests-of-justice test, which seems far too wide. Mr Macleod addressed that and discussed safeguards that we might need to explore, so that is fine.

Roderick Campbell: If the provision is used, participants will be mindful of potential implications under article 6 of the ECHR if it is abused, so there are long-stops.

I asked the previous panel about section 25. I would be grateful for this panel's views on 16 and 17-year-olds being able to waive their right of access to a lawyer.

Murdo Macleod: I heard the previous question and the response. If the age limit was raised to 18, it would be curious that a person could get married and join the Army but could not waive that right. However, the faculty has not addressed the point in detail. The letter of rights draws a distinction between people up to the age of 16 and people up to the age of 18. If the suspect was availed of the additional safeguard of not being allowed to waive their right, that would only be to the suspect's benefit. We would be happy to entertain that idea.

Grazia Robertson: The Law Society's position is that the protection of being unable to waive the right to a solicitor should be given to those who are under 18. That is a safeguard; it is not an onerous obligation. It is appropriate to give under-18s the same protection as under-16s are given.

Even the bill defines a child as someone who is under 18. Given the particular vulnerabilities—on which I think that the police commented—of people of such an age who might find themselves in a police station, it is entirely appropriate that they should have access to legal advice. They need not take it—no one need do that—but it should be made available to them, because it is a protection and a safeguard.

The Convener: It is simpler and more consistent than having something for 16-year-olds and then something different for 17 and 18-year-olds, which would be unnecessarily complex.

David Harvie: The matter was considered recently by the appeal court in McCann v HMA. As a result of that, the Lord Advocate issued guidance that indicated that, in relation to 16 and 17-year-old suspects, there is to be a strong presumption that they should not be able to waive their right of access to legal advice. The guidance sets out various requirements that the interviewing officer must take into account. The key point is that the more serious the case, the less likely it is that the presumption should be rebutted. As it currently stands, the guidance offers perhaps a greater level of comfort than might be foreseen from the bare terms of the legislation. In essence, it is a rebuttal of strong presumption.

Murdo Macleod: There is another tricky point in section 25(2)(b), which is the provision in which a person

"owing to mental disorder, appears to a constable to be unable to—

(i) understand sufficiently what is happening, or

(ii) communicate effectively with the police."

"Mental disorder" is a specific phrase. In our submission to the committee, we say:

"It may be very difficult for a police officer, without medical training and without any assistance from a police casualty surgeon, to assess whether or not a person is suffering from a mental disorder."

We urge the committee to remove the words "owing to mental disorder" and leave the provision that the person is unable to understand what is happening—a police officer would be able to see that—and is not able to communicate effectively with the police. Why on earth should a person in that state not be availed of their rights? In any event, if they were not availed of such a right, the evidence would probably be inadmissible.

The committee should seek to remove the phrase "owing to mental disorder". That applies in section 33, too.

The Convener: I bring this evidence session to a close, because the committee has more to do. If you think that we ought to have raised supplementary points and we have not done so, please feel free to write to me as convener; any such submissions will be distributed to the committee and put on our website.

I thank you for your evidence, and we look forward to receiving your drafted amendments—I expect that amendments will be drafted and sent to members of Parliament to lodge at stage 2. We might see some of you back here when we move on to discuss other issues in the bill.

Subordinate Legislation

Personal Licence (Training) (Scotland) Regulations 2013 (SSI 2013/261)

12:28

The Convener: Without further ado, we move on to subordinate legislation. The Personal Licence (Training) (Scotland) Regulations 2013 prescribe the training requirement for personal licence holders and how evidence of compliance with the training requirements is to be demonstrated and submitted by the licence holder. The Delegated Powers and Law Reform Committee has drawn the Parliament's attention to the regulations on two grounds.

First, the form and meaning of the regulations could be clearer, in that regulation 2(2)(a) and (b) duplicates the terms of section 87(1)(a) and (b) of the Licensing (Scotland) Act 2005. The Delegated Powers and Law Reform Committee concluded that such an unnecessary inclusion is of possible detriment to the clarity of the regulations in the context of their interaction with the parent statute.

Secondly, regulation 2(2), which prescribes the training requirement to be met by personal licence holders, appears to have been made by an unusual or unexpected use of the enabling powers. The Delegated Powers and Law Reform Committee concluded that the regulations do not explain to users of the legislation how, on a practical level, they can comply with the training requirement.

Do members have any comments? Are we content to endorse the Delegated Powers and Law Reform Committee's views and make no recommendation in relation to the regulations?

Members *indicated agreement.*

Margaret Mitchell: I am happy to agree to adopt the regulations, but with a note about drafting issues, although that might be more pertinent to the next two instruments that we will consider.

The Convener: Yes; that also relates to what Lord Gill said in his evidence about the pressures on the statute draftspersons. If legislation is churned out, that puts pressure on those who draft it.

Act of Sederunt (Rules of the Court of Session Amendment No 5) (Miscellaneous) 2013 (SSI 2013/238)

The Convener: The instrument makes a number of amendments to the Court of Session rules. The Delegated Powers and Law Reform Committee has drawn the Parliament's attention to the instrument on the grounds that there appears to be doubt whether it is intra vires, and that there is a minor drafting error. The Lord President's private office has undertaken to rectify those matters promptly by laying an amending instrument.

Do members have any comments on the instrument? Are we content to note the instrument and endorse the Delegated Powers and Law Reform Committee's concerns?

Members *indicated agreement.*

Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (Commencement No 2) Order 2013 (SSI 2013/262)

The Convener: The Delegated Powers and Law Reform Committee agreed to draw the order to the attention of Parliament on the ground that it is defective as it brings into force section 20 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 when that was not the policy intention. The Scottish Government has brought forward another Scottish statutory instrument—SSI 2013/271—to correct the defect before it comes into force.

Do members have any comments? Are we agreed to note the order?

Members *indicated agreement.*

Margaret Mitchell: Again, I am content to note the order with the comment that this is Scottish statutory instrument 262 and there are more than 300 instruments per year; the Scottish Government must put sufficient resources into the drafting of instruments so that it gets it right first time. If it does not do that, it is spending valuable time and resources on correcting mistakes.

The Convener: That is on the record now, so we do not need to write to the Government about it.

12:28

Meeting continued in private until 13:03.

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