The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 12 November 2013

Session 4

Tuesday 12 November 2013

CONTENTS

JUSTICE COMMITTEE
31st Meeting 2013, Session 4

CONVENER

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

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*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:

Kenny MacAskill (Cabinet Secretary for Justice)
Graeme Pearson (South Scotland) (Lab)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 12 November 2013

[The Convener *opened the meeting at 09:30*]

Interests

The Convener (Christine Grahame): I welcome everyone to the Justice Committee's 31st meeting in 2013. I ask you all to switch off 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, and I welcome our new member, Christian Allard, to the committee. I also thank Colin Keir, who made his escape—[*Laughter*.] Sorry. I thank him for his work on the committee over the past couple of years.

Le premier point à l'ordre du jour est d'inviter Christian Allard à déclarer les intérêts pertinents à la compétence du comité.

Our first agenda item is to invite Christian Allard to declare any interests that are relevant to the remit of the committee.

Christian Allard (North East Scotland) (SNP): Bonjour. Thank you very much. I refer members to my declaration on the Parliament website.

Decision on Taking Business in Private

09:31

The Convener: Item 2 is a decision on taking business in private. I ask members to agree that we take in private item 4, which is consideration of our draft report to the Finance Committee on the draft budget 2014-15, and item 5, which is consideration of our work programme. Do I have everyone's agreement?

Members *indicated agreement.*

Victims and Witnesses (Scotland) Bill: Stage 2

The Convener: Item 3 is stage 2 of the Victims and Witnesses (Scotland) Bill. As I said before the meeting—and will repeat for the benefit of the Cabinet Secretary for Justice, so he knows how long he is going to be sitting here—I intend to hold the session for two hours. If it looks as though people are wilting on the vine, I may take a little break, after which we will move to consideration of our budget report, which needs to be signed off today. If we do not get through all the amendments to the bill, we can return to them next week; I know that members are delighted about that.

I welcome the cabinet secretary and his officials. I remind members that he is giving evidence on and responding to the amendments, while the officials are here strictly in a supporting capacity and cannot speak during proceedings or be questioned by members.

Members should have a copy of the bill, the marshalled list and the groupings of amendments.

I thank the cabinet secretary and all his officials for attending today.

Before section 1

The Convener: Amendment 74, in the name of Margaret Mitchell, is grouped with amendments 75, 76, 20, 22, 23, 26, 39, 40, 41, 49, 48, 50 and 51.

Margaret Mitchell (Central Scotland) (Con): Amendment 74 is in line with the committee's stage 1 report recommendation that a definition of "victim" should be provided in the text of the bill. It appears somewhat strange that a bill that confers a range of rights on victims of crime does not include a definition of the term. The inclusion of a clear definition would assist in providing clarity for individuals in what may be traumatic circumstances, thereby avoiding further distress and anxiety. It would also assist the qualifying person in determining and complying with their duties and obligations under the provisions in the bill.

The amendment is intended to cover both natural persons and legal entities in three sets of circumstances: first, cases in which the person has a crime committed directly against them; secondly, where a relative or dependant of that person suffers harm as a result of a crime committed against that person; and thirdly, cases in which a person suffers as a result of intervening to help another person against whom a crime is being committed. Harm is defined in such a way as to include physical, mental or emotional harm as well as economic loss.

Amendment 74 would also require Scottish ministers to set out in a negative instrument the family members to which the definition would apply, as is the case elsewhere in the bill.

Amendments 75 and 76 are consequential to amendment 74.

I move amendment 74.

The Cabinet Secretary for Justice (Kenny MacAskill): Amendments 74 to 76, in the name of Margaret Mitchell, would insert an overarching definition of "victim" in the bill and make minor consequential amendments. In its stage 1 report, the committee recommended that the Scottish Government should give full consideration to including a definition of "victim", to provide clarity. I do not consider such an overarching definition to be necessary, but I indicated that I was happy to consider further whether additional clarity was required in relation to the use of the word "victim" in the bill.

The word "victim" is used and understood, without definition, by justice organisations and victim support organisations throughout Scotland. By inserting an overarching definition of such a clearly understood term, we would significantly complicate matters and risk inadvertently excluding individuals who should benefit from the bill or including those who would not fall within any reasonable interpretation of "victim".

For example, the definition in amendment 74 hinges on an offence having been committed against a person. That could imply that a conviction is necessary to establish that an offence has been committed against the victim, as there is no reference to an offence that is alleged to have been committed against a person.

Given the concerns that were raised at stage 1 about the presumption of innocence, the current drafting of the bill—which refers, where necessary, to people who appear to be victims and to the offence or alleged offence—is preferable. It also ensures that people who appear to be victims are treated as such before a trial or conviction.

The definition in amendment 74 covers only offences against the person, so offences against property might not be covered. The risk is that people whose property had been vandalised would not be classed as victims under that definition.

In addition to potentially excluding some victims, the definition would include some who do not need to be covered. The inclusion of prescribed relatives of all victims—not only victims who have died as a result of an offence but victims who have suffered any harm—seems a step too far. I

absolutely agree that victims' relatives should benefit from the bill in some circumstances, but the idea of treating as a victim the relative of someone whose wallet was stolen—and who therefore suffered economic loss, as set out in amendment 74—is hard to justify.

For those reasons, I consider it better to qualify and explain the use of the term "victim" only when necessary and to make it applicable to the circumstances, as in the bill at present.

On reflection, I consider that minor amendments are necessary to ensure that certain provisions extend to family members of victims as well as to victims. Amendments 22, 23 and 26 will ensure that when a person's death was caused by a criminal offence, prescribed relatives of that person will be able to request information under section 3, in the same way as victims and witnesses can. Similarly, amendments 39 to 41, 49, 48, 50 and 51 will ensure that the victim surcharge fund can be used to support those who appear to be victims, in order to offer immediate support before any criminal proceedings commence and to support prescribed relatives of victims, as well as victims.

It is only right that families of people whose death has been or appears to have been caused by a criminal offence or alleged offence can seek and receive information about that offence and that families of people who are or appear to be the victims of crime can access support services through the victim surcharge fund. My amendments will achieve that.

Amendment 20, in my name, is a minor technical amendment to reflect the fact that an order to prescribe the relatives of a victim for the purposes of section 2 will be made under subsection (5) of that section.

I invite the committee to support my amendments 20, 22, 23, 26, 39 to 41, 49, 48, 50 and 51 and I urge Margaret Mitchell to withdraw amendment 74 and not to move amendments 75 and 76.

Elaine Murray (Dumfriesshire) (Lab): I understand that Children 1st supports Margaret Mitchell's amendments because children might in some cases—such as those involving domestic abuse—be treated as witnesses, although they are victims because of their vulnerability and the circumstances in which the offences were committed.

My concern about having the definition of "victim" in the bill is that it might be overprescriptive and that, if the definition were not appropriate, we would have to amend primary legislation. The issue might be better addressed in regulations. The suggestion from the cabinet secretary is that some of his amendments would mean the ability to define "victim" in regulations rather than in the bill, and that would probably be a better approach.

Kenny MacAskill: I think that I agree with Elaine Murray. The nature of crime and victims has changed; people can be the victim of internet crime when that could not have been conceived of 20 or 30 years ago. We do not necessarily know what the situation will be in five or 10 years, so we have to treat victims as we find them in the world in which we live. I therefore agree with Elaine Murray.

Margaret Mitchell: The cabinet secretary's amendments are to be welcomed but I do not think that they necessarily exclude putting a definition of "victim" into the bill. However, I take the point and am open to looking at the issue again at stage 3, particularly because of the concern, which the cabinet secretary highlighted again this morning and which was raised at stage 1, that the term "victim" is sometimes used in the bill in reference to cases in which the guilt of the accused has not been proven in court. The Faculty of Advocates argued that that approach might give rise to an implicit assumption that a victim's allegations are true, thereby potentially undermining the presumption of innocence of the accused, as the cabinet secretary has stated.

I still think that there is good reason for a definition in the bill although the cabinet secretary might be clear in his mind about what a victim is. The three situations outlined in amendment 74 clarify who is included and I am happy to look at those again and come back at stage 3 with a revised proposal.

I should say that amendment 74 is supported in principle by the Law Society of Scotland.

With the committee's permission, I will withdraw amendment 74.

Amendment 74, by agreement, withdrawn.

Section 1—General principles

The Convener: Amendment 55, in the name of Elaine Murray, is grouped with amendments 56 and 57. I call Elaine Murray to move amendment 55 and speak to the other amendments in the group.

Elaine Murray: I will start by moving amendment 55 because I will have forgotten to do it by the time I get to the end of what I am going to say.

The Convener: I nearly forgot to remind you to move it, but we will get to that shortly. We need to get our sleeves rolled up. Off you go.

Elaine Murray: Amendment 55 would ensure that when a victim or a witness is a child, the

information that is provided by the persons listed in section 1(2) is in a form that might be understood by that child. Amendment 56 would ensure that the rights, needs and wishes of children who are victims or witnesses are considered by the persons who are listed in section 1(2). Amendment 57 has been lodged to ensure that the definition of "child" is consistent throughout the bill.

Evidence suggests that more than 60 per cent of people in the youth justice system have difficulties with speech, language and communication, which makes it even more important that information should be accessible to those children. Indeed, it is the difficulties that many young people have with communication in the justice system that make it more difficult for them to navigate their way around the court system. At the moment, there is no requirement for anyone who is involved in criminal proceedings to communicate with children and young people in formats and ways that best suit their needs. That could include sending text messages about the date of a trial, sending out a leaflet, or emailing a link to a video in which a young person can see the information that they require to become involved.

Because of the range of ways in which people, particularly young people, communicate now, I hope that the bill will incorporate the need to communicate in some of those ways. I hope that the cabinet secretary and ministers are amenable to the intent of the amendments, even if there are technical issues, so that we can get some way towards achieving this.

I move amendment 55.

The Convener: So you are probing.

09:45

Kenny MacAskill: I appreciate the intent of the amendments and what Elaine Murray and others are trying to achieve.

Section 1 sets out a number of general principles that are deliberately high level and aspirational and are intended to inform the creation of standards of service under section 2. The intention behind including a section on general principles was to set out the underlying aim of the bill and of the justice system as a whole, and ensure a level of consistency when justice agencies consider how they interact with victims and witnesses.

I therefore expect the bodies listed in sections 1 and 2 to consider the needs, rights and wishes of children in the same way as I would expect them to consider the needs, rights and wishes of all other victims and witnesses involved in criminal proceedings. If we were to single out child victims and witnesses, as Elaine Murray's amendments 55, 56 and 57 propose, should we not also include persons with a mental or physical disability, older persons—indeed, where would we stop?

Although I commend Elaine Murray for bringing to the fore the need for organisations to take into consideration the requirements of children, I believe that the general principles should be precisely that: general and equally applicable to all groups of victims and witnesses who come into contact with the criminal justice system—albeit that refinement might be required for individual categories.

I therefore invite Elaine Murray to withdraw amendment 55 and not to move amendments 56 and 57. I give an assurance that we are happy to continue working with organisations to address the issue, so that the particular needs of particular sections of society are dealt with.

Elaine Murray: In my introductory remarks, I said that I was not convinced that section 1 was the best section in which to put the requirement proposed in amendments 55 to 57, although it was important to discuss it. There might be other more suitable parts of the bill. I am prepared to withdraw amendment 55 and not to move amendments 56 and 57 at the moment and to examine at stage 3 whether there might be an appropriate part of the bill for such a requirement.

Amendment 55, by agreement, withdrawn.

Amendments 56 and 57 not moved.

Section 1 agreed to.

Section 2—Standards of service

The Convener: Amendment 12, in the name of the cabinet secretary, is grouped with amendments 58, 13 to 19, 59, 60 and 21.

Kenny MacAskill: Amendments 12 to 19 and 21 all relate to the proposed duty on criminal justice agencies under section 2 to set out clear standards of service for victims and witnesses. The proposal has broad support but, at stage 1, the committee and some victim support groups suggested that improvements could be made, particularly in relation to ensuring that there is some consistency in the standards set out by different organisations, and that compliance with the standards is monitored.

Amendment 18 will place a duty on each of the named organisations to consult all the other named organisations and relevant stakeholders before setting their standards of service. I believe that requiring the organisations to consult each other will ensure a level of consistency in their approach to the standards, while maintaining the general approach of allowing for the development

of organisation-specific standards that relate to the type of service that a particular organisation provides.

Furthermore, the duty to consult those who have an interest in the standards will ensure that organisations such as Victim Support Scotland and Scottish Women's Aid—with their years of invaluable experience from working with victims and witnesses—will have a chance to contribute.

Amendment 21 will place a duty on the named organisations to publish a report that assesses how their standards have been met, how they intend to continue to meet them, any modification that has been made to the standards during the reporting period and any modification that they propose to make during the following year.

Best-value guidance for public sector bodies already requires organisations to ensure that feedback, including complaints about service standards and failures, is recorded and monitored and feeds into the continuous improvement of services. However, on reflection, and in light of representations that were made at stage 1, I believe that a duty should be placed on the organisations to publish a report in relation to their standards of service. That reporting will ensure that the criminal justice organisations not only reflect on how they have met the standards during the period of the report, but think ahead as to how they intend to meet the standards in the future.

Elaine Murray's amendment 59 is very similar to my amendments 18 and 21, as it would also require the making of reports annually, with an element of consultation. While I obviously support the intention behind amendment 59, on balance I consider that my amendments 18 and 21 are more appropriate.

In particular, the requirement in amendment 21 for the organisation to set out not only how it has met the standards, but how it intends to continue to meet them over the next reporting period and to signal any changes that it intends to make—not just in response to any issues raised, but more generally—will build in a vital element of reflection and continuous improvement. I therefore invite Elaine Murray to consider supporting my amendments 18 and 21, and not to move amendment 59.

Amendments 12 to 17 and 19 are all technical drafting amendments to aid the clarity of the bill following the insertion of the consultation requirement through amendment 18.

Amendment 58, in the name of Elaine Murray, would put a duty on a person who was "setting and publishing standards" under section 2—in so far as the standards could relate to a child—to do so in

"such a way that the welfare of a child is of paramount consideration."

I welcome Elaine Murray's commitment to child victims and witnesses and agree that organisations should take into consideration the specific needs of that group. However, as I also stated in relation to the general principles, if we were to single out child victims and witnesses, should we not also include other groups of victims and witnesses? The list could be considerable.

I have proposed, through amendment 18, that we place a duty on each of the named organisations to consult relevant stakeholders before setting their standards of service and I would expect such stakeholders to include children's organisations where appropriate. I do not, therefore, believe that it is necessary or desirable to single out any particular group of victims and witnesses in this section of the bill.

I move amendment 12.

Elaine Murray: As the cabinet secretary said, the purpose of amendment 58 is to require that "setting and publishing standards" in respect to victims and witnesses who are children must be done in

"such a way that the welfare of a child is of paramount consideration."

We know that the impact on children of issues to do with criminal proceedings can be extremely traumatising and that the way in which young people are dealt with, whether it is by the police, by the legal services or by anyone else, is extremely important. Children often find it very difficult to verbalise what is happening to them and what they have experienced.

This may not be the most appropriate section in which to put amendment 58, but I think that there should be somewhere in the bill that deals specifically with the issues for children. It may not be about inserting the amendment in the standards of service or in the general principles—perhaps we need to have an amendment to the bill that looks specifically at children and the way in which we deal with child victims and witnesses.

The cabinet secretary mentioned that my amendment 59 is very similar to his amendments 18 and 21. Amendment 59 requires that the persons listed in section 2 report on their compliance with the standards of service annually and that they seek the views of victims and witnesses in preparing that report. It also enables those standards to be revised as a consequence of the report and requires any revision of standards of service to be published. It enables ministers to prescribe the information to be contained in the reports by negative procedure. That enables compliance with the standards of

service to be monitored and revised in the light of experience.

Amendment 21, in the name of the cabinet secretary, is similar in that it also requires the annual publication of reports and requires assessment of whether the standards have been met, a look forward to how they might be met in the following year and any proposed modifications. It also enables ministers to prescribe information by negative procedure.

The principal difference is that my amendment 59 requires those persons listed in section 2(2) to consult, as far as is practicable, victims and witnesses in preparing the report and in revising the standards, in order to meet the needs of victims and witnesses. I hear the cabinet secretary's plea that I support his amendment 21. However, I think that the provision in my amendment 59 of consultation of victims and witnesses is important.

Amendment 60 defines the meaning of the word "child" in this section and it is obviously consequential to amendment 58.

The Convener: I think that one of your pleas fell on deaf ears, but we will find out.

Graeme Pearson (South Scotland) (Lab): In the evidence that we received at stage 1 from witnesses and victims who were involved in court procedures, I was certainly impressed—I am sure that others were impressed, too—by the feelings of impotence and almost abuse that witnesses and victims felt, whether rightly or wrongly, when they were in the system.

I know that the cabinet secretary is loth to create a special category for children in trying to deal with such situations, as he mentioned in relation to Elaine Murray's amendment 55. However, there is no doubt that the culture within courts as it affects witnesses and victims—no matter the various pieces of legislation—appears to be quite corrosive in their experience.

We should consider at least beginning the shift towards understanding the impact on witnesses. Children are particularly vulnerable, and the world is new to them, so courts will be all the more challenging from their perspective. If the Government could show its intentions on a shift, that might begin to send a signal that would prevent a recurrence of some of the most awful examples that have been reported over the years in which victims have had a dreadful time in the public environment of a court. Acceptance of the amendments might begin to signal a change in the approach of those who work in our courts.

Kenny MacAskill: We accept that we are on a journey. I put on record my gratitude to former Lord Advocate Elish Angiolini, who kicked off the process, and to the current Lord Advocate, Frank Mulholland, who has expanded the work on victims to include witnesses. We recognise that horrendous situations have occurred that should not have arisen, and we hope that similar situations will not arise in future. Work is under way through judicial studies and the Crown Office and Procurator Fiscal Service to address those matters. However, I believe that we have the overall balance right in the bill, with our amendments in this group.

Children come with a variety of issues, needs and wants—we will deal later with how evidence is given. Our approach is to ensure that standards are dealt with by the agencies and bodies that are required to deliver. I am happy to reflect on how we can improve matters but, equally, the bill as it stands and the amendments in my name have been reached after discussion with organisations including Victim Support Scotland, Scottish Women's Aid and Shakti Women's Aid. Those organisations deal not only with adults but with children, although I accept that some children's charities deal specifically with that. However, the current view of those who help victims and witnesses to deal with the challenges is that we need to view things in the totality, although obviously we have to reflect on and recognise the needs and wants of each individual in their particular circumstances.

Whatever someone's age, they might have a physical or mental incapacity that needs to be taken on board and there might be particular challenges. That is why we think that the individual must be considered but victims and witnesses must also be dealt with in the totality. We need to ensure that we have the ability to deal specifically with the individual but that we have the general guidance right, and that is the balance that we have provided for.

Amendment 12 agreed to.

The Convener: Amendment 58, in the name of Elaine Murray, has already been debated with amendment 12.

Elaine Murray: I will not move amendment 58 at stage 2, because I want to reflect on whether there is a more appropriate part of the bill in which to introduce provisions on children. I might bring that back at stage 3.

The Convener: You have put down a marker.

Amendment 58 not moved.

Amendments 13 to 19 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 59, in the name of Elaine Murray, has already been debated with amendment 12.

Elaine Murray: I will move amendment 59, because I believe that, as it requires consultation with victims and witnesses, it is preferable to amendment 21, although I know that amendment 21 goes part of the way.

Amendment 59 moved—[Elaine Murray].

The Convener: The question is, that amendment 59 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 59 disagreed to.

Amendments 60, 75 and 76 not moved.

Amendment 20 moved—[Kenny MacAskill]—and agreed to.

Section 2, as amended, agreed to.

After section 2

Amendment 21 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 77, in the name of the cabinet secretary, is in a group on its own.

10:00

Kenny MacAskill: Article 11 of the European Union victims directive requires that victims of crime should be able to request a review of a decision not to prosecute, and that the procedure for the review should be determined by national law. I noted with interest the discussion of article 11 at stage 1. Stakeholders, including Rape Crisis Scotland and Scottish Women's Aid, questioned why there was no provision in the bill for a right to request a review of a decision not to prosecute. The Crown Office advised that it was reviewing its current procedure in light of the directive.

Having considered the matter further since stage 1, I concluded that article 11 should be reflected in the bill, although I think that the detail of how such reviews are carried out is best left to the Lord Advocate. Amendment 77 will place an obligation on the Lord Advocate to set and publish the procedural rules for conducting a review of decisions not to prosecute, following a request by a victim.

I move amendment 77.

Margaret Mitchell: I welcome the approach. It is a positive move and I support amendment 77.

Alison McInnes (North East Scotland) (LD): I, too, welcome and support amendment 77. Does the cabinet secretary think that it is fully compliant with the victims directive, in the context of victims' understanding of when they can request a review?

Kenny MacAskill: I think that it is. The devil is in the detail, as always, and some of that will depend on what the Lord Advocate brings forward. By enshrining in statute the right to request a review, we place obligations on the Lord Advocate that will be challengeable in judicial review, but I think that the Crown is willing, and I am sure that discussions between Alison McInnes or the committee and the Lord Advocate will ensure that the balance is struck and that the European convention on human rights is complied with, so that there will be rights for people who remain aggrieved.

Roderick Campbell (North East Fife) (SNP): Constituency MSPs frequently get correspondence from people about decisions not to prosecute. The move is a positive step forward.

The Convener: I remind members to indicate when they want to comment on an amendment. I am trying to give everyone a chance to speak, while keeping us apace. I take it that the cabinet secretary does not wish to wind up the debate.

Kenny MacAskill: No.

Amendment 77 agreed to.

The Convener: Amendment 78, in the name of Margaret Mitchell, is in a group on its own.

Margaret Mitchell: During stage 1, the committee heard that communication between justice organisations is not as good as it could be, which is causing problems. For example, David Ross, of the Scottish Police Federation, said:

> "All partners in the criminal justice system would probably accept that we have been poor at keeping victims and witnesses informed as to the progress of cases in which they are involved."—[*Official Report*, *Justice Committee*, 30 April 2013; c 2708.]

Victims told us that correspondence was often complex and difficult to understand, particularly when they were already confused and distressed in the aftermath of a crime. Worse still, David McKenna, of Victim Support Scotland, told the committee that victims sometimes have to tell their story around 16 times to various agencies. That is

clearly unnecessary and unacceptable and can add to victims' distress.

I lodged amendment 78 to explore what can be done in the bill to tackle the problem. It would require the Crown and the police to co-operate and co-ordinate in providing support and information to victims and witnesses, through a strategic communications plan; to share information about victims, thereby reducing the need for victims to repeat their stories; and to share best practice in relation to victim support.

Amendment 78 would also require there to be a single point of contact for all victims and witnesses who sought information, so that the people who were involved in the criminal justice system would know where they could get help. The single point of contact would be made known to all victims and witnesses and would have to provide information on the services that were available to them. My intention is that properly trained individuals would provide much-needed support for victims, who are not currently, in all cases, treated with compassion or given the time that they deserve to be given.

I move amendment 78.

Kenny MacAskill: I appreciate the underlying principles behind amendment 78, which aims to ensure that justice organisations work together more closely in ensuring that victims and witnesses have the information and support that they need. Indeed, a key aim of the making justice work programme that this Government set up in 2010 is for justice organisations to work together more closely in delivering system structures and processes that are fit for the 21st century.

However, although I agree that justice organisations should work together to support victims and witnesses and ensure that information is provided effectively, I do not consider that that requires primary legislation. We are already participating in discussions between all the justice organisations to explore how they can work together more effectively, and an important element of that work is mapping the victim's journey through the criminal justice system and identifying areas in which the organisations can offer victims a more joined-up experience. Margaret Mitchell mentioned that.

The justice organisations will also collaborate with one another and with stakeholders in developing standards of service for their functions in relation to victims and witnesses. As we discussed when we considered an earlier group of amendments, the persons who are named in section 2(2), including the Lord Advocate and the chief constable of Police Scotland, will be required to consult each other and relevant stakeholders prior to publishing their standards. They will also have to publish a report that assesses how their standards have been met and states how they intend to meet them in the future and whether they require any modification to be made to them.

On the proposal for a single point of contact, again, I do not consider that that requires a statutory basis. We are looking at the feasibility of establishing an online information hub to provide easier access for victims and witnesses to case-specific information, and we are open to other ideas that would improve communication and benefit victims and witnesses.

In summary, although I support the broad principles behind amendment 78, I consider it unnecessary. It is sometimes distressing for the organisations in question to put witnesses through the present process, and they are working to amend and change it. I invite Margaret Mitchell to consider withdrawing her amendment 78 on the basis that these matters are under review. Work is on-going and the agencies are showing willingness to go down that route.

The Convener: I do not usually let members in at this point, but Elaine Murray is waving her pen at me. Do you want to say something?

Elaine Murray: I was just going to support Margaret Mitchell's amendment.

The Convener: You should have come in earlier. I will train them. Some day, they will be trained. I ask Margaret Mitchell to wind up.

Margaret Mitchell: I listened carefully to what the cabinet secretary said. I agree that the organisations that I mentioned should co-operate and communicate, but the fact is that that is not happening just now. My amendment focuses clearly on what should be done and it would put that in statute, which would be a clear guide. It would ensure that victims and witnesses are right up there receiving the service that they should expect.

I freely admit that witnesses were split on the idea of having a single point of contact, and I note that the cabinet secretary has said that he is not supportive of that. However, Diane Greenaway, a former precognition officer, stated:

"I cannot stress ... enough the need for dedicated ... and informed support persons (Case Companions) who have essential experience of criminal justice processes".

In essence, the amendment would allow a huge improvement for the people who, above all, deserve our support. They should get a better experience and better treatment in the courts. For that reason, I will press my amendment.

The Convener: As soon as I mention training members, I get members wanting to come in. I am happy to let members develop the discussion because I am a flexible person, as you know.

Sandra White wants to say something. I will let the cabinet secretary back in after that if he wishes.

Sandra White (Glasgow Kelvin) (SNP): Thank you, convener. Good morning, cabinet secretary. Will there be further information before stage 3 on the online information hub that you mentioned?

The Convener: Before the cabinet secretary answers that, I will let Elaine Murray in. I must not show partisanship here. It was all going too well.

Elaine Murray: I apologise that I did not indicate right at the beginning that I wanted to speak, but I was listening carefully to what the cabinet secretary said in response to Margaret Mitchell.

The Convener: Of course you were.

Elaine Murray: I am sympathetic to the principles of Margaret Mitchell's amendment 78. As she said, the issue is that the system has not been working well in practice even though the principles are there, and her amendment would strengthen the requirement. I appreciate that some witnesses were not happy about the idea of having a single point of contact, but I presume that Margaret Mitchell's amendment would not force anyone to have one. It would simply require that to be done when it is required. The bill would be strengthened if the provision were included.

The Convener: Do you want to say anything else, cabinet secretary?

Kenny MacAskill: All that I would say on Sandra White's point is that we are looking at a feasibility study. Whether that will be ready for stage 3, I do not know. Some of the issues will be systemic as they involve linking up computer systems, and we are aware of issues there, but the intention is to look into the matter and there is a desire to achieve it.

The glass is most certainly half full. We have come a long way. Each of the organisations has improved and they are now seeking to work together. That is why I think that we should have more trust and faith in them.

Margaret Mitchell: I refer members again to the statement from David McKenna of Victim Support Scotland that, in courts today, victims and witnesses sometimes have to repeat their stories 16 times. That is unacceptable. Amendment 78 would address that situation, so I will press it.

The Convener: The question is, that amendment 78 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 78 disagreed to.

The Convener: Amendment 79, in the name of Alison McInnes, is in a group on its own.

Alison McInnes: My amendment largely reflects article 12 of the European Union victims directive, which stipulates that member states must

"facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral."

The directive maintains that victims who choose to participate should have access to safe and competent restorative justice services.

Amendment 79 would require ministers to provide for the referral of a victim and the perpetrator of a crime to restorative justice services. It would require ministers to define when that should occur and to set out the procedures for referrals.

The amendment sets out safeguards. A referral would occur only if the victim had consented, and that consent could be withdrawn at any time. The victim should also be fully informed of how relevant restorative justice services work and protected from any form of further victimisation or retaliation.

We know how effective diversion from prosecution projects can be in reducing reoffending. That is why the amendment allows for referral to occur before or after sentencing, but only when the perpetrator acknowledges the basic facts of the case.

The Government has acknowledged that restorative justice services can assist victims to overcome their experiences and provide a form of accountability and a forum in which to receive an apology. Restorative justice can enable those who have committed crimes to reflect on their actions, take personal responsibility, appreciate the harm that they have caused and start to make amends. That can prove key to the rehabilitation of both parties.

Given that a fundamental purpose of the bill is to ensure that Scotland complies with the directive, I am disappointed that the bill does not mention

restorative justice. It makes no effort to promote the value of that, to instil greater confidence in the system or to standardise referral procedures.

I move amendment 79.

Roderick Campbell: I have some sympathy with Alison McInnes's view, but the committee did not look at the subject at stage 1. The issue is important and we need to pay attention to it, but I am not persuaded that introducing regulations is the right way forward.

Graeme Pearson: Sacro has made strong representations in support of Alison McInnes's approach. Over the years, we have regularly spoken about developing such services, and we now have the opportunity to do something about that in legislation.

Margaret Mitchell: I will listen carefully to what the cabinet secretary says, but there seems to be an omission from the bill. I am sympathetic to Alison McInnes's amendment.

John Finnie (Highlands and Islands) (Ind): I support the amendment, which achieves the correct balance. Restorative justice is often seen—simplistically—as just another avenue of disposal, without regard to the victim. However, the amendment would provide appropriate protection for the victim. This important element should be considered.

Kenny MacAskill: I fully understand the intention behind amendment 79. Alison McInnes is right to flag up restorative justice, which I support and which has in many instances great benefits for offenders and especially for victims.

We have seen that restorative justice processes can be useful in relation to youth justice in particular, but I am not persuaded that the time is right to introduce what is essentially a statutory right to access such services. Detailed consideration would need to be given to the nature and effectiveness of the services that were to be offered and to the potential costs, which cannot be ignored in the current financial situation.

Given the voluntary and case-specific nature of any restorative justice services, there are compelling reasons for adopting a more flexible approach than would be possible through a statutory scheme. In particular, it would be difficult to establish definitive circumstances in which referral would be appropriate, and which reflect the very personal and specific circumstances of each case.

10:15

A relatively small number of responses to the "Making Justice Work for Victims and Witnesses" consultation that we carried out last year referred to restorative justice. Two responses suggested the need to review the role of restorative justice for victims of crime committed by adults. I would be willing to consider such a review if there was support from victims' organisations, particularly given the provisions on restorative justice services in the recent EU directive on victims' rights.

In summary, I cannot support amendment 79, and I invite Alison McInnes to consider withdrawing it, with my assurance that we are open to giving further consideration to whether the potential benefits of restorative justice should be more widely reviewed. At present, there is certainly a difference between what is available in some areas for children and what would be available as a statutory requirement for all.

Alison McInnes: I thank members for their support for amendment 79. I will press the amendment, because it is important. In response to the cabinet secretary's comment about restorative justice as a statutory requirement for all, the amendment would require the Government to define when it should occur and to set out procedures for referral. The amendment would allow the cabinet secretary to take a stepped approach.

I acknowledge that there are many excellent restorative justice services already operating; I have met Sacro, and I know that it supports the concept. However, I have been concerned for some time that the system is emerging in a very ad hoc fashion; that provision is not consistent throughout the country; and that best practice is not always being shared.

I believe that amendment 79 would bring the bill into line with the EU directive and help to establish appropriate guidelines and procedures, and I urge members to support it.

The Convener: The question is, that amendment 79 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 79 agreed to.

Section 3—Disclosure of information about criminal proceedings

Amendments 22 and 23 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 24, in the name of the cabinet secretary, is grouped with amendments 25, 80 and 81.

Kenny MacAskill: Section 3 of the bill gives victims and witnesses the right to access certain information about their case on request from the Scottish Court Service, the Crown Office and Procurator Fiscal Service and Police Scotland. The section largely reflects the requirements of article 6 of the EU victims directive.

Amendment 24, in my name, introduces two new paragraphs to section 3(6), to clarify that victims and witnesses can access information about the location, time and date of any appeal arising from a trial as well as accessing information in relation to the trial itself. That coincides with article 6 of the directive as read with recital 31 of the directive.

Amendment 25, also in my name, is a minor drafting amendment to reflect more accurately the wording in article 6(2) of the directive by providing that the final decision in a trial and the reasons for that decision should be disclosed to victims and witnesses on request. It also clarifies that the decision in any appeal arising from a trial, and the reasons for that decision, should be disclosed to victims and witnesses on request.

Amendments 80 and 81, in the name of Margaret Mitchell, seek to set out specific occasions when information need not be disclosed under section 3.

The bill reflects the requirements of article 6 of the EU directive, which provides that victims should be able to request information on all aspects of the proceedings in which they are involved. As the directive acknowledges, however, there will inevitably be occasions on which releasing some information will not be appropriate.

The bill as introduced allows for the police, Crown Office and Scottish Court Service to exercise their professional discretion in response to the individual circumstances of a case, by not attempting to set out specific circumstances in which the exemption would apply. I consider amendments 80 and 81 to be unnecessary and that those organisations are entirely capable of making decisions without particular circumstances being set out in the text of the bill.

In addition, there is a real risk that the inclusion of the amendments could result in a breach of the requirements in article 6 of the EU victims directive. There is nothing in article 6 that would permit a member state to withhold information from a victim—for example, on grounds that it is not in a format that could be given to the victim. The use of the word "inappropriate" in section 3(4) of the bill is designed to capture the situations that are described in article 6(3) and recital 28 of the directive while giving the persons listed in section 3(5) of the bill the discretion to decide when a request falls within one of those situations.

I urge the committee to support amendment 24 along with amendment 25. I invite Margaret Mitchell not to move amendments 80 and 81.

I move amendment 24.

Margaret Mitchell: Section 3 will place a duty on the chief constable, the Scottish Court Service and prosecutors to provide information to victims and witnesses that relates to criminal investigations in their cases, but under subsection (4) the police and Crown may withhold the information that has been requested if they consider that it would be "inappropriate" to release it.

The exemption might be necessary in a range of circumstances, and withholding information might be in the interests of the victim or, more widely, in the interests of justice. However, the bill provides no guidance on what is meant by "inappropriate". People who gave evidence to the committee, including the Law Society of Scotland and Scotland's Commissioner for Children and Young People, told us that guidance is needed.

Amendment 80 would make clear the range of circumstances in which disclosure of information that had been requested could be refused. It would be inappropriate to disclose information if doing so would breach other legislation, constitute contempt of court, prejudice justice or cause distress to the person who had requested it. Also, information would not have to be disclosed if it was not available in a transferable format or could easily be obtained elsewhere.

I do not accept that amendment 80 is so prescriptive that it breaches article 6 of the victims directive. I lodged it in an attempt to tease out what the Government means by "inappropriate". The information that section 3 covers is:

"(a) a decision not to proceed with a criminal investigation and any reasons for it,

(b) a decision to end a criminal investigation and any reasons for it,

(c) a decision not to institute criminal proceedings against a person and any reasons for it,

(d) the place in which a trial is to be held,

(e) the date on which and time at which a trial is to be held,

(f) the nature of charges libelled against a person,

(g) the stage that criminal proceedings have reached,

(h) the final disposal in criminal proceedings and any reasons for it."

Those are all important issues.

Amendment 80 sets out reasons why such information should not be disclosed to victims, although in the vast majority of cases there will be no reason why it should not be disclosed. In the interests of clarity, clear guidance in the bill or elsewhere should point towards the circumstances in which information should not be disclosed. Amendment 81 is consequential on amendment 80.

I support amendments 24 and 25, which will improve the bill.

Alison McInnes: I support amendment 80, which would prevent people from hiding behind a single word and saying, "We're not disclosing information because that would be inappropriate." The approach will encourage people to be open, so we should welcome the amendment.

The Convener: I invite the cabinet secretary to wind up the debate.

Kenny MacAskill: The intention of amendments 24 and 25 is to make clear that organisations should seek to provide information. It is difficult to clarify precisely the circumstances that would preclude disclosure, because the circumstances would be case specific. John Finnie has given examples from his experience as a police officer, and it has been suggested that it might not be appropriate to disclose information to an individual who was being investigated, for example, in relation to fraud that related to the case.

It is difficult to specify such matters. What we need is a general presumption about disclosure, while allowing organisations some flexibility. If we go down the route that Margaret Mitchell proposes and specify circumstances, then as soon as we come across matters that are not specified there could be great difficulties for the organisations involved. We must have trust and faith in organisations, which will have a statutory duty to provide information and will try to do the right thing but will need some flexibility to deal with circumstances that might arise and which we perhaps cannot currently envisage.

The Convener: The question is, that amendment 24—

Margaret Mitchell: May I respond to the cabinet secretary?

The Convener: Yes, you may respond.

Margaret Mitchell: Transparency is fundamental. Amendment 80 would make transparent the range of circumstances—not specific circumstances, to which the cabinet secretary tried to whittle it down—in which it would be inappropriate to disclose information. On that basis, I will press amendment 80.

The Convener: Before you do that, I bring in the cabinet secretary, to—

Kenny MacAskill: I think that where Margaret Mitchell is taking us—

The Convener: Hang on a wee minute; I am not finished. I was just saying that I have allowed some flexibility here.

I am finished now.

Kenny MacAskill: Margaret Mitchell's amendment 80 would presumably open up the opportunity for judicial review and perhaps for somebody to have to disclose that there is an on-going investigation or, indeed, disclose circumstances that would be quite distressing for relatives.

We will ensure that guidance is given and that organisations can make decisions from that perspective. Referring to specific matters in the bill would naturally mean that some matters would be excluded, which would cause difficulties; equally, decisions would be open to challenge, which could cause significant problems and greater distress.

The Convener: I let the cabinet secretary in again because the process is that the member who moves the first amendment in a group winds up at the end of the debate. However, I am happy to let other people come back in. The process is that, if someone speaks to their amendment in the middle of a group but is not the member who moves the first amendment in the group, they are not the person who winds up at the end. However, I am happy to be flexible about that where there are issues to be clarified. I want to—

Margaret Mitchell: Convener, I think that an important point is raised by giving the cabinet secretary the right of reply.

The Convener: No. I did not give him the right of reply. The member who moves the first amendment in a group is the person who winds up.

Margaret Mitchell: Okay.

The Convener: That is the usual process. I remind members: if you move the first amendment in a group, notwithstanding that you might have another amendment in the middle of the group, you have the right to sum up at the end. That is just how the procedure operates. However, I am happy to let back in someone who has an amendment in the middle of a group.

Have I made myself clear? John Pentland is looking puzzled. Have I explained that point?

John Pentland (Motherwell and Wishaw) (Lab): Yes, you are very clear, convener.

The Convener: I am very clear. Oh, I do like you.

I explained the process so that people are clear that, if they move the first amendment in a group, they have the final say. Is that okay?

Margaret Mitchell: Yes.

Amendment 24 agreed to.

Amendment 25 moved—[Kenny MacAskill]—and agreed to.

Amendment 80 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 80 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 80 disagreed to.

Amendment 81 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 81 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Mitchell, Margaret (Central Scotland) (Con)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 1, Against 8, Abstentions 0.

Amendment 81 disagreed to.

Amendment 26 moved—[Kenny MacAskill]—and agreed to.

Section 3, as amended, agreed to.

Section 4—Interviews with children: guidance

The Convener: Amendment 61, in the name of Alison McInnes, is grouped with amendment 62. I point out that, if amendment 61 is agreed to, I cannot call amendment 62, because of pre-emption.

Alison McInnes: The fact that the bill will place the existing guidance on joint investigative interviews on a statutory basis is welcome. However, amendment 61 would require constables and social workers to comply with the guidance issued by Scottish ministers when carrying out interviews with children—anyone under the age of 18—in relation to criminal proceedings. I am concerned that the current provision in the bill that those persons should "have regard" to the guidance will not adequately ensure that it is consistently adhered to. The current provision rather gives the impression that it matters little if they do not follow it.

Amendment 62, in the name of John Finnie, builds on the Government's proposals. The convener has just noted that amendment 61 would pre-empt amendment 62. If amendment 61 is not passed, I will support amendment 62's proposed minor strengthening of the current provision.

I share Children 1st's concern that guidance of this nature should be deviated from only in exceptional circumstances. It strikes me that such circumstances—cases or instances where it is deemed permissible to depart from the rules—could be accommodated within the guidance.

I move amendment 61.

10:30

John Finnie: The convention of joint investigations has meant some good experiences for children, primarily as a result of the training. However, it is still perceived that there are different interests. The interests of the child are foremost and the guidance should have primacy. Competing interests, such as those that arise through the pressures on staffing and overtime budgets, for example, could begin to impact, particularly in rural areas. It is important to be consistent and the examples that will be known to many of the different approaches that are taken by people who have received this training and those who have not, and the different outcomes that are achieved, mean that the training is significant. I will not dissent too much from what Alison McInnes has said.

Elaine Murray: I support the amendments, although one precludes the other. The general thrust of both is correct. Amendment 62, in John Finnie's name, is a bit more flexible in that Alison McInnes's amendment would appear to insist on compliance in every single circumstance. John Finnie's is a bit more flexible and allows for that exceptional circumstance when it is not possible to be accommodated.

The Convener: John, would you like to come back in on that?

John Finnie: Thank you for being flexible, convener, and allowing me to come back in.

The Convener: Well, you have got a flexible amendment, apparently.

John Finnie: The reality of the situation is that that flexibility can be used positively and pragmatically if the interests of the child are to the fore, or it could be used if there is an insistence. The amendment builds in flexibility around staffing deployment for the police in particular. I do not think that social work has the same issue with having competently trained people being involved in joint investigative interviews.

Kenny MacAskill: The guidance on interviewing child witnesses in Scotland currently sets out principles of best practice for police and social workers who are undertaking joint investigative interviews, and aims to make the process more child focused and to enhance the quality of such interviews. Section 4 intends to put that guidance on to a statutory footing and to require police and social workers to have regard to it when undertaking such interviews.

Amendment 61, in the name of Alison McInnes, would have the effect of requiring the police and social workers to comply with the guidance rather than simply having regard to it. Placing an obligation on the police and social workers to comply with the guidance would effectively take away any discretion that those professionals have to make decisions that are based on the individual circumstances of a case, no matter how exceptional those circumstances might prove to be. Furthermore, a requirement to comply with the guidance rather than have regard to it might force the police or social workers into a position in which, in order to do the sensible thing in the circumstances of the interview, they must breach their statutory obligation, as no departure from the guidance, however reasonable, would be permitted by the amendment.

Amendment 61 would also have the effect of empowering Scottish ministers to issue instructions to the police and social workers to operate in a certain way without any requirement for parliamentary scrutiny of those instructions. The guidance issued under section 4 does not require to be laid before Parliament. Clearly, the use of the term "guidance" would be misleading if it were compulsory.

I also welcome John Finnie's recognition of the importance of the guidance. However, although I agree that ensuring that regard is paid to the guidance is vital, I consider the reference to "due regard" to be unnecessary. Departing from the duty that is currently in the bill that is commonly used might also create some uncertainty about how the guidance would apply in different circumstances. I believe that the wording of the bill as introduced strikes the appropriate balance between putting such important guidance on a statutory footing and not removing the discretion that might prove to be essential in protecting the best interests of the child at a particular time or interview. I therefore cannot support amendments 61 and 62.

Alison McInnes: We have heard already this morning that how the police or social workers conduct interviews with children is key. At the start of the investigation process, we need to ensure that children feel comfortable and confident when they are telling their often traumatic experiences. Conducting the interview in a manner that coheres with the child's best interests will ultimately lead to a better quality of evidence.

However, I have listened to what the cabinet secretary has said about discretion and I would not wish to fetter the professionals' ability to respond flexibly to a particular child's needs. On that basis, I will withdraw my amendment. However, I still support John Finnie's amendment, which gives a little more clout to the guidance.

Amendment 61, by agreement, withdrawn.

Amendment 62 moved—[John Finnie].

The Convener: The question is, that amendment 62 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 62 agreed to.

Section 4, as amended, agreed to.

Section 5 agreed to.

After section 5

The Convener: Shall I slow down for you all? Have you not had your Weetabix or porridge?

Amendment 27, in the name of the cabinet secretary, is in a group on its own.

Kenny MacAskill: Section 5 contains provisions that will allow victims of certain offences to choose the gender of the officer who interviews them. At stage 1, stakeholders welcomed those provisions and called for the right to be extended to enable such victims to choose the gender of the person who carried out their forensic medical examination. In my response to the committee's stage 1 report, I made a commitment to consider that suggestion.

As I said when I gave evidence at stage 1, the issue is not just about legislation but about ensuring that things happen in practice. All those who deal with such matters, whether the police, the Procurator Fiscal Service or the health service, recognise that the process is traumatic, and anything that can be done to reduce the distress for the victim is very important.

We want to ensure flexibility to deal with such situations as they arise, regardless of time of day or geographical location, so that if the victim says that they want a doctor of a specific gender, we should seek to provide that doctor.

Clearly, there are wider justice and health implications involved in delivering a service that is responsive to the needs of victims of sexual offences, which cannot be achieved through legislation alone. Crucial discussions are already under way between Police Scotland and NHS Scotland to ensure that appropriate guidance and support are available to those who are responsible for carrying out the forensic examination and to the victims of sexual offences. It is also clear that the development of the relevant workforce of the future must be responsive to the requirements of such victims.

Amendment 27 will underpin that on-going work. It will ensure that the police inform alleged victims of sexual offences that they may request a forensic medical examiner of a specified gender. It will also ensure that such a request is relayed to the doctor who is to conduct the forensic medical examination. To take into account the evolving remit of healthcare professionals, I have proposed a power to amend the reference to a registered medical practitioner, if it were required to reflect future practice.

I acknowledge that meeting the needs of victims of sexual offences clearly requires more work, and that amendment 27 alone is not a complete solution to the issues raised. However, I believe that it is a vital first step to ensure that victims' views are sought and efforts are made to meet such requests, and that it will act as a driver for more comprehensive change.

I move amendment 27.

Margaret Mitchell: I am very supportive of amendment 27. It is a positive move forward for victims.

Sandra White: I echo Margaret Mitchell's comments. I am very supportive of amendment 27 and welcome it from the cabinet secretary. It certainly is a step forward. I thank all the groups who requested the amendment in their evidence to the committee. It will help the justice system move forward.

Graeme Pearson: I agree with earlier statements on the matter. Access to practitioners at a time of great stress is a very sensitive issue and amendment 27 strikes the right balance, in terms of responsibilities and responses.

Amendment 27 agreed to.

The Convener: Amendment 82, in the name of Graeme Pearson, is grouped with amendments 83 and 85.

Graeme Pearson: Amendment 82 deals with a very sensitive issue for the courts, which has caused a great deal of controversy over a number of years. It relates to evidence on sexual offences and the ability or otherwise of the courts to review a victim's previous health record.

Amendment 82 seeks to empower the Scottish ministers to make provision, by means of regulation,

"for the circumstances when information relating to the physical or mental health of a person who is or appears to be a victim of an offence of a type mentioned in subsection (3) ... can be disclosed in relation to a criminal investigation or criminal proceedings."

In particular, the regulations must make provision for

"the circumstances when it may be considered appropriate to seek disclosure of such information",

as well as

"the process by which a decision to disclose such information must be made"

and

"the need to obtain the free and informed consent of the victim",

although that is subject to the following provision, which is on

"the circumstances when it may be appropriate to disclose such information without the consent of the victim".

The regulations would also have to cover

"the nature of the support that must be made available to the victim where disclosure of such information is sought."

Evidence from Rape Crisis Scotland and other women's aid groups made it clear that victims feel a further level of victimisation when their histories or medical conditions are exposed in the public domain of a court in inappropriate circumstances. Victims feel that that disclosure not only breaches their rights of confidentiality but exposes them to a great deal of embarrassment and further victimisation. Such disclosure has occurred in a number of cases and the way that it has been dealt with has caused a great deal of public angst.

Currently, it is left to individual judges to decide whether such information should be shared in the public domain as part of the criminal process. Amendment 82 seeks to ensure that the Government offers guidance on those decisions. Such guidance would be helpful in delivering a proper process for deciding the law in certain circumstances and in particular cases without further abusing a victim. Victims can become the target of intrusive questioning by defence agents, who sometimes investigate historical circumstances. Many who witness such interrogations in open court deem them to be inappropriate in the extreme. I encourage the cabinet secretary to look kindly on amendment 82, which I think would be welcomed by victims of sexual offences, who have suffered over many years in our courts. Despite the previous guidance that has been offered to the courts on how those circumstances should be managed, members of our communities are still badly affected by such interrogations in the public domain.

Through amendment 83, Margaret Mitchell seeks to deal with a similar set of circumstances. She seeks to introduce the idea that legal advice would be made available to victims in such circumstances. I presume from the detail that we have received that such legal advice would seek to offer protection in a similar domain. It is a challenge to conceive how a third member of the legal profession could be involved in the court process with the specific duty of protecting the victim in such circumstances.

I presume that the cabinet secretary will be concerned about the financial implications of that arrangement. We should be responsible and acknowledge and deal with the financial implications. In administering justice, our Scottish courts should, with proper guidance for the Crown Office and Procurator Fiscal Service and for advocates who appear in court, be able to deliver on our behalf without the need for an additional member of the legal profession to be there. A trial process would become enormously complicated if another member of the legal profession was in court solely to deal with the needs and requirements of the victim. For that reason, amendment 83 is a challenge and I am not minded to support it.

I move amendment 82.

10:45

Margaret Mitchell: The concerns surrounding the use of sexual history and character evidence in sexual offence trials are not new; they have stretched back for far too many years. Sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 allow the defence to make an application to use evidence on the sexual history and character of the complainer in sexual offence trials.

Legislation designed to restrict the use of this type of evidence was passed in 2002, which means that it is now necessary for a written application to be submitted in advance of the preliminary hearing. The court can admit such evidence only where it is satisfied that it is relevant to whether the accused is guilty of the offence and that the value of it is likely to outweigh any risk of prejudice.

An evaluation commissioned by the Scottish Government and published in 2007 found that, far from tightening the use of sexual history and character evidence, legislation that was introduced by the Scottish Executive in 2002 had led to an increase in the use of this type of evidence. The key findings of the research made for very concerning reading. Seventy-two per cent of trials featured an application to introduce sexual history or character evidence and only 7 per cent of those applications were refused.

Concerns about the use of this evidence relate to its potential to be highly prejudicial, particularly in light of pre-existing attitudes among some jury members. It can also, without doubt, be extremely distressing for victims and can actively deter them from reporting crimes to the police.

The type of information requested on sexual history is often irrelevant to the case. Twenty-four per cent of the evidence sought relates to the general character of the complainer, including previous and long-resolved mental health issues.

Amendments 83 and 85 were suggested by and have the support of Rape Crisis Scotland. Its experience is that the use of this type of information is causing distress to victims and the relevance of the evidence is not being routinely challenged by the Crown. It appears that, in the vast majority of cases, complainers consent to their records being recovered but do not feel that such consent is given freely, because the likely alternative is the possibility of the prosecution

being dropped or a warrant being sought for the information.

Part of the problem is that we do not have up-to-date information on the use of applications made under sections 274 and 275 of the 1995 act. The Crown does not currently record the use of applications and therefore we have only the 2007 figure to go by.

The amendments would have two effects. Amendment 83 would require independent legal advice to be provided to victims of sexual offences when the information is requested from the Crown, the defence or the police. Such legal advice would provide victims with information on their rights and would explicitly make them aware that they are able to refuse such requests. Amendment 85 would provide independent legal advice at a preliminary hearing where the Crown and the defence can lodge an application to use evidence on complainers' sexual history and character.

It is hoped that such legal advice would be provided largely on a pro bono basis—at little cost—but it may be that legal aid would be required to be extended to cover such legal representation. Access to independent legal advice is a routine entitlement across European jurisdictions such as France, Belgium, Austria, Finland, Greece, Spain and Sweden. In Ireland, which has an adversarial legal system, sexual offence complainers have a right to independent legal representation if the defence makes an application to the judge to introduce sexual history evidence.

Independent legal advice could be implemented in a phased way, and my amendments leave it open for a pilot to be carried out. The proposed changes are a practical way in which to help rape victims to avoid unnecessary distress during the court process. Currently, they have little way to challenge the legality of the use of their private information in court, and it appears that the Crown is not robust enough in challenging section 274 and 275 applications. Perhaps more important, if this type of evidence is routinely being used, there is a real concern that medical records and sensitive information are being used to discredit witnesses, which plays into the prejudices and myths that we know prevail around sexual offences.

I note in amendment 82 that Graeme Pearson seeks to address the same issue but in a slightly different way. The amendment requires Scottish ministers to make rules on when information relating to a victim's physical or mental health can be disclosed in court. The problem is that those rules are already legislated for but they seem not to be robustly followed, and inappropriate information continues to be used in court. Amendment 82 does not establish independent legal representation for victims.

I add that amendments 83 and 85 have the broad support of the Faculty of Advocates.

Elaine Murray: I am sympathetic to the policy intention of all the amendments in the group. The issue is important, because we know the damage that can be done to victims if they are forced to disclose aspects of their lives that are not really relevant to the case. That can cause them extreme distress.

However, I have some concerns about Margaret Mitchell's amendments 83 and 85. I tend to support Graeme Pearson's amendment 82: it is more flexible, and I prefer its approach of compelling ministers to make new regulations, which would come before the committee under the affirmative procedure. With Margaret Mitchell's amendments, there is an issue about the relationship between the legal representation that she calls for and the legal representation that already exists in court.

The other thing that worries me—although it might worry me only because I am a novice on the committee and do not have a legal background—is that the provisions in subsection (5) of amendment 83 and subsection (5C) of amendment 85 that the complainer is automatically entitled to legal aid seem to be contrary to the circumstances in which legal aid is normally available, where it is income dependent. Maybe it is a misunderstanding on my part, but the amendments seem to make a particular exception for these cases. I would be a little concerned if that were the case.

The Convener: I do not think that it is a misunderstanding. You are too clever for that.

Elaine Murray: I have a concern about the provisions being introduced in that way.

Roderick Campbell: I refer members to my entry in the register of members' interests, which states that I am a member of the Faculty of Advocates.

I have sympathy with Margaret Mitchell's amendment 85. On the point about legal aid, I rather concur with Elaine Murray. It does not seem appropriate for those provisions to be in the bill. However, we need to make some progress in dealing with the widespread attitude that people hold. People look at the Crown as representing the public interest and they ask, "Who is representing my interest? Who is my lawyer?" It is precisely in applications such as those that we are discussing that such questions arise.

There is a real issue. It was flagged up when Murdo Macleod of the Faculty of Advocates gave evidence, although we did not explore it in detail.

The proposal would break substantial new ground. I am not sure what discussions the Government has had with the Faculty of Advocates, as opposed to Rape Crisis Scotland, since stage 1. I think that the onus is on the Faculty of Advocates to convey its thoughts to the Government. That was the impression that I got from the evidence session in May.

Although I have reservations about amendment 85, the issue will not go away. I will oppose Margaret Mitchell's amendments today, but the issue needs wider attention than we have given it so far.

The Convener: I want to comment, for a change. Although I am hugely sympathetic in relation to the difficulties of giving evidence in court for many people, particularly victims of sexual offences, I am pleased that both amendment 82 and amendment 83 use the term

"a person who is or appears to be a victim".

There is always a difficulty in using the term "victim" in court proceedings, when there is a presumption of innocence and the onus is on the Crown to establish guilt. It is a difficult area in which to get definitions right.

I was immediately concerned when Margaret Mitchell said that we could introduce a pilot. If we pilot an approach, we change access to justice in certain areas. In the context that we are talking about, there would be independent inquiries into the medical and sexual health background of some people but not others, while trials were going on.

Margaret Mitchell's suggestion that pro bono legal advice could be given also concerned me, again because that would mean that different people would have different access to independent legal advice. Those are practical comments on what Margaret Mitchell said, rather than on the amendments in her name.

I think that I have said before to the cabinet secretary that there is a huge difficulty about using the term "victim", as opposed to "appears to be a victim". There is a difficult balance to strike to ensure that legislation is fair to victims and to the accused.

Kenny MacAskill: I think that everyone has a great deal of sympathy with the intention behind all the amendments in the group, but I echo the comments of Graeme Pearson and others on amendments 83 and 85, in Margaret Mitchell's name.

On amendment 82, in Graeme Pearson's name, making regulations that governed the application for, the granting of and the circumstances of disclosure of information relating to a victim's physical or mental health would be a major departure from current practice. Mr Pearson might draw an analogy with the regime in sections 274, 275, 275A and 275B of the Criminal Procedure (Scotland) Act 1995, in respect of evidence of a complainer's sexual history, but his proposal goes further in two important respects.

First, the restrictions on rehearsing a complainer's sexual history in a trial relating to sexual offences are of obvious and immediate relevance. Amendment 82 would greatly extend the categories of offence in which restrictions would be imposed and the kind of evidence that could be denied. Aside from the reluctance that we should have to withhold evidence from a jury, the link between sexual offences and sexual history is wholly absent in the proposal. If evidence of a victim's mental or physical health is to be restricted in that broad category of offences, why not restrict such evidence in other categories of offence? Why should evidence of a victim's state of health be restricted in a stalking case but not in a case of assault?

The other major difference with the regime in the 1995 act is that amendment 82 would oblige the Government to define in legislation matters that the court is currently free to decide. For example, the Government would even decide whether a court might allow application to be made to it. This Government has promoted—and indeed set in statute—the independence of the judiciary. We take the view that decisions about proceedings are best left to the courts themselves. We would be very reluctant to take on the function of making courts' procedural decisions for them. Such decisions are best made in the circumstances of each case by experienced personnel who have heard all the proceedings.

We are also conscious that restricting by law the availability of evidence, irrespective of any circumstances on which a case might turn, would have clear human rights implications.

Amendments 83 and 85, too, would result in a major innovation in our law. There are currently no rights for victims to have independent legal representation in criminal proceedings. I question such a step, particularly given that the proposed approach would apply to a restricted group of victims. It would be a tricky task to defend a situation in which a victim of an assault who had been left in a wheelchair by her attacker was not deserving of legal representation, when the victim of a sexual offence was deserving of such representation.

The assault parallel is apposite, given that evidence about the victim's state of health or previous conduct might well be relevant, for example in the case of a self-defence plea. It is difficult to defend the scope of the drastic innovation that amendments 83 and 85 would

make. Inevitably, the approach would lead to demand for similar rights for other victims, possibly to the great detriment of the availability of evidence and thus the fairness of trials.

Finally, it is unclear what additional benefit would be brought by the proposed approach in amendment 83 that alleged victims be given an opportunity to seek legal advice or representation when information is being sought, for example by the Crown Office or the police, before criminal proceedings have been raised.

If information is being sought, the reason for that should be clearly explained, but that could be dealt with on a practical basis, rather than by requiring advice to be sought from a solicitor. I understand that the Crown Office, in particular, already has comprehensive guidance in place to ensure that victims are given a full explanation of exactly why any sensitive information is being asked for. Furthermore, in the event that legal advice is required, current legal aid legislation already makes that available to victims and witnesses through advice and assistance, subject to the usual statutory tests.

11:00

As I said, I appreciate the intention behind the amendments and agree that we should do all that we can to reduce the distress of alleged victims in such cases. I discussed the matter with Rape Crisis Scotland, which spoke in favour of similar proposals at stage 1, just last month. As I said then, I think that these proposals are a step too far, but I am more than willing to consider the underlying concerns that have been raised and to work with Rape Crisis Scotland, the Crown Office and Procurator Fiscal Service and others to explore what more can be done.

In relation to the specific point that Rod Campbell raised, we met Rape Crisis Scotland recently. My understanding is that the Crown Office has agreed to gather more information on section 275 of the 1995 act and that it will discuss the matter with Rape Crisis Scotland. The Faculty of Advocates has not been in touch with us since it indicated its support for Rape Crisis Scotland. I fall back on the position that Graeme Pearson takes in relation to amendment 83, which is that a fundamental change in how we conduct trials would be involved, and that would cause great difficulties for those who preside at trials.

The Convener: Graeme Pearson will sum up, because he moved the lead amendment in the group. I will take Margaret Mitchell first.

Margaret Mitchell: I gently remind the cabinet secretary that the greatest threat to the fairness of trials is his endorsement of the proposal to abolish corroboration.

The Convener: I rule that that is out of order, as it is not relevant to the bill.

Margaret Mitchell: The cabinet secretary said that my amendments would prejudice a fair trial. The main thrust of his comments does not fill me with anything other than dismay, because he is giving a green light to business as usual, whereby the daily use of sexual history and other irrelevant information to discredit witnesses will continue.

However, I have reflected on some of the other comments that have been made, not least those by the Faculty of Advocates, which has suggested some improvements to my amendments. It is important that we get this right, so I will reflect on the comments that have been made and will lodge similar amendments at stage 3, in the hope that I can persuade the chamber to do the right thing.

Graeme Pearson: The cabinet secretary has made a number of comments about the proposals in question. He properly identified that what we are talking about as far as victims are concerned is the use in the public domain of highly sensitive personal information. He suggested that decisions on such issues are best left to the courts and that they should be made by those who hear the whole trial. In the current situation, that is the nub of the problem. It is acknowledged even by the cabinet secretary and other members present that we have a problem. It is a problem that has pertained for decades. Victims are going to court and highly sensitive personal information about them is being exposed in the public domain. That cannot subsequently be switched off or forgotten about, and we cannot allow the situation to continue.

The cabinet secretary says that, by focusing solely on sex-related crimes, the proposal to restrict the use of sexual history would create a new category and would set a precedent that could also apply to assaults and so forth, but the truth is that we do not appear to have a problem in trials in which assaults or other crimes are alleged. Something creates a mystery in the public mind surrounding the category of sex-related crimes that seems to allow the courts and those who serve them to delve into the background of victims to an extent that I think goes beyond what is necessary. As Margaret Mitchell said, in 72 per cent of such trials, the issue of sexual history has become central to the development of the case, despite the fact that legislation to address the matter was put in place in 2002.

The cabinet secretary is correct to acknowledge that Rape Crisis Scotland and other women's groups have focused on the issue repeatedly, year after year. Victims look to the Parliament to protect them by passing legislation that works as best as humanly possible to guard their requirements while delivering due process and justice in a trial situation.

Roderick Campbell has acknowledged that there is a real issue, and Margaret Mitchell has outlined in detail the evidence that lies behind the need for such an amendment. The cabinet secretary has indicated that he is sympathetic to the problems that we have mentioned and is willing to discuss them with all the relevant partners.

It is now time for us to show a real commitment to dealing with an issue that has caused enormous embarrassment in the public courts; has been reported on repeatedly in the media; and has, it must be acknowledged, largely affected women—and sometimes children—who are exposed in our public courts and have to live with that exposure in their own communities day after day, month after month and year after year. We all just walk away from that and feel that we have been part of a process.

The cabinet secretary has a real opportunity to address the issues. I would be happy to see some discussion of amendment 82, but I hope that the committee will support it and allow us to break with what has previously been an injustice suffered by victims in our courts, which we have condoned until now.

The Convener: Are you pressing amendment 82?

Graeme Pearson: I am indeed.

The Convener: The question is, that amendment 82 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions

Finnie, John (Highlands and Islands) (Ind)
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 4, Abstentions 2.

Amendment 82 disagreed to.

Amendment 83 not moved.

Section 6—Vulnerable witnesses: main definitions

The Convener: Amendment 28, in the name of the cabinet secretary, is grouped with amendments 52 and 53.

Kenny MacAskill: Amendment 28 is a minor drafting amendment to section 6 to make it clear that the sub-paragraphs in new section 271(1)(c) of the Criminal Procedure (Scotland) Act 1995 are intended as alternatives.

Amendments 52 and 53 are minor drafting amendments to sections 23 and 25 of the bill, to correct the format of the references to the Prisons (Scotland) Act 1989 in our amendments to section 16 of, and our addition of section 17A to, the Criminal Justice (Scotland) Act 2003.

I move amendment 28.

Amendment 28 agreed to.

Section 6, as amended, agreed to.

Sections 7 and 8 agreed to.

Section 9—Objections to special measures: child and deemed vulnerable witnesses

The Convener: Amendment 63, in the name of Alison McInnes, is grouped with amendments 64, 65 and 67.

Alison McInnes: Members will recall that the victims organisations collaboration forum Scotland, which comprises 12 victim support organisations, wrote to the Justice Committee on 18 June regarding the proposal to allow objections to special measures. The organisations described their shared "deep concern" and united opposition to the Scottish Government's plans. They argued that it would

"undermine all the other provisions and rights contained in the Bill".

That is a truly damning verdict.

My amendment 63 would remove the proposed right of any party to a criminal proceeding to lodge an objection notice to the use of standard special measures, which are those protections to which children and vulnerable witnesses are entitled by law at present.

A live television link, a screen or a supporter can empower those individuals to give their best evidence. Removing that entitlement would result in an increase in the number of vulnerable witnesses who have to appear in the courtroom. The objection process, even if it is unsuccessful, will serve only to prolong the process, increase the witness's apprehension about giving evidence and severely dent their confidence in the system. It will make their experience worse. We should not ask vulnerable witnesses and their legal representatives to justify the use of standard

special measures and risk denying them their rights.

I note that Elaine Murray's amendment 65 proposes to delete section 9 entirely. My amendment 63 differs from amendment 65 because it would still afford both parties the right to lodge an objection notice to an application for further special measures for children and deemed vulnerable witnesses. If additional special measures are applied for, the accused should have the right to question why they are necessary, given the considerable list of standard measures.

As drafted, section 9 would erode the existing rights of children and deemed vulnerable witnesses, not enhance them. The committee raised concerns about section 9 at stage 1 and I hope that it will agree with me that standard special measures for those groups must always be deemed appropriate.

I move amendment 63.

Kenny MacAskill: I fully support Alison McInnes's amendment 63 and consider that it addresses the concerns that were expressed during stage 1 by the committee, the Crown Office and various victim support organisations. I emphasise that the intention behind the original provisions was not to complicate proceedings or undermine the support that is available to vulnerable witnesses, but to ensure compatibility with the ECHR and give the court the flexibility and discretion to consider any legitimate concerns raised by any party to the proceedings.

As I indicated to the committee, the issues that were raised in evidence at stage 1 caused me some concern, and my officials had extensive discussions over the summer with the Crown Office and Procurator Fiscal Service and victim support organisations. Following those discussions, I am satisfied that objections should not be possible in relation to those standard special measures that are automatically available to certain categories of vulnerable witness. I believe that that approach strikes the appropriate balance between the rights of victims and those of the accused and I am grateful to Alison McInnes.

Amendment 64, in my name, is consequential on amendment 63 and will ensure that when a vulnerable witness notice contains a request for both standard and non-standard special measures and an objection is lodged in relation to the latter, the resulting hearing will deal only with the non-standard measures—with the standard special measures being granted as usual.

Elaine Murray's amendment 65 proposes to remove section 9 altogether, which would have the effect that the procedure for objecting to any special measures that were specified in a vulnerable witness notice in respect of child and deemed vulnerable witnesses would be removed. Furthermore, her amendment 67 proposes to remove section 13, which would have the effect that the procedure for objecting to any special measures specified in a vulnerable witness application, which relates to objections to special measures for other vulnerable witnesses, would also be removed.

As I said, my officials have had extensive discussions with the Crown Office and victim support organisations on these matters and have given considerable thought to what is required to meet the needs of the victim while upholding the rights of the accused.

It is worth noting that representations can already be made to the court in relation to special measures, albeit without any formal procedure or process involved, and that that would continue to be the case even if sections 9 and 13 were removed. I consider it more appropriate, therefore, to clarify what can already happen and put that on a statutory footing, while ensuring that special measures that are automatically available to certain groups are not subject to challenge.

I do not believe that removing sections 9 and 13 is the right approach. I urge the committee to support amendments 63 and 64, and I invite Elaine Murray not to move amendments 65 and 67.

Elaine Murray: I lodged amendments 65 and 67 after receiving representations from members of the victims organisations collaboration forum Scotland, who are deeply concerned about sections 9 and 13. They believe that giving the accused the right to object to special measures will increase uncertainty and pressure on vulnerable witnesses. Those sections could mean that child witnesses, who have an automatic right to special measures, could find themselves subject to objections and possible loss of those measures.

The VOCFS argued that it would be illogical to extend the rights of vulnerable witnesses to special measures while at the same time bringing in provisions to deny them those rights. Special measures enable witnesses to provide the best evidence to court and sections 9 and 13 appear to contradict the general principles of the bill. In addition, as special measures are provided to ensure the provision of best evidence, they are not prejudicial to the interests of the accused.

Alison McInnes's amendment 63 would remove the right to object to standard special measures, which would go some way to allay the fears of the VOCFS. I think that amendment 63 may well be a better way to deal with the issue than the deletion of section 9. However, I ask whether there should

be a similar amendment to section 13 to address concerns about that section.

Kenny MacAskill: Section 13 is in a different category and deals with different aspects. I welcome Elaine Murray's position and I understand where she is coming from. I presume that her amendment was lodged at the same time as Alison McInnes's amendment 63. If we support Alison McInnes's amendment together with amendment 64, which is consequential, we will get the right balance and provide the appropriate protection that Elaine Murray correctly wants.

11:15

Alison McInnes: The cabinet secretary is correct that my amendment 63, with his consequential amendment 64, strikes the right balance. It is unfair for children, who already have automatic entitlement to standard special measures, to find themselves subject to objections in relation to the use of those standard special measures. An objection would require the child and their solicitor or counsel to justify their entitlement to standard special measures, which would put vulnerable children through an unnecessary additional court process.

Standard special measures were introduced to enable vulnerable witnesses such as children to give their best evidence. Making that entitlement conditional would diminish the purpose and reduce people's ability to give their best evidence. Children and young people often experience court in a negative way, despite the provision of special measures. Perpetrators often make threats about what they will do to children if they tell about what is happening to them. A perpetrator might threaten to kill a child's family or pets if they tell. For that reason, it is difficult for children to give evidence in court, as there is a high level of fear. My amendment 63 would remove the right to object to standard special measures and I very much welcome the cabinet secretary's support for that.

Amendment 63 agreed to.

Amendment 64 moved—[Kenny MacAskill]—and agreed to.

Amendment 65 not moved.

Section 9, as amended, agreed to.

Section 10—Child witnesses

The Convener: Amendment 66, in the name of Alison McInnes, is in a group on its own.

Alison McInnes: Can I just have a moment to find my notes, convener?

The Convener: You can. I am whizzing on. While you are looking, I point out that I hope to get to the end of section 16 today, which is a good pace. Then we will have a break, but not a permanent break because, as members know, we are busy bees.

Have you found them now, Alison?

Alison McInnes: Yes, I have—thank you very much.

I am concerned that section 10 will remove the assumption that child witnesses who are under the age of 12 will give evidence away from the court building. The committee heard evidence on that and raised concerns about it. The measure seeks to address poor practice through statutory provision. The law as it stands, in section 271A of the Criminal Procedure (Scotland) Act 1995, is sufficient in enabling children to give evidence in person should they wish to do so. Indeed, it presumes that they will give evidence away from the courtroom unless the child has expressed a wish to be present, or where the risk of prejudice to the fairness of the trial and to the interests of justice outweighs the risks to the interests of the child.

As our stage 1 report noted, the Scottish Government's justification for removing the existing presumption through section 10 is that it is being too rigidly applied by the courts. It is argued that the current law has led to children being required to give evidence remotely and separately from their parents, who are in the court. However, Children 1st points out that, rather than legislate further, training and guidance need to be improved to help better present the options to children and young people on how and where they can give evidence. We need to be more sensitive to the needs of vulnerable families. Earlier, the cabinet secretary spoke about the need for flexibility, and I believe that amendment 66 would give flexibility. The creation of new categories of vulnerable witnesses and the extension of special measures to more distressed adult victims will help to overcome any perceived problem.

My amendment 66 therefore seeks to remove section 10 entirely, to ensure that the bill does not have the unintended consequence of empowering other people to decide when a child should be in court, perhaps even against their will.

I move amendment 66.

Roderick Campbell: On section 10, there is a difference of opinion between Children 1st and Scotland's Commissioner for Children and Young People. I kind of side with the children's commissioner, who points out that the bill as drafted will give more choice to the child, and I do not share the concerns of Children 1st on the issue.

Elaine Murray: I support Alison McInnes's amendment 66. I considered lodging an

amendment along the same lines. Representative children's organisations have expressed serious concern that young children could be compelled to give evidence. We are talking not about 17-year-old ruffians or whatever but about children who are under the age of 12, and they need to be protected.

Kenny MacAskill: Amendment 66 would delete section 10 so that the current presumption that children under the age of 12 will give evidence away from the court building in trials for certain offences would stand.

Section 10 makes a minor amendment to the existing legislation to place greater weight on the views of the child, with the result that if the child expresses a desire to give evidence in court, there is a presumption that that will be allowed. The intention is to give children greater freedom to give evidence in the manner that will be of least emotional stress and upset to them, which will improve their experience and could result in better-quality evidence from them.

The changes that would be made by section 10 were proposed in response to feedback from victim support organisations such as Scottish Women's Aid, Rape Crisis Scotland and the ASSIST—advice, support, safety and information services together—project, which indicated that the current presumption might be being applied too strictly with the result that children who wish to give evidence in court are being forced to give evidence from a remote location. For example, a child might wish to give evidence in court to prevent them from being separated from a parent who is required to be in court for the proceedings. The change being made by the bill will not force child witnesses to appear in court, nor will it make significant changes to the current and sensible presumption that young witnesses should give evidence remotely. However, it will provide that when a child witness has expressed a desire to give evidence in court, the preference is heeded unless there is good reason why it would be inappropriate.

Section 10 will give children more choice, not less. The point was welcomed by Scotland's Commissioner for Children and Young People at the committee's meeting on 30 April. I therefore cannot support Alison McInnes's amendment.

Alison McInnes: I listened to what the cabinet secretary said, but I will press amendment 66. Children have told us things such as:

"I know I should feel better now that he is in jail, but I keep having flashbacks of court."

That was a 14-year-old boy who probably thought that it would be okay to give evidence in court. A 15-year-old girl who was the victim of an attempted rape said:

"When I entered the courtroom I was really really scared. There were all these people staring at me. The lawyers had wigs, the judge didn't say anything to me except to tell me to stand. There were all these people taking notes about what I was saying. [The accused] was always in the corner of my eye… The court day was the worst day of my life."

We need to listen to the voices of young children and protect them, so I will press amendment 66.

The Convener: The question is, that amendment 66 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 5, Abstentions 1.

Amendment 66 disagreed to.

Section 10 agreed to.

Sections 11 and 12 agreed to.

Section 13—Objections to special measures: other vulnerable witnesses

Amendment 67 not moved.

Section 13 agreed to.

Sections 14 to 16 agreed to.

The Convener: We have come to the end of the sections that we are dealing with today. If members are content, we will have a short break and move on. I apologise to John Finnie, but doing this will allow us to have a short break. I thank the cabinet secretary and his officials for attending and we now move into private session.

11:23

Meeting continued in private until 13:01.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

Available in e-format only. Printed Scottish Parliament documentation is published in Edinburgh by APS Group Scotland.

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

For details of documents available to
order in hard copy format, please contact:
APS Scottish Parliament Publications on 0131 629 9941.

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk

e-format first available
ISBN 978-1-78392-085-3

Revised e-format available
ISBN 978-1-78392-101-0

Printed in Scotland by APS Group Scotland