The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 7 January 2014

Session 4

Tuesday 7 January 2014

CONTENTS

JUSTICE COMMITTEE
1st Meeting 2014, 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:

Lesley Bagha (Scottish Government)
Aileen Bearhop (Scottish Government)
Jim Devoy (Scottish Government)
Philip Lamont (Scottish Government)
Kenny MacAskill (Cabinet Secretary for Justice)
Graeme Pearson (South Scotland) (Lab)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 7 January 2014

[The Convener *opened the meeting at 09:33*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the Justice Committee's first meeting in 2014—I feel as if we have never been away. A guid new year to everyone, including all our witnesses and those in the public area.

I ask everyone to switch off mobile phones and other electronic devices completely, as they interfere with the broadcasting system, even when they are switched to silent.

No apologies have been received.

Under item 1, I invite the committee to agree to consider items 3 and 4 in private. Item 3 is consideration of a draft report on the proposed Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014, and item 4 is consideration of the evidence that has been received to date on a legislative consent memorandum relating to forced marriage. Do members agree to take items 3 and 4 in private?

Members *indicated agreement.*

Criminal Justice (Scotland) Bill: Stage 1

09:33

The Convener: Agenda item 2 is the Criminal Justice (Scotland) Bill. Am I going too fast for you?

Margaret Mitchell (Central Scotland) (Con): Just a tad.

The Convener: I will slow down for you, Margaret, until you get your bearings again.

Our next item is to take evidence from the Cabinet Secretary for Justice on the Criminal Justice (Scotland) Bill. The cabinet secretary will give evidence on part 1 of the bill, which is on arrest and custody; part 4, which is on sentencing; part 5, which is on appeals and the Scottish Criminal Cases Review Commission; and part 6, which is on people trafficking, television links and the police negotiating board for Scotland. I remind members to keep to those segments—"segment" is my mot du jour. We will move on to other items next week.

We will start by looking at part 1. We will then have a break to allow officials to change over for parts 4, 5 and 6.

I welcome to the meeting Kenny MacAskill, Cabinet Secretary for Justice, and Scottish Government officials. Elspeth MacDonald is deputy director, criminal justice division. Lesley—Bagha?

Lesley Bagha (Scottish Government): Bagha. Lesley Bagha.

The Convener: Thank you. Lesley Bagha is the bill team leader. Aileen—oh, somebody should tell me how to say it—Bearhop?

Aileen Bearhop (Scottish Government): Bearhop, yes.

The Convener: There we go. Why can you not have Smith as your name? It is so much easier. Aileen Bearhop is head of the police powers team. Jim—Devoy?

Jim Devoy (Scottish Government): Correct.

The Convener: Gosh. Jim Devoy is policy officer, youth justice. Anne Hampson—you are a good person—is policy officer, victims and witnesses team.

Cabinet secretary, I understand that you wish to make a brief opening statement, after which I will take questions from members, who should be ready with their hands up to get on my list.

The Cabinet Secretary for Justice (Kenny MacAskill): Thank you, convener. A good new

year to you, members and all. I welcome the opportunity to give evidence today on the bill's provisions relating to arrest and custody, sentencing, appeals and other issues. In this opening statement I will focus on police powers and the rights of suspects.

We all want Scotland to have a modern and effective criminal justice system—one that is fit for purpose and which properly balances the rights of individuals and the duties of the state. I believe that the bill's provisions will deliver that system. The bill will clarify and modernise police powers of arrest. It will streamline current police powers by moving from detention followed by arrest when a sufficiency of evidence exists to a single power of arrest on suspicion of having committed an offence. The provisions will improve the law and will be easier for the police to apply than those under the current system.

The statutory arrest power will replace the existing complicated landscape of common law and statutory arrest. It will bring the Scottish system more into line with the European convention on human rights, which refers to arrest with initial deprivation of liberty and detention as the period of police custody following arrest.

The bill recognises that modern investigations are often complex and protracted. In line with Lord Carloway's recommendations, the bill balances the needs of a thorough police inquiry with a suspect's right to liberty, for example through the introduction of investigative liberation.

The bill's provisions put Scotland at the forefront of human rights protection. The bill will extend the rights of those held in police custody. Everyone will now have the right to speak to a solicitor, regardless of whether they will be interviewed by the police.

The bill provides greater protections for children and vulnerable persons held in police custody.

The committee has heard evidence from representatives of various organisations involved with the criminal justice system and I have listened to their views and concerns. As a result, I intend to lodge a number of Government amendments to the bill.

One area in which change is needed is to make provision for the release of a person from arrest when the grounds for that arrest cease to exist. That has been referred to in evidence as "de-arrest". I will lodge an amendment to section 4 to make a de-arrest provision.

I am also aware of police concerns about the 12-hour limit for keeping persons in custody and the need to consider provisions to allow an extension in exceptional circumstances. There is a serious issue here about balancing an individual's right to liberty against protection of the public, and I continue to listen to all the arguments for potential extension in exceptional circumstances.

Police powers of detention and arrest, both at common law and statutory, have served Scotland well. However, it is time for us to modernise our systems and recognise that modern-day investigations require modern-day legislation. We must ensure that the public are protected by police who have the powers to do the job that we entrust to them. We must also protect the rights of individuals in police custody.

I am grateful for the opportunity to answer your questions on those and other provisions in the bill.

The Convener: Thank you, cabinet secretary.

It was remiss of me—I will not be forgiven—not to welcome Graeme Pearson to the meeting. He seems to want to join us on many occasions. You are welcome back, Graeme.

Graeme Pearson (South Scotland) (Lab): Thank you.

The Convener: It is nothing; I just felt in a good mood.

I want us to start off with arrest and police custody, if that is all right with everyone, before we move on to other questions. Elaine Murray will be followed by Mary—sorry, I mean Margaret Mitchell. I beg your pardon, Margaret.

Elaine Murray (Dumfriesshire) (Lab): Thank you, convener. Happy new year.

Cabinet secretary, in your opening statement you explained a bit about the definition of arrest and detention—detention being the period after arrest when one is being questioned. I suppose that the problem is that public perception of arrest and detention is slightly different. In the public mind, arrest is when the police think that someone may have done something and they charge them, and they could be questioned prior to that. Because of that perception, could there be damage to the reputation of people who are arrested but who do not go on to be charged?

Kenny MacAskill: No, I do not believe so. I understand and recognise where you are coming from. Many of the points that you make relate not to nomenclature or the statutory definitions of arrest or detention but to media profile. I am thinking of the example of a high-profile case in England a year or so ago—never mind the fact that, although I do not recall any prosecution against Nigella Lawson, every time I saw the television, I thought that she was on trial because that is how the media portrayed matters. That is for a separate debate and must be dealt with separately.

In Scotland, we must remember that the presumption of innocence remains sacrosanct. Although somebody may be arrested by the police, they are presumed innocent until a court case conclusively proves otherwise. I think that everyone in Scotland recognises that point, although, sadly, it sometimes does not appear to be portrayed in that way in the media.

It is correct that we move towards the European definition in relation to arrest and detention. The concept of detention is relatively new in Scotland, as Mr Pearson and Mr Finnie will no doubt be able to confirm. When I started my law degree, detention did not exist, but by the time I became a law apprentice, the Criminal Justice (Scotland) Act 1980 had come in, so what Charles Stoddart taught me was superseded.

Detention has been with us only since the 1980 act, and we are providing greater clarity in the bill. The bill provides clear definitions of arrest and detention, which are beneficial and will apply not only in Scotland, because they apply across other jurisdictions. However, we must also remember that those who are arrested on suspicion—it is on suspicion only—are presumed innocent. That will always remain the case, and perhaps we must all work with the media to ensure that that applies to people who are arrested for whatever reason. Indeed, as in the high-profile case to which I referred, sometimes people are not even arrested but simply interviewed by the police.

Elaine Murray: I understand what you are saying. From listening to the media in England, I myself have sometimes misapprehended what an arrest has meant when somebody has been taken in. I am thinking of the case that you mentioned. If the bill is enacted, are there ways in which we can tackle the public perception so that, if somebody is arrested, it is not presumed that they have done something?

Kenny MacAskill: Some of that might have to be for another day—dealing with the media certainly is—but the bill provides greater clarity. If we were to ask them, we would find that ordinary citizens in Scotland find it pretty hard to explain the difference between arrest and detention and why some people are arrested straight by the police and others are detained.

There is a desire, which is correct and comes from Europe, for a clear difference between detention, which is when someone is deprived of their liberty, and arrest, which happens at the outset. We are heading towards that. It might take some time, but it will be a lot clearer than the current situation in Scotland, where someone is detained under the 1980 act but can be arrested under common law, which is probably harder for people to understand. It will become quite clear that detention is when someone is detained and their liberty is affected, but the point of arrest is when there is the suspicion that an offence has been committed.

Greater clarity will come as we row back, perhaps, from what was introduced in 1980.

The Convener: I subscribe in part to what Elaine Murray says. I agree that it is a matter for the media, but I do not think that they will be contained in that way. Might there be room at some point to consider giving accused parties in certain cases the anonymity that is provided to the principal witness?

If we are going to move to people being arrested and not officially accused, the public will say that there is no smoke without fire in certain very serious cases. In the case in London to which you referred, the man's life was pretty well ruined. He had to change his appearance and all kinds of things. I presume that he has never got over the fact that he was tried by the papers and, to some of the public, will still have been found guilty by the press. Can we not do something in law that would provide protection?

Kenny MacAskill: That is a jurisprudential debate that we can have. The only caveat that I would add concerns the world of social media. Various high-profile footballers who have had court orders or anonymity south of the border have appeared on the front page of *The Scotsman* newspaper, albeit with some masking of their eyes, and anyone who had any passing knowledge of football knew who was being discussed.

I am always happy to look at such matters because they have great consequences. The difficulty is when such things happen in a different jurisdiction or the information is available on Twitter or YouTube. Even if there were a court order it would be pretty hard to enforce.

09:45

The Convener: Nevertheless, if one were to go in that direction, there would be a breach.

Quite rightly, we have protections for the principal witness in certain cases, particularly sexual offence and rape cases. All I am saying is that, in those circumstances, it may be worth considering allowing the accused protection, given that we will have in custody persons who are not officially accused, which seems to take it a step on from being about perception. I appreciate the difficulties with the media, but that applies to all our laws.

Kenny MacAskill: You are correct. Such protection applies at present to minors, unless the court were specifically to exclude that and allow for publication. At present, the young person's

name would not be published unless the court decided otherwise. These are matters on which we do not have a formal policy. We are happy to consider them and engage with the committee, the legal profession and, doubtless, the media and those involved in social media. You raise a legitimate and understandable point. As always, the devil is in the detail, especially in relation to social media.

The Convener: Oh, this committee knows that. The issue just popped into my head and I thought that there may be an opportunity to give it some consideration. I think that there is some traction behind the issue now. In certain cases at the moment, notwithstanding the protections that the court allows, people—on both sides, including witnesses—are tried by the media and have to live with that. There are issues there to be examined.

Margaret Mitchell: Good morning, cabinet secretary. Happy new year to you.

Kenny MacAskill: Happy new year.

Margaret Mitchell: On 1 October, the committee took evidence from various police witnesses. John Gillies of Police Scotland told the committee that the change from detention to arrest on suspicion would result in considerable additional training and resource requirements. Regardless of what you said about modernising and streamlining the law on detention, the feeling that we got from the police was that, due to the additional burdens that the changes would put on Police Scotland, they did not think that the changes were justified. Would you comment on that?

Kenny MacAskill: I do not think that that is Police Scotland's evidence. I have no doubt that John Gillies indicated that training would be required. We accept that and it will be factored into the timescales for the implementation of the legislation if it is passed by Parliament. Police Scotland supports the general thrust of the bill. Any change—whether to the 1980 act or in the 2014 legislation—requires officers to review and learn procedures. We have been through that with Cadder, when officers had to be given cards to read that referred to matters that they had perhaps not been taught about when they first passed through Tulliallan.

I think that Police Scotland is content and understands the obligations that go with any new legislation. That applies to every act of Parliament that we pass. The police have to take it on board and act accordingly.

Margaret Mitchell: I put to you what Calum Steele from the Scottish Police Federation said, which was that the case for a change relating to detention and arrest had not been made. He went on to say:

"I have yet to hear a cogent argument for why it makes something better to change terminology largely without changing content, and I fear that the consequence of the wrong information being recorded because officers are dealing with a new set of processes, even if the general principles of fairness are applied, could lead to cases being thrown out of court."—[*Official Report, Justice Committee*, 1 October 2013; c 3288.]

Kenny MacAskill: I do not believe that will happen. What Lord Carloway is proposing, which is part of a general direction within Europe, will make things clearer. We are moving from the current position, in which an officer has to decide whether to arrest somebody or detain them under the 1980 act. The bill will make it clearer. The officer will simply arrest someone on suspicion—it has to be a reasonable suspicion. The situation will be clearer for officers, although I accept John Gillies's point that officers will require to be given some training. I go back to the point first raised by Elaine Murray, on people's understanding of detention and arrest. At present, detention and arrest blur into each other. We should head towards the situation in which—as correctly encapsulated by Europe—arrest should be at a point when there is suspicion, and detention should be the deprivation of someone's liberty.

We will have to see how the media and the public interpret that approach but I think that it will give greater clarity than exists at the moment. If someone were to be detained by a police officer now, would they be arrested or detained? At the moment, the answer could be both. It would all depend on what the officer has decided and which act he was following. The situation will be clearer when the bill is passed because people will simply be arrested. There may come a point at which they will be detained but, to begin with, they will be arrested on suspicion.

Margaret Mitchell: In that case, you will not agree with Assistant Chief Constable Graham of Police Scotland, who feared that the new definition could prevent a person from being arrested in order to stop a crime. Are you quite satisfied that arrest on suspicion fully covers that?

Kenny MacAskill: Yes.

Margaret Mitchell: So you see no need for the power of arrest to prevent a crime to be implicit in the bill.

Kenny MacAskill: The Association of Scottish Police Superintendents was correct to express its concerns on the matter but I make it quite clear that the common-law powers of arrest, other than that changed by the formal statutory arrest procedure, remain and will always be available. The power of arrest to prevent a crime and indeed to ensure public safety remains.

Margaret Mitchell: But your opening statement suggested that you were seeking to clarify the

common law in statute. Surely this is an opportunity to make it clear that the power to arrest on the ground of prevention is within the powers available to the police.

Aileen Bearhop: In part 1 of the bill, we are making the common-law power of arrest a statutory power. Other common-law powers are not affected at all and will continue. Our concern about putting into the bill the power to arrest on the ground of prevention is all about what someone who has not committed a crime would be arrested for. The bill allows for someone who is committing a crime to be arrested.

The Convener: What if someone with a brick in their hand is standing next to a car window?

Aileen Bearhop: I think that that would come under intent to commit a crime.

The Convener: Under common law.

Aileen Bearhop: If the brick were sitting on the pavement and the person in question had not moved towards it, they would not have actually done anything.

The Convener: What if they have the brick in their hand and are looking at the car window? That situation would not be covered by this power because they would not be committing an offence. They might just be holding a brick.

Aileen Bearhop: The point at which the person in question becomes someone who will commit a crime is an operational decision for the police. They would be in the act of committing a crime.

The Convener: So someone standing with a brick in their hand looking at a car window would be committing an offence under the bill.

Aileen Bearhop: Yes.

The Convener: I am just asking because surely it would be difficult to know. After all, the person could defend themselves by saying, "I'm a brickie," or, "This is my car." Could you explain the common-law provision that deals with such a situation?

Aileen Bearhop: It does not come under common-law provisions. It is an operational decision about the point at which a person is seen to be committing a crime.

The Convener: Okey-dokey.

Aileen Bearhop: I believe that the Civic Government (Scotland) Act 1982 also contains powers to allow the police to pick up, say, a known housebreaker with housebreaking kit who is walking towards a building.

The Convener: What is "housebreaking kit"? A T-shirt?

Aileen Bearhop: The police can also pick up someone who is in a building they should not be in and who looks as if they are about to commit a crime. Other powers are available.

The Convener: I must apologise to Margaret Mitchell. I was just intrigued by the issue.

Margaret Mitchell: Perhaps I can tease this out a bit more. How does the new power to arrest on suspicion of committing a crime differ from arresting someone to prevent a crime from being committed?

Aileen Bearhop: I have just been handed a note—from the lawyers, I think—that says that there is a common-law offence of attempting to commit a crime and conspiracy. That will remain.

Kenny MacAskill: I think that we are getting into esoteric matters. If there is evidence to show that someone is conspiring to commit armed robbery, that person will be arrested. If someone is standing with a brick in their hand and it looks as though they are about to put it through a car window to take a handbag or whatever else might be lying around, they are clearly about to commit a crime.

The difficulties for police and law enforcement come, to some extent, from the position that there is no jail for thought, as such. There are people out there whom we think might be considering offending, but unless we can show conspiracy we are not really able to charge them.

Aileen Bearhop referred to specific statutory matters. For example, if someone is in the curtilage of a property or in a common close—in a stair where they do not live and where there is no reason for them to be—with a screwdriver in their back pocket, an assumption can be made, especially if they have previous convictions, that might mean that they could be detained. I am trying to remember whether that would be under the Civic Government (Scotland) Act 1982.

Aileen Bearhop: Yes, it would be.

Kenny MacAskill: The difficulty arises when people are thinking about offending. Unless that can be proved, or there is a risk of a sexual offence and we can get a sexual offences prevention order, or the person is subject to an order for lifelong restriction, there are difficulties, which present huge challenges for all jurisdictions. What would the person be charged with if they were arrested—"We think that you are thinking of committing an offence"? They would say, "What offence?" We might know that the person has a propensity for doing evil things. That causes great problems, which is why we created the SOPO, for example. However, if someone is standing with a brick or has gone into a common close with a screwdriver in their back pocket, that can be dealt

with and will be dealt with under the new statutory provisions.

Margaret Mitchell: Do you envisage that the police will need more training?

Kenny MacAskill: When any new legislation comes in, as happened post-Cadder, the police look to ensure that they can deal with it. What we are talking about will not happen in isolation; Lord Carloway has taken a position about matters from the point of first suspicion through to the ultimate appeal, so there will be a whole area in the legislation in relation to which the police will have to get trained up to deal with the changes.

The police will work through those matters, and we have had discussions with them. They will take time to ensure that training is given—some of it will be on the job, some of it will be online and some of it might take place at Tulliallan. That is a matter for John Gillies and the senior officer command team. As I said, post-Cadder, only a few years back, the police showed that they were able to deal with the situation and I do not think that people noticed a change in the quality of service in our communities.

Margaret Mitchell: Concern has been expressed about the provision whereby the person who is arrested must be taken to a police station as soon as is practicably possible. It has been suggested that the provision lacks flexibility. Will you comment on that?

Kenny MacAskill: That is to do with the interview. Apart from in exceptional circumstances, such as a kidnapping, in which access is denied—there will be very few such cases—a person who is arrested will be taken to a police station, where they will be advised by their letter of rights, which will be available in a variety of languages and scripts. Officers and senior officers will have to indicate whether the person is vulnerable because of their age, capacity and so on, and legal advice will be offered.

Margaret Mitchell: Lord Carloway recommended a less rigorous approach. He said that the arrested person should be taken to a police station only "when necessary". Why has the Government gone further?

Aileen Bearhop: I think that your first point was about the provision that a person should be taken to a police station

"as quickly as is reasonably practicable".

Is that correct?

Margaret Mitchell: Yes. I think that the implication is that every person who is arrested will have to be taken to a police station as soon as possible.

Aileen Bearhop: The wording is there simply in recognition of the fact that in some cases—for example, in rural areas—it might take longer to get the person to a station. As the minister said in his opening statement in the context of de-arrest, it is recognised that there will be cases in which the grounds for arrest no longer apply and the person should no longer be under arrest, so we will change the bill to ensure that the arrest can be stopped and the person can be released straight from the street without having first to be taken to a police station only to be sent home.

Margaret Mitchell: Lord Carloway said that a person should be taken to a police station only "when necessary"—never mind the de-arrest, which I think muddies the waters. I admit that I am not a great fan of the term "de-arrest", which sounds a bit confused.

Aileen Bearhop: I think that the reason for requiring that a person be taken to a station is the recognition that people must be accorded their rights. Individuals must be given access to a solicitor and proper recording must be done, so that the right process is followed.

Margaret Mitchell: If that happens for every crime, will that not change dramatically how things work in practice?

Aileen Bearhop: If the police could charge persons on the streets, they would not have to go to a police station.

10:00

Kenny MacAskill: Many of the challenges that we have faced post Cadder have related to statements or admissions that were made at the scenes of road traffic accidents or other such scenes when the person had not been cautioned, and the person who admits that they were the driver could incriminate themselves. I think that there is good reason for people being taken as quickly as possible to a police station and for ensuring that when the police want to interview a person it is done at a police station at the point of arrest.

We must have latitude, however. Scotland is not a uniform country; we have rural and isolated communities. Such challenges arise rarely, but I have heard of officers in Shetland, for example, having had to hire a boat in order to arrest someone who lived not on their beat but on one of the smaller islands. It takes time to get to those islands. On other, larger islands that are closer to the mainland there may be no lawyer present when a death has occurred in a section 1 road traffic accident, so we must ensure that there is latitude.

There must be fairness for the accused when the police have formed a suspicion. The person has a right to know that they have the right to legal advice, and I do not think that that can, in the main, be dealt with at the roadside or in the common close. Down at the police station, things can be formalised and a balance can be struck between officers seeking to interview people and advice being made available to those who may or may not wish to make comment.

Margaret Mitchell: For the avoidance of doubt, convener—

The Convener: I want to move on. I have a list of members who want to speak.

Margaret Mitchell: Are you saying that, under the bill, every person must be taken to the police station at some point?

Aileen Bearhop: That is not so if the officer decides that they can charge the person immediately—in which case the person can be charged and then released for appearance in court at a later date.

Kenny MacAskill: That process is for dealing with very minor matters. We know the challenges that police officers face, for example when they encounter somebody urinating in the street at night. That is unacceptable behaviour whether it is being done in their own close or wherever. It is downright offensive. Do we need to take officers off the streets to take such people back to the police station? We might if their behaviour became more unacceptable, but the officers might just be able to deal with the matter there and then. We must provide the flexibility to allow officers out on the streets to make that decision.

If somebody needs to be taken off the street and interviewed, we must balance their rights. If their behaviour is unacceptable but can be dealt with at a later date, we can move on. They do not have to accept the ticket—they can challenge it—but the matter can be dealt with later. The bill provides flexibility for the police officer in such circumstances.

The Convener: Thank you for that full explanation. I want to move on to supplementaries on this line of questioning.

Roderick Campbell (North East Fife) (SNP): You have covered most of what I was going to ask about in your most recent response, cabinet secretary.

The Scottish Human Rights Commission has suggested that there should be more statutory definition of the reasons for which someone can be taken to a police station. Will you comment on that?

Kenny MacAskill: We are happy to consider that, but the SHRC would have to spell out what it is suggesting. We have had discussions with it to ensure that, through the letter of rights, people will understand what is happening to them, what their rights are and what may happen thereafter. Other than that, the best thing that we can do in the circumstances is let people know that they have a right to additional advice, if they want it, through access to a lawyer either by telephone or in meetings, depending on the views and wishes of both the individual and the legal representative. I think that that is the best way of addressing the matter.

John Finnie (Highlands and Islands) (Ind): Good morning, cabinet secretary. You said that common-law and statutory powers of arrest have served us well—I think that that was the term that you used. You went on to say that the common-law powers remain. On the changes that have taken place, do you think that the 1980 detention legislation was an improvement on the previous legislation?

Kenny MacAskill: I do not think that I am able to comment on that. I did my evidence and procedures in 1977 and the detention act came in in 1980, so my life as a practising lawyer started with the 1980 act coming in. It was just kicking in when I was a law apprentice—I was the last of the jurisdiction of law apprentices before the move to law trainees. So, I had a historical training from Sheriff Stoddart on the common law from Sheriff Gordon's textbook, but all my practising life we have had detention, so I do not think that I am best qualified to comment. What that shows, however, is that detention has not been with us forever. Regardless of whether people were arrested or detained, to some extent what mattered was that they were down the police station.

John Finnie: Of course, prior to 1980 people who were down the police station "helping police with their inquiries" had a very indeterminate status. The 1980 act formalised an arrangement, which I would have thought the legal profession welcomed.

Kenny MacAskill: "Helping police with their inquiries" was a euphemism that could have a variety of meanings, some of which were perfectly acceptable but some of which began to go to the margins of what would be viewed as acceptable. Greater clarity was provided.

That is why Lord Carloway went away and looked at matters. He is quite correct that, from the public's perspective—and sometimes even from the perspective of a police officer—it might be an arbitrary judgment call as to whether someone should be arrested or detained. Equally, if people are in police custody, various things have to kick in, particularly access to rights and the availability

of legal knowledge. Therefore, we could not and should not go back to a situation where people are "helping police with their inquiries."

John Finnie: I agree. Do you acknowledge that the purpose of the power of arrest would change if the bill goes through? What would the purpose of the power of arrest be?

Kenny MacAskill: I do not think that it would change, necessarily. Police officers detain people when they think that a crime has occurred, or is about to occur, and they have to intercede. There are, doubtless, instances—John Finnie has probably experienced this more than I have—when officers have had to decide whether to detain someone under the statutory powers or to arrest them under common law. The bill makes it clearer that officers will simply arrest on suspicion. The basis will not be flimsy, however. People will not be arrested because the officer does not like the cut of their jib or their gait. Something will have to have happened; there will have to be a clear reason.

Immediately on a person's being arrested, rights will kick in, because we have to retain balance. The bill provides greater clarity—certainly for the man or woman in the street, who probably would not understand whether the person had been detained under the statutory powers for six hours or whether they had been arrested. All that they would know is that their son, husband or whoever was down at the police station.

John Finnie: Section 1(1) of the bill states:

"A constable may arrest a person without a warrant if the constable has reasonable grounds for suspecting that the person has committed or is committing an offence."

Given that, do you think that there is any possibility of a reduction in people being reported for summons?

Kenny MacAskill: No. I think that it will come down to good practice. We do not want officers to be off the street when they could instead deal with situations by issuing fixed penalty notices or in a variety of other ways. This is simply about allowing officers to use their discretion so that matters can be dealt with in other ways, such as giving information or issuing a fixed penalty notice. We want to keep that rolling.

It is a matter of balance. If someone's behaviour has been unacceptable and can be dealt with by a fixed penalty notice, we think that that person would prefer to accept that notice and then go away suitably humbled to being taken down to the police station for many hours. It will come down to how the legislation is implemented in practice, but I have no reason to believe that the police will not continue to use their discretion, which I believe is at the core of policing in Scotland.

John Finnie: I agree that discretion is the strongest power that any constable has.

Section 1(2) qualifies the power of arrest by stating:

"a constable may arrest a person under subsection (1) only if the constable is satisfied that it would not be in the interests of justice to delay the arrest in order to seek a warrant".

Section 1(3) lists the circumstances in which that would be legitimate. If the common-law powers of arrest have served us well and will be in place, why does section 1(3) not refer to the common-law powers of arrest, rather than being worded as it is?

Aileen Bearhop: We recognise the need to be clearer in law about what police officers are arresting for. The bill is clearer in that regard than the current position, in which some police use common-law powers of arrest because they are not entirely sure what the proper statutory power of arrest might be.

John Finnie: I acknowledge that I might be extremely rusty on this, but aspects such as someone having no fixed abode or their giving a name and address that are believed to be not correct do not seem to feature in the bill.

The Convener: What about the catch-all phrase,

"otherwise obstruct the course of justice"?

Does that help?

John Finnie: My question is this: if the common-law powers have served us well, why are they not reproduced in the bill?

Aileen Bearhop: We considered that the wording of that particular provision was sufficient for the purposes of arrest in Scotland.

John Finnie: So, just to clarify, will section 1(3) supersede the common-law powers? Are we in for one of those many legal debates?

Aileen Bearhop: There will be no common-law powers of arrest.

John Finnie: I am sorry, but I understood the cabinet secretary to say that those powers will remain.

Aileen Bearhop: There will be no common-law powers of arrest. In response to a question that came up earlier, we talked, in terms of prevention arrangements, about there being common-law powers regarding attempts to commit crimes.

Lesley Bagha: Just to clarify, in talking about the difference with common-law powers, the ones that are remaining are not criminal common-law powers or offences. They are still there as statutory offences; it is just the common-law power

of arrest that is being replaced by a statutory power in the bill.

John Finnie: So, if the bill is passed, the common-law power of arrest will cease. Is that correct?

Aileen Bearhop: Yes.

John Finnie: Okay. Thank you very much.

Sandra White (Glasgow Kelvin) (SNP): Good morning everyone and happy new year. I think that a number of my questions have already been answered.

The Convener: Excellent. So this will be a short question.

Sandra White: I have supplementary questions. To go back to the first point about detention and arrest, which I thInk has had a very good airing, I just want to pose to the Cabinet Secretary for Justice—and perhaps to committee members, as well—a particular question. We are talking about people being innocent until proven guilty and the different terminology, but I just wonder whether you would agree that there is also a responsibility on the media and press. The convener mentioned the fact that we could perhaps look at some way of explaining it. Do you agree that the media also have a responsibility with regard to people being innocent until proven guilty when this law comes in?

Kenny MacAskill: Absolutely.

The Convener: Can I just stop you, cabinet secretary? Can we have questions on the bill?

Sandra White: The question is on the bill.

The Convener: No.

Sandra White: I am sorry, convener. The question is on the bill. It is about people being detained or arrested. We have discussed it.

The Convener: I think that we have pretty well examined the role of the media and the fact that we cannot deal with the media in this bill.

Sandra White: I am sorry, convener, but—

The Convener: I will let you go on.

Sandra White: Thank you very much, convener.

The Convener: You are looking peeved.

Sandra White: I was third to come in for a question, but unfortunately I am now about sixth. I am not bothered about that. I just want clarification on a point.

The Convener: Forgive me, but I think that you are bothered because you have mentioned it. Your colleagues came in for supplementaries. If you had asked for one, I would have allowed it.

Right. On you go.

Sandra White: I just want clarification on the point that I raised. Do you agree that the media have a role, and that they have a responsibility to people who are innocent until proven guilty?

Kenny MacAskill: Absolutely. As the convener said, that is a jurisprudential argument, but people are innocent until proven guilty, which should be reflected. Clearly, the courts have powers if matters are reported inaccurately; occasionally editors are summoned. In the main, we try to ensure that we get that balance right.

Sandra White: My next question may be a supplementary question. It is on what Margaret Mitchell said. Again, the first premise of any justice system is that people are innocent until proven guilty, and that obviously applies to where there is suspicion that a crime has been committed. In that regard, we talked about the housebreaking kit, for example. John Finnie and Graeme Pearson obviously have a lot more experience in such areas and I think that, by the looks on their faces, they will certainly come up with more issues. We have talked about suspicion of crime, cabinet secretary, and common law and the new law that will come in. Will the new law protect the police as well as suspects, and make it clearer for the police that they have a power of arrest?

10:15

Kenny MacAskill: The intention is that the bill will make it clear that the common-law power of arrest for offences will be repealed and replaced with a power of arrest on suspicion of having committed a crime. All other common-law powers will remain. An issue was raised by the ASPS, understandably, about the powers that officers would have if someone was about to jump off a bridge, for example. The powers will therefore remain for the police to protect people from harming themselves and others.

The bill will provide greater clarity and certainty and will allow us to avoid situations such as the ones that John Finnie mentioned. Inviting people to come to the police station when they did not feel that they could decline was inappropriate, and people did not have certainty. Post Cadder, we have made sure that we provide access to lawyers and information about rights. The bill will make the situation clearer and retain that which was sought by ASPS, which is the general catch-all question about what the police do when they think that something dreadful is about to happen, but it is not necessarily a criminal offence.

Sandra White: Thank you, convener.

The Convener: Not at all. That was very graciously said, Sandra.

Alison McInnes (North East Scotland) (LD): I turn to custody of suspects prior to their first appearance in court. You will recall that the Carloway report outlined concerns about the length of time for which some suspects are held in custody, particularly during bank holidays and long weekends. During our evidence sessions, a number of witnesses raised concerns about whether we could continue to comply with article 5 of the European convention on human rights if that continues. What practical measures are you putting in place to ensure that people are not held in police custody for unacceptably long periods?

Kenny MacAskill: We have, for example, courts that sit on Saturday when there are public holidays. We have a working group that is led by Police Scotland, and which also includes the Scottish Court Service and the Crown, to consider what can, should or might be done relating to what are called Saturday courts; I have never heard anyone suggest that there should be a Sunday court. That is being looked at because I am aware of the pressures on courts, and on those who do the detaining as well as those who are being detained. I am happy to keep the committee apprised as that progresses.

Alison McInnes: Are you comfortable that we do not need a stronger legislative framework within the bill to cover the concern?

Kenny MacAskill: It is more a matter of practice than of the legislative framework. We need to see whether the problem can be worked out without putting the specifics in the legislation. There is a general understanding that there are pressures on the system.

Those concerns do not just come from the police who detain individuals. I get complaints from sheriffs about Mondays when courts can sit well into the evening, which affects everyone involved. I do not think that we require any legislative change. The situation is not straightforward or simple; for example, employees' terms and conditions have to be considered, as do a raft of other matters. The Crown has to be brought in because if someone is arrested for an offence on a Friday and is in court on the Saturday, the indictment or complaint has to be prepared. The detail is important.

We recognise the desire that Lord Carloway encapsulated; I sympathise with him. We just have to make sure of the practicalities if someone is to appear in a court on a Saturday. Is the fiscal's office open? Are staff available? Can the issue be dealt with by the following morning? I do not think that legislative change is needed, but I assure the committee that the working group is up and running and that I will meet officials regularly.

Alison McInnes: I accept what you say about not needing legislative change, but I am not sure that there is enough momentum in the system at the moment. Clearly, your responsibility is to ensure that the legislation complies with the ECHR. Do I have your assurance that you will take a keen interest in the issue?

Kenny MacAskill: Absolutely. I will meet the chief executive of the Scottish Court Service later this week; I am more than happy to take on board points that the committee might wish to make about the desirability of Saturday courts. I will also be happy to feed back to the committee.

Alison McInnes: I have one more question to ask, if I may, convener.

Sections 31 and 33 of the bill deal directly with protecting the rights of child suspects. Can we consider the age of criminal responsibility? I know that your Government's 2012 publication that reported on its action plan to deliver progress against the 2008 concluding observations of the United Nations Committee on the Rights of the Child said that you would

"give fresh consideration to raising the age of criminal responsibility from 8 to 12 ... in the lifetime of this Parliament."

It seems to me that the bill is a good bill to do that. Why did not you choose to do that in the bill? Will you consider lodging an amendment to address that anomaly?

Kenny MacAskill: I think that we would require to consult. We have raised the minimum age of prosecution, which was always unacceptable and was not applied in practice, to 12, and we are aware of the calls for the minimum age of criminal responsibility to increase. We are happy to see what we can do within the lifetime of this session of Parliament, but I do not think that it would be practical to raise the age in the bill, especially given that consultation will have to take place and that there are disputes about what that age should be.

Alison McInnes: There was extensive consultation in the run-up to the bill. Would it have been sensible to take forward such consultation at the same time? What is behind your reluctance?

Kenny MacAskill: I do not think that we are in a position to do that at the moment. We must consult on the matter, and we are happy to work to have that dealt with within the lifetime of this session of Parliament.

Not everything can be included in the bill. There is a limit to the on-going consultations that we can have at any one time. As I said, we have addressed the minimum age of prosecution. There are understandable concerns about the age of

criminal responsibility, and we are happy to give an undertaking to work on that.

Alison McInnes: Thank you.

The Convener: I think that Elaine Murray has a supplementary question.

Elaine Murray: Yes. Does the bill achieve an appropriate balance by allowing 16 and 17-year-olds to consent to be interviewed by the police without a solicitor being present?

Kenny MacAskill: I think that we have struck the correct balance. Those under 16 clearly are protected—Lord Carloway is right about that—but we have recognised as a Parliament and we recognise as a Government that 16 and 17-year-olds in Scotland are in a different position. They still have to be protected, but they can marry, pay taxes or join the army. Clearly, they must have advice, which is why I think that we have the correct and appropriate balance. They would have to have the presence of a responsible adult—that would have to be taken on board—before they could renounce anything.

We take the view that protection is sacrosanct, so to speak, for under 16s. Given the position that 16 and 17-year-olds have and the rights to which they are entitled in Scotland, however, while we provide that protection we also have to give them some responsibility to be able to overrule if they have taken advice on board from a responsible adult.

Elaine Murray: In the recent Victims and Witnesses (Scotland) Bill, we defined a child as a person up to the age of 18. We received evidence from witnesses, such as the Law Society of Scotland, who believed that somebody who is under 18 should not be able to waive that right.

Kenny MacAskill: We have had on-going debates about things such as the age at which people should have the right to vote in the referendum and the age at which people should be able to drive a car. We live in a world in which people can get married at 16, cannot drive a car until they are 17, cannot drink alcohol until they are 18, and cannot get a high-powered car until they are probably around 25 or 27, given the insurance issues.

We take the view that we have to protect those who are under 18. Those who are under 16 are in a specific position that has to be protected. Those who are 16 or 17—whether because of their voting entitlement that will come not only in the referendum but probably across the board, marriage or whatever—should have some ability to overturn that position so long as they have the benefit of some responsible advice.

John Finnie: Cabinet secretary, the Scottish Human Rights Commission raised two issues, the first of which relates to the information to be given to suspects. It seeks—and I hope that you support—a simplification and strengthening of the advice that is given to suspects. Will you consider that?

Kenny MacAskill: I think that we have done that. The letter of rights has been drafted and, as far as I am aware, the SHRC is happy and content with it. Part of the issue is then about how it is made available. As I recall off the top of my head, it comes in something like 34 different languages and in a variety of scripts. Everything that can be done is being done to make the information as readily available as possible, and to make it available in a manner and format that is understandable.

John Finnie: Are the levels of illiteracy among people who find themselves in custody being taken into account?

Lesley Bagha: I can add to what the cabinet secretary said.

I note that the letter of rights has been used in police stations since July. It is the plain English version at the moment. As the cabinet secretary said, the letter has been translated into 34 languages, and we are now looking to roll out those versions to address the point that you make and to ensure that suspects who have special needs, particularly those who are vulnerable, have access to the letter in additional formats. We are going to set up a couple of groups, including an advisory group with third-sector organisations that deal with such individuals, to ensure that we have the most appropriate formats so that the letter can be as effective as possible in practice.

It is not yet a statutory letter of rights, but that is on-going work. The letter of rights will need to be amended again if the bill is passed and the rights are enhanced, but that work will continue over the next few months.

John Finnie: That is welcome. Could the committee be kept apprised of the progress of that work, please?

Lesley Bagha: Absolutely.

John Finnie: Thank you. The second point is on access to legal advice and whether it is made clear to individuals that they have the right to face-to-face contact with a solicitor and not just the right to speak to them. I acknowledge that there are challenges regarding geography—they have been alluded to in relation to other matters—but can some regard be paid to that? The role of a solicitor is not simply to give advice; sometimes, it is to check on the conditions in which individuals are being held.

Lesley Bagha: If I may, I will answer that question as well. We are trying to keep some

flexibility in the bill. The normal default would be that the suspect has the right to choose, but we did not want to place too much in the bill to say that the contact has to be face to face because it might be that, in some circumstances, that is not appropriate. If the suspect is going to be—

John Finnie: In what circumstances would it be inappropriate for a suspect to be given advice in that way?

Lesley Bagha: It may be that they speak to their solicitor and their solicitor does not think that it is necessary for them to come out. The suspect may not be being questioned.

The aim is just to keep some flexibility. If the suspect is being questioned, there is a right for the solicitor to be present, which is an enhancement from the current position. It may be that in many cases a telephone call is sufficient, although there may be other circumstances where that approach would not be appropriate. The suspect would be told that they have a right to speak to their lawyer. They would discuss the matter with their lawyer, and their lawyer might choose to come down.

The aim is to maintain flexibility. The bill enhances the right to legal advice for suspects who are taken into custody. We want to ensure that it works effectively in practice for all those who are involved, and particularly for persons who are in custody, according to what is appropriate in individual cases. In most cases, it is for them to decide what is appropriate.

John Finnie: Will you clarify whether discussions have taken place with the Law Society? It previously made representations on the circumstances that you have mentioned, where an accused changes their mind and a question arises about the reimbursement of fees to a lawyer who has travelled a distance only to find that the contact has been cancelled.

Lesley Bagha: We have spoken to the Law Society about the bill. The legislation enables a suspect to change their mind. It may be that, initially, they do not want to take legal advice and that, having been informed of their rights, they say, "No, I want to waive my right to legal advice", although that cannot happen in the case of certain categories such as vulnerable persons. However, even if they choose to waive their right to legal advice, the bill does not prevent them from changing their mind, saying, "I've now decided that I want to obtain legal advice", and asking for their solicitor to be contacted.

Kenny MacAskill: Some of this is a matter of custom and practice for lawyers. When I practised and I got a call from an officer such as you, Mr Finnie, or Mr Pearson in the early hours of the morning, if it was a serious charge, the likelihood was that I would go down, but if it was a less serious charge or it involved somebody with past experience, I basically went back to my bed—

The Convener: That is too much information.

Kenny MacAskill: What we find is that lawyers speak to their clients and give them advice over the phone. If they feel that it is appropriate for them to attend because of the nature of the charge or the nature of the client, they will attend. A lot of decisions to deal with matters by telephone come from lawyers themselves, who have no desire to go to the police station.

John Finnie: Absolutely, but if someone travels 30 miles to a police station and arrives there only to find that the accused or the suspect has changed their mind, will they be reimbursed?

Kenny MacAskill: That would be a matter for the Scottish Legal Aid Board. I do not know the particular rules or regulations there, but—

The Convener: We are wandering off the bill here.

John Finnie: Are we?

The Convener: Yes.

John Finnie: All right. I will be guided by you, convener.

The Convener: Legal aid costs are not in the bill.

Kenny MacAskill: We have the duty agent scheme and the contact line that the Scottish Legal Aid Board has set up.

10:30

John Finnie: Okay.

The Convener: Legal aid costs are not in the bill, John—they are covered in another bill. You are giving me a quizzical look, but I am telling you—that is the fact.

Sandra White has a supplementary question.

Sandra White: Yes, I do.

The Convener: It had better be a supplementary question—I feel that I am being tested this morning.

Sandra White: I feel as though I am in court or on trial—

The Convener: You are close.

Sandra White: But thank you very much convener—this is a supplementary question.

I was very interested in what Ms Bagha said about working with the third sector to give information and advice. From past experience on other committees, I know that there was a problem with people who are deaf and dumb being able to

get interpreters and suchlike. Would you be looking at the voluntary sector being able to work with them? Can we get an appraisal of that approach?

Lesley Bagha: Yes. I am aware that there is also another EU directive about interpretation, but that might be separate from languages. We have not yet set up the group to do this, but the first thing to do is to identify the groups of people currently in custody who are most in need of information in other formats. One of our first tasks is to identify our priorities. Over the next few months, once the group is set up and we have identified where other formats may be appropriate, we will be more than happy to write to the committee to let you know about that.

The Convener: That is close to the bill, but we are drifting a bit. An arrest is challengeable—all these processes are challengeable if the party does not understand the proceedings.

Sandra White: You are awfy tetchy this morning.

The Convener: I am not tetchy. I am just trying to keep to the facts of the bill and not drift into other areas—interesting though they are.

Roderick Campbell has a question. I hope that it relates to the bill—I am sure that it will, given that he is an advocate.

Roderick Campbell: It definitely relates to section 14 on investigative liberation.

Section 14(2) states that

"If releasing the person from custody, a constable may impose any condition that an appropriate constable"—

that is deemed to be an inspector—

"considers necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence."

There seems to be a right to apply to a sheriff to have the conditions reviewed if there are concerns about them. Is it your view that the bill says enough or balances the rights of an accused sufficiently in these circumstances? For example, if, as has been suggested by one witness, curfew conditions were imposed, which would certainly have an impact on liberty, is there enough balance in the bill to protect the rights of the accused?

Kenny MacAskill: I am happy to take on board any thoughts that the committee may have, although ultimately I think that these details have to be considered by the court. To some extent, it is about the ability to get the issue to court: if we are looking at the rights of the accused, there has to be some form of appeal and the appeal on the decision of the senior officer, albeit that it is not a formal legal appeal, would be to the court.

In years to come, the courts will no doubt set down what they view as appropriate. Some of these things have to come from working parties. On a lot of issues the concern has also perhaps come in relation to the rights of victims of domestic abuse to ensure that people who are being released will not return to the matrimonial home or into a certain area. Some of the issues are best dealt with at a local level, where senior officers will work with the judiciary to get an indication of what is acceptable and how they wish to deal with matters. Equally, when the conditions are not acceptable, we have to enable the accused to get to court as quickly as possible to challenge them.

I am open to providing greater detail in the bill, but I find it difficult to see how the issue could be dealt with, because a lot of the conditions might be geographically specific or specific to individuals and might relate to the nature of the curfew or the street or address that the accused cannot go to. Understandably, in cases of prolific shoplifting it may be that the accused is denied access to the town centre or, if it is an assault, they may be denied access to a housing scheme. I am open to any thoughts or suggestions.

Roderick Campbell: Is the 28-day period right? Police witnesses have suggested that they should be able to apply for a longer period.

Kenny MacAskill: The 28-day period is what Lord Carloway came back with. I think that, in the main, 28 days should be sufficient. There may be challenges on some aspects related to forensics or other issues, but as you said at the outset we have to balance that with the rights of the accused.

Again, I am happy to hear and take on board members' thoughts on the matter, but the 28-day period seems appropriate and reasonable to me. I certainly think that the accused and, indeed, victims and witnesses need finality and certainty, and given that the people concerned will be in something of a limbo we need to keep things tight.

Roderick Campbell: Do you think that the 28-day period will have significant resource implications? Some have suggested that the whole investigative liberation scenario will have a resource implication.

Kenny MacAskill: I cannot for the life of me see why it should. After all, no matter whether the person was remanded or detained, the police would probably be doing the same work anyway and making further inquiries either through technical means such as computers or forensics or through investigatory means and dogged police work. What investigative liberation does is provide greater flexibility for the person under suspicion.

Roderick Campbell: I also have a short question about post-charge questioning.

The Convener: Before you ask it, Mr Campbell, I would like to get the issue of investigative liberation straight in my head.

At that stage, the person will have been arrested but not officially accused or charged of anything, but will there be a crime—say, attempted burglary—that can be labelled or defined as such? My concern is that, if a person is arrested under investigative liberation, the police might—to use common parlance—try to find something to pin on them. In that case, it might be like a fishing warrant. Am I on the wrong path? Will the investigation in question be pretty narrow?

Aileen Bearhop: The person in question will have been told the general reason for their having been arrested.

The Convener: What do you mean by "general reason"? How broad would that be?

Aileen Bearhop: It would be as it is now—[*Interruption*.]

The Convener: I beg your pardon. Did you want to say something, Roderick?

Roderick Campbell: I think that section 14(1) gives some indication, convener. It has to be "a relevant offence".

The Convener: Yes, and it also includes the phrase:

"by virtue of authorisation given under section 7".

However, section 7 just mentions

"a person ... in ... custody ... arrested without a warrant, and"

who

"since being arrested ... has not been charged with an offence".

It does not say that the reason has to be pretty specific.

Jim Devoy: We have to be clear about the purpose of the criminal procedure that the police will be undertaking at that point, which will be to investigate a crime.

The Convener: Yes, but what crime are we talking about? Will the person under the investigative liberation procedure—or indeed their lawyers—have any clear idea of what on earth they have been accused of?

Jim Devoy: The police will be clear about the complaint that they have received in relation to the offence that has been committed. The charge might change based on the investigation and the information that is gathered, but the police will be clear about the investigation that they are undertaking and the suspect will be clear about what the investigation relates to and what the alleged offence is.

The Convener: What would happen if something else turned up that had nothing to do with what the person in question had originally been arrested on suspicion for? Could that form another investigation?

Jim Devoy: Yes. As happens at the moment, that would be a separate matter that would be dealt with separately.

Kenny MacAskill: The usual view of caution and charge is that it relates only to the reply that is given at the time. However, if someone is arrested or detained, cautioned and charged on breach of the peace and other matters come to light, the complaint or indictment served by the Crown can differ significantly from that to which the caution and charge relates. As I have said, the caution and charge relates only to the reply that is given at the time.

The Convener: I understand that, but is investigative liberation like having a search warrant? Does it involve digging into material things, looking at people's computers and cupboards or going into their factories or whatever?

Aileen Bearhop: It gives the police time to undertake their investigations and acknowledges that in a modern society such investigations can be rather more complex.

The Convener: I understand all that, but will police officers and so on still have to apply for a search warrant?

Aileen Bearhop: Yes.

Kenny MacAskill: Absolutely.

The Convener: But might the investigative liberation procedure supersede all that?

Aileen Bearhop: No.

Kenny MacAskill: No, it will not change the warrant procedure. However, it will avoid the accused being remanded or the police not having specific evidence in a world where, as Aileen Bearhop has made clear, we have access to computers, forensics and so on. It does not give them any right to go in and do anything that would otherwise require a warrant.

The Convener: Thank you—that is clear now. The issue had concerned me.

Margaret Mitchell: Cabinet secretary, I seek clarification of the logistics of how investigative liberation would work. It would cover a 12-hour period but could be for an hour or half an hour at a time, and someone could be released but be officially under suspicion all that time. They could be brought in for two hours and released, and then brought in for another half an hour and released again over a 28-day period. Are you confident that

the information technology system that is being developed by Police Scotland as we speak will be able to cope with that? The Scottish Police Federation has raised real concerns about that, and we have raised the issue in the Justice Sub-Committee on Policing. It seems to me that a very complicated set of recordings could be required.

Kenny MacAskill: I am confident that the IT system will be able to cope. In the main, people will be released for a period of time before they return, which will allow the police time to investigate. I think that you are mixing up investigative liberation with periods of detention. As we know, the computer system requires to be upgraded. That is a priority for Police Scotland and it will ensure that the system is fit for purpose to deal with both the current and future issues and challenges.

The Convener: Roderick Campbell has a different question.

Roderick Campbell: I have a short question on post-charge questioning. The Scottish Human Rights Commission takes the view that the bill should state that no adverse inference should be taken from silence. What is your view on that in the—we hope—relatively rare circumstances of post-charge questioning?

Kenny MacAskill: That seems to be the current position: more and more, interviews in the presence of a lawyer and under caution are dealt with by the simple response that, on the advice of their solicitor, the person has no comment to make. That may be the advice in the context of post-charge questioning just as in the context of judicial examinations, which were the previous way in which the matter would have been dealt with.

In my limited involvement with judicial examination, the advice that I gave to my client was that they should say that, on the advice of their solicitor, they had no comment to make. No real questions can be asked if that is the line that the accused takes, so I do not see how any inference can be drawn.

Lesley Bagha: The position on post-charge questioning is very much the same as the position on pre-charge questioning, which takes place before somebody is officially accused, in that there is a right to silence and the person does not have to say anything.

Under the current legislation, when there is a judicial examination, rather than the possibility of adverse inference as such there is a provision that enables, in certain circumstances, comment to be made during a trial as a result of something that happens at the judicial examination. The legislation tends to have to enable comment to be made rather than it being the other way about. Therefore, rather than the legislation saying that no adverse inference should be made, it is assumed that there is a right to silence and that people have a right not to say anything.

Roderick Campbell: That answers my question. Thank you.

Elaine Murray: I have a question on section 33, on the support for vulnerable people, particularly in relation to people who are suffering from a mental disorder, which is defined as having

"the meaning given by section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003".

Section 33 requires a constable to assess whether intimation should be sent to a person who is

"suitable to provide the support."

The constable must also assess whether the support is required. Is it not rather a burden on the constable involved that they should, for a start, be aware of the definition of "mental disorder" in the 2003 act?

Kenny MacAskill: We have had the definition for a considerable time. A mental disorder is defined as a "mental illness", "personality disorder" or "learning disability", and there is tried and tested practice according to which the police have been assessing the vulnerability of suspects, accused, victims and witnesses for many years. I tend to think that the term "mental disorder" is perfectly understandable. We are not asking police officers to act as psychiatrists; we are asking them simply to make an assessment of somebody's ability. That has been routine custom and practice and has worked well.

Elaine Murray: You do not agree with the Law Society's concerns that it might be difficult for a constable to assess whether somebody has such a condition.

Kenny MacAskill: No. Over the years, officers have shown their ability to make an appropriate assessment and, as I said, when they have doubts on aspects they go to a police surgeon.

The Convener: Right. I am going to stop this section. I thank the other witnesses; the cabinet secretary is staying. We will suspend for two minutes to allow the officials to change places before we move on to the next sections.

10:45

Meeting suspended.

10:46

On resuming—

The Convener: We will press on, because we are dilly-dallying a bit today. We move on to parts

4, 5 and 6. In addition to the cabinet secretary I welcome to the meeting Elspeth MacDonald—I beg your pardon; I am not welcoming her at all, as I have done that already. Wait a minute. Where am I going? She is still here, but in addition—I will need to learn to read my script—I welcome Kathleen McInulty, policy officer, criminal justice bill team; Philip Lamont, head of the criminal law and licensing team; and Ann Thomson, head of the workforce sponsorship unit. I still have Lesley Bagha and, of course, Elspeth MacDonald. We have settled it now. Thank you.

I will move on to questions. What am I doing now? It is sentencing and—

Roderick Campbell: Appeals.

The Convener: Sentencing and appeals and so on. Right.

Elaine Murray: I have a question on delays in appeals. Why do the bill's provisions concentrate on the initial stages—the late notice of appeal and so on—rather than the progress of appeals? I am sure that the cabinet secretary will remember the case of one of my constituents, Adam Carruthers, who was convicted of rape of a couple of people who were also my constituents. There was a series of appeals that dragged on and on. At that time, I had quite a lot of contact with one of the victims, who felt that the appeal process was an additional burden on her as she had to relive the crime. The bill does not seem to address that part of what is often a very traumatic—

The Convener: Can I ask whether those proceedings are concluded?

Elaine Murray: Yes. The person has served his sentence and has been released, so we can discuss it.

That part of a victim's experience, when the appeal process can continue to torment the victim, does not seem to have been addressed.

Kenny MacAskill: You make a fair point, which is why the bill has to take cognisance of the rights of victims and those involved in the court process. On-going appeals, which there have to be as a consequence of the ECHR, which I think nobody challenges, have caused families significant pain and had a significant impact on them.

There are two things. One is that we must have some certainty and clarity for those who seek to appeal and those who are affected by that—the victims—which is why Lord Carloway has correctly put in specific timescales that apply other than in exceptional circumstances where there is a reason why an appeal has not gone in.

Some of the other aspects that you touched on relate to case management, which is down to the judiciary. Some of that will be dealt with through, and will I hope benefit from, court reform. It is down to individual case management by the appeal court and the judiciary.

I think that we have struck the right balance. The Lord President and the Lord Justice Clerk both understand that delays affect not simply the rights of the accused but the rights of the victim. You made a fair point, but the latter aspect is more about case management; the other aspect relates to what has to be in the statutory provisions.

Elaine Murray: So the bill is not the place to deal with the latter aspect, because it is not a legislative issue.

Kenny MacAskill: Government and Parliament would always hesitate to get involved in case management and how proceedings run in court. Aspects of evidence and how long the case should run for should be dealt with by those who are, quite correctly, set up independently. That is why we passed the Judiciary and Courts (Scotland) Act 2010.

What we are doing here is giving the accused clear intimation of what the timescales are for marking an appeal against sentence or conviction or both. That also makes it clear to victims that if an appeal is not in by a specific time, it will not come in—barring exceptional circumstances.

I understand the point about on-going delays in an appeal, but some of that has to be left to those who are administrating it. If new evidence has to be obtained, that issue has to be left to the courts. I think that we would face difficulties if we said that an appeal has to be dealt with within a period of X. If someone said, "I've got to get additional evidence", it could be a period of X plus Y.

Elaine Murray: While we are on that topic, we had evidence from the Law Society that the exceptional circumstances test might be unduly restrictive. Are you able to comment on that?

Kenny MacAskill: I do not believe that it is. It is for the judiciary and the appeal court to interpret that, but I think there is common parlance of what is viewed as exceptional circumstances. The fact that someone just could not be bothered or had not quite made up their mind does not constitute exceptional circumstances. Ill health or clerical error could constitute exceptional circumstances. I think that the appeal court can work with the test and solicitors clearly understand that exceptional circumstances are beyond something that just did not fit in with someone's schedule.

The Convener: Is that not the case anyway just now? Is that not the way the court behaves anyway if there has just been sloppiness on the part of an agency?

Kenny MacAskill: Yes, which is why we decided not to go down the route of sanctions. It is

a matter for the administration of the system by the courts or those in professional practice.

John Pentland (Motherwell and Wishaw) (Lab): Section 71 talks about extending the maximum term for weapon offences from four to five years. At the committee's meeting on 19 November witnesses were questioned on that topic, but they were unable to provide much guidance on whether there is a need for increased sentencing powers. What evidence do you have for the need for the extension?

Kenny MacAskill: We have made significant progress in tackling knife crime in Scotland. We have seen a 60 per cent reduction in the offence of handling an offensive weapon since this Government came to office, but there have been tragedies. Every member of the committee and probably every area of Scotland has been touched by such tragedies in some shape or form.

As an Administration, we are not prepared to take our foot off the accelerator in tackling and driving down knife offences, because they affect families, communities and the whole country. We therefore think that we are heading in the right direction. The average sentence now for handling an offensive weapon is over a year. I think that that gives the court the appropriate balance. When they think that some leniency can be shown because of the background to the case, they can show it. Equally, when it is quite clear that there was malevolence and malice, they correctly impose tough sentences, which we fully support. This is about continuing to make Scotland safer and continuing to address an issue that has scarred Scotland. The situation is getting better, but we would be remiss if we were complacent.

John Pentland: If section 71 is approved, what impact do you expect the availability of longer sentences to have in practice?

Kenny MacAskill: It will give greater discretion to a sentencing judge or sheriff. Our position has always been that the sentence is for the judiciary to decide, which is why we have never supported mandatory sentences. Indeed, as the average sentence in Scotland is over a year, why would we wish to impose a mandatory tariff that is less than that? The measure is simply about giving the judiciary discretion and recognising the significant harm that knife crime can cause. It will be for the judiciary to decide whether to impose that length of sentence. I think that they should have the right to impose such a sentence, but it will be for them to decide whether to do so, on the basis of clear facts and circumstances that merit that.

Alison McInnes: I have a tiny supplementary question. The bill does not seek to alter the maximum custodial sentence for summary offences. Will you explain your rationale for that?

Kenny MacAskill: It is for the Crown to decide whether a case should be a summary one or on indictment. A sheriff might feel that his sentencing powers are inappropriate. That is really a matter for the Crown and the judiciary. They will have to decide whether to proceed on summary complaint or under the solemn procedure.

Philip Lamont (Scottish Government): It might be helpful to clarify that the current maximum for handling an offensive weapon when prosecuted at the summary court is 12 months, which is the maximum general sentencing power of the summary court. If we were to increase that, we would be going beyond the general maximum that has been provided for in other legislation. That is why we have not done that.

The Convener: Do we have the figure for how many sentences of four years have been dished out?

Philip Lamont: It is very low. I think that the most recent statistics indicated that the maximum had been given in only one or two cases, although it is sometimes complicated because other offences are wrapped up together. Not very many people received the maximum but, as the cabinet secretary explained, we feel that the measure is about empowering judges by making an increased maximum available, perhaps for repeat offenders who have a track record of using knives and who once again are caught carrying them. It will be for judges to decide on the basis of the individual circumstances of the case.

Roderick Campbell: Human trafficking is an issue on which things have been moving quite quickly in recent weeks and months. I welcome sections 83 and 84, and I have read the cabinet secretary's letter to the convener dated 16 July 2013 but, for the record, will you outline the Government's thinking in connection with human trafficking? What do you say to the critics who say that Scots law should have a definition of human trafficking?

Kenny MacAskill: A statutory people trafficking aggravation is the first stage. The Government has recognised that there is a problem. We are aware that people have been trafficked here and that Scots have been involved in carrying out trafficking and have been correctly sentenced in other jurisdictions, particularly in Northern Ireland. We are aware of the issue. We believe that the first necessary step is to bring in a general aggravation, because we are conscious that that will help to raise awareness and allow evidence to be led. I think that it will make it easier for us to deal appropriately with those who perpetrate human trafficking.

However, we are persuaded that more has to be done, so the question then is how we do it. Jenny

Marra has proposed a member's bill on the issue, and we are in on-going discussions with the United Kingdom Government on its draft modern slavery bill. Indeed, I recently attended an event down at number 10 that was chaired by the Prime Minister. We are introducing the general aggravation to show our willingness and desire to deal with the issue, and to show the necessity of doing so.

11:00

On the broader aspect of the legal definition of human trafficking, we are happy to look at what is best and see whether matters can be dealt with in the draft modern slavery bill. We are talking about a criminal offence that, by its nature, crosses jurisdictions. We are in discussion with the UK about whether the bill will apply to Scotland, and if it can do so appropriately, we will be more than happy to take that route, because that will be the quickest way of ensuring that Scots law is fit and appropriate.

The Convener: I am interested in section 82, "References by SCCRC". You might recall a little tussle, which I lost—not for the first time—in the context of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, which was emergency legislation on the back of Cadder. It was thought that there would be a flood of applications to the Scottish Criminal Cases Review Commission, so the 2010 act introduced, first, a gatekeeping role for the High Court, so that it could refuse referrals from the SCCRC. Secondly, the act provided that, even if an appeal was successful, the sentence might not be quashed if that was in the interests of justice. That is the background.

I am glad that the gatekeeping role is going; I am not glad to see that the second aspect remains. For the life of me, I do not understand why, when an appeal has been successful on its merits, the High Court, sitting as the appellate court, should be able to reject the appeal, on the basis that quashing the sentence would not be in the interests of justice, having regard to "finality and certainty".

The example that Lord Carloway gave—of a person pleading guilty to the crime in the middle of the appeal proceedings—is not helpful, because such an event is very unlikely. Why are we retaining the approach? I do not understand why we are doing so. There was no flood of applications to the SCCRC after Cadder. You are always talking about access to justice, but the approach seems to fly in the face of justice.

Kenny MacAskill: The proposals in the bill strike the correct balance. I am aware of your concerns and I think that we have retained what is necessary while taking on board your concerns. It is clear that the role of the SCCRC, which we in Scotland cherish, is to consider miscarriages of justice and seek review. It is important that the High Court should consider and take cognisance of whether there has been a miscarriage of justice and, at the end of the day, it is the High Court of Justiciary, sitting as the appeal court, that must decide whether something is in the interests of justice. The provisions are likely to be used or considered very sparingly.

The point that the Lord Justice Clerk made has merit. There could be circumstances in which, for whatever reasons, matters were not dealt with appropriately at first instance and there was a miscarriage of justice, but there has been an admission of guilt. In such a case, it seems to me that the court of appeal should be able and required to take into account the interests of justice, or we might end up with the absurd situation in which a person is acquitted by the court of appeal and in the following week we must consider an application in the context of double jeopardy, on the basis that there is good reason to believe that the person committed the crime.

The Convener: I would have no problem with such an application, now that we have got rid of the double jeopardy rule. My concern is that, in any other appeal process, if the appeal is successful it is successful. However, if there is a successful appeal in a case that was referred by the SCCRC, which will already have applied an interests-of-justice test before referring the case, it will be treated differently from any other appeal, solely because it has come from the SCCRC. That is my problem. The principle should be the same as it is for every other appeal: if the appeal is successful, it is successful.

Kenny MacAskill: I see where you are coming from but, in the main, appeals that come from the SCCRC tend to be a lot more historic. Years will have passed and every other avenue will have been considered—there will probably have been a great deal of events over a long timescale. At the end of the day, the SCCRC must be protected and cherished for what it does in allowing reviews in such cases, but it is fundamental that in an appeal the High Court should remain the ultimate arbiter of not simply whether there has been a miscarriage of justice but whether action is in the interests of justice. The SCCRC makes the referral, but the ultimate decision should be made by the High Court.

The Convener: May I clarify something? If an appeal goes through the normal appellate procedure rather than being referred by the SCCRC, is it the case that, even if the appeal is successful on its merits, the High Court can apply an interests-of-justice test and reject the appeal?

Philip Lamont: No. That is not the case.

The Convener: The High Court can apply that extra test only if the reference was from the SCCRC.

Philip Lamont: That is right.

The Convener: Well, that is my problem.

Philip Lamont: As the cabinet secretary explained, the approach reflects the fact that, since the commission was established in 1999, it has always had to apply the interests-of-justice test as part of its consideration. As the cabinet secretary said, that reflects the type of case that the commission often deals with and its special role. What Lord Carloway recommended—we agreed and put the provision in the bill—was that the commission should review cases and be the avenue by which cases can come back to court, and that it should consider the interests of justice in so doing, but that the High Court should apply the same tests. That is what is in the bill.

The Convener: The test has already been applied, but the High Court applies it again.

Philip Lamont: Because of the type of cases that we are talking about.

The Convener: We are just going to have to differ on this. It seems to me that when you say "type of cases" you are making two classes of appeal, which is completely unnecessary and was not the case before. The SCCRC's sifting procedures are rigorous, as you know, and the commission has a good record at achieving success either on sentence alone or on conviction and sentence. The SCCRC's sifting procedure is pretty tough.

I understand why the approach was taken initially, but for the life of me I do not understand why we are retaining it. Cabinet secretary, I must give you notice that I will lodge an amendment to delete the provision and take us back to where we were before the 2010 act. I will see whether I am successful this time.

So there you go. I think that Roderick Campbell wants to raise a different subject.

Roderick Campbell: Yes. Calum Steele, of the Scottish Police Federation, expressed concern about whether the police negotiating board's remit will include the terms and conditions of all police officers. Can the cabinet secretary update us on the position?

Kenny MacAskill: Yes. We were waiting only to hear from the Scottish Chief Police Officers Staff Association, which has indicated that it is willing in that regard. We have never pushed on that; we have always taken the view that a willing volunteer is better than a reluctant conscript. We hoped that the SCPOSA would come forward, as it has done. All police officers, from the newest constable to the chief constable, will therefore be dealt with by the board.

The Convener: If members have exhausted their questions—I see that we are exhausted—I thank the cabinet secretary very much.

11:07

Meeting continued in private until 12:15.

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 978-1-78392-458-5

Revised e-format available
ISBN 978-1-78392-465-3

Printed in Scotland by APS Group Scotland