The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 19 November 2013

Session 4

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JUSTICE COMMITTEE
32nd Meeting 2013, Session 4

CONVENER

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

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bronagh Andrew (Community Safety Glasgow)
Dorothy Bain QC (Faculty of Advocates)
Alison Di Rollo (Crown Office and Procurator Fiscal Service)
Fraser Gibson (Crown Office and Procurator Fiscal Service)
Murray Macara QC (Law Society of Scotland)
Kenny MacAskill (Cabinet Secretary for Justice)
Graeme Pearson (South Scotland) (Lab)
Michael Walker (Scottish Criminal Cases Review Commission)
James Wolffe QC (Faculty of Advocates)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 19 November 2013

[The Convener *opened the meeting at 09:16*]

Victims and Witnesses (Scotland) Bill: Stage 2

The Convener (Christine Grahame): Good morning. I welcome everyone to the 32nd meeting of an extremely hard-working Justice Committee, which will sit again tomorrow. We never get away from one another.

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. Members will be aware that I want—in fact, we all want—to conclude by 12.30 in order to allow those of us who are travelling to Helen Eadie's funeral to leave.

Item 1 is the continuation of stage 2 proceedings on the Victims and Witnesses (Scotland) Bill, which I hope to complete today. I welcome the Cabinet Secretary for Justice and his officials. As with our previous meeting, the officials are not here to answer questions at this stage. Members should have with them their copies of the bill and the marshalled list and groupings of amendments for consideration.

After section 16

The Convener: We move straight to the amendments. I hope that John Finnie is sitting comfortably, because he is up first. Amendment 84, in the name of John Finnie, is in a group on its own.

John Finnie (Highlands and Islands) (Ind): Amendment 84 aims to designate as standard special measures in respect of intermediaries. There is significant evidence of the benefits of supporting child victims and witnesses in particular to give best evidence, which we all want. That is the case particularly if there is an additional vulnerability—for example, if the person has communication or special support needs, learning difficulties or a disability. In the current adversarial system, the language and forms of questioning are often confusing, which can be distressing for hardy souls, never mind people in that position.

I understand that ministers have indicated that they intend to use powers under section 15 to assess the effectiveness of intermediaries as a temporary additional special measure, with a view to using section 17 powers to prescribe intermediaries as a further special measure. I would welcome confirmation of that if the cabinet secretary felt able to give it.

I move amendment 84.

The Cabinet Secretary for Justice (Kenny MacAskill): I thank John Finnie for raising the issue, and I am keen to explore further the potential benefits of using intermediaries to assist vulnerable witnesses who have communication and support needs. I urge some caution, however, as it is crucial to cost and pilot additional special measures to allow for a proper evaluation of their effectiveness and benefit to witnesses prior to any wider roll-out.

As John Finnie mentioned, discussions took place with victim support organisations and others during the witness review and the development of the bill with regard to piloting additional special measures. Section 15 allows that to happen, and I am happy to commit to holding further detailed discussions with stakeholders and our justice partners following the bill's passage in order to explore the establishment of pilot schemes.

I know that Children 1st and the Royal College of Speech and Language Therapists are particularly interested in the issue, and their involvement will be invaluable. I invite John Finnie to withdraw amendment 84, and give my commitment to hold further discussions on the issue and to consider piloting the use of intermediaries as a special measure once the bill is passed.

John Finnie: Thank you, cabinet secretary—I am grateful for those words. That being the case, I will not press my amendment.

Amendment 84, by agreement, withdrawn.

Section 17 agreed to.

After section 17

Amendment 85 not moved.

Section 18 agreed to.

Section 19—Victim statements

The Convener: Amendment 29, in the name of the cabinet secretary, is grouped with amendments 86, 30, 68, 31 and 32. If amendment 68 is agreed to, amendment 31 will be pre-empted.

Kenny MacAskill: I speak first to amendment 32, which is in my name. Victims of crime should clearly have the opportunity to communicate to the court the physical, emotional and economic impact of crime. That is why I introduced the victim

statement scheme, which allows victims to give a written statement describing how the offence has affected them. However, I have heard first hand from victims of crime who struggle to fully convey in writing the impact that the crime has had on them. I have been asked why it is not possible to make a victim statement by way of a pre-recorded video. In this day and age, we should explore whether such alternative means of making statements are viable; we should also ensure that we have the flexibility to utilise new technologies as they become available.

Amendment 32 introduces an order-making power into section 14 of the Criminal Justice (Scotland) Act 2003 to allow the Scottish ministers to specify the format in which victim statements can be made. Crucially, that allows formats to be piloted for specific periods of time and in specific areas. Taking a power to pilot new formats will allow for a full evaluation of any new approach to be carried out, taking into consideration the views of victims, the courts, the Crown and the defence. If pilots are successful, any new statement formats can be extended more widely.

The new power will enable the Scottish ministers and criminal justice partners to take a balanced and considered approach to extending the format in which victim statements can be delivered, while allowing for the development of new formats in response to advances in technology.

In amendment 86, Graeme Pearson has made a suggestion in the same vein that allows for different means by which a victim statement can be made. I welcome his attention to the matter. I have concerns, however, regarding the extent of amendment 86, in that victims would be able to read their victim statement live in court. I am not sure how well that would work in practice, nor am I persuaded of the benefits of such a measure. I have concerns about the potential impact on the victim.

That said, I would not want to rule out that proposal altogether and would be happy to revisit it once greater consideration has been given to how such a measure would operate in practice and the benefits and risks to the victim have been explored in more detail, which will also be informed by any pilots of alternative forms of victim statement.

Amendments 30 and 31 in my name amend section 19 of the bill. The effect is that children over the age of 12, rather than 14, will be able to make victim statements in their own right. At present, children over 14 are able to make victim statements. However, as a number of victim support groups, including Children 1st and Scottish Women's Aid, have pointed out, the age of 14 is inconsistent with other legislation relating to children, primarily the Age of Legal Capacity (Scotland) Act 1991, which provides that children over the age of 12 have testamentary capacity and are able to make decisions about many things, including instructing a solicitor.

I agree that it is appropriate to align the provisions around victim statements with existing legislation as far as possible and therefore I am taking this opportunity to introduce an amendment at stage 2 to lower the minimum age from 14 to 12. However, I am not persuaded that there is a need to totally remove the minimum age limit at which children may make a statement in their own right, as proposed by Elaine Murray in amendment 68.

Basing a decision on whether a child is capable of making a statement solely on the age and maturity of the child would involve additional delays in the process by requiring an assessment by a psychologist. That delay and additional process could cause further stress to the child. It is more appropriate that statements should be prepared by a parent or carer on the child's behalf, taking into account the views of the child, as proposed in the bill and by amendments 30 and 31.

I consider that requiring the court to make a decision on which carer should make the statement, where there is more than one possible candidate, as set out in amendment 68, is an unnecessary requirement. Again, that step will cause additional delays and prolong the process for the child. Where more than one person is eligible to make a statement of behalf of the child, there is existing provision in section 19 to provide for agreement to be reached by the carers themselves. It also sets out that the child must be allowed to express their views and that those views must be taken into account when the decision is made. That less formal approach does not require the involvement of the court, thereby reducing the possibility of delays and additional stress on the child.

Amendment 29 is a minor drafting amendment that does not alter the overall effect of section 19 and is in consequence of amendment 32.

I urge Elaine Murray and Graeme Pearson not to move amendments 68 and 86 respectively.

I move amendment 29.

Graeme Pearson (South Scotland) (Lab): When we considered amendments to the bill at our previous meeting, I rehearsed for the committee the evidence that we had received from victims and the general wisdom out there about the treatment that many—although not all—victims and witnesses currently receive in our courts.

This is perhaps a coincidence—although I think that such experiences are probably a regular occurrence—but in *The Courier* this week, there is an article about the treatment of children in the Dundee courts. A parent of children involved in a particular case feels that they received unhappy treatment at the hands of the court and that they were treated badly. I think that the amendments that we are discussing are absolutely vital to the wellbeing of children in our criminal justice system.

I welcome the fact that the cabinet secretary is at least prepared to consider the proposal that an oral statement can and should be received from a victim in the event that a victim wishes to make such a statement. I am concerned, however, that in the cabinet secretary's amendment 32, there is no specific mention of oral statements.

I hope that, between now and stage 3, we will be able to discuss the issue further, because there is no doubt that the evidence that we received from victims indicated that some victims want to be heard and to make an oral statement at the completion of a case. It seems unnecessary that we should frustrate such a desire on the part of a victim. Indeed, making an oral statement may allow a victim to achieve some measure of closure at the conclusion of what must be a very difficult process for them. We have to accept that, in the 21st century, courts are not solely about law; they are also about delivering some means of justice and closure.

At this stage, I am happy not to follow through on my amendment 86, but I sincerely hope that the cabinet secretary will indicate that he will engage in some earnest discussion about the proposal.

I will leave it to Elaine Murray to decide her way forward in relation to amendment 68, but I think that it is right that children should have the opportunity to speak if they desire to offer such evidence. It is not necessarily the case that the court process would be unnecessarily delayed, as the court would have made its judgment at an earlier stage as to whether a child was capable of giving evidence and would have assessed the child accordingly before that part of the process was complete.

Presumably, advice could be given to the child as well as to the parent or guardian in relation to making a statement at the end of the process. I think that we should give children the opportunity. They should not be left to live the rest of their lives regretting that they never had the chance to unburden themselves.

09:30

Elaine Murray (Dumfriesshire) (Lab): I welcome the cabinet secretary's amendments 30 and 31, which lower the age at which a child may automatically make a victim statement to the age of 12. That of course is in line with the presumed age of maturity contained in the Children (Scotland) Act 1995 and in other more recent legislation.

My amendment 68 was drafted after a discussion with Children 1st, which strongly believes that younger children of sufficient age and maturity should be able to make a statement should they wish to do so. The amendment proposes that where a child does not have sufficient age or maturity, a parent or carer may make the statement on their behalf. However, there might be circumstances in which a parent or carer is not able to make such a statement, and the amendment proposes that, in such cases, a qualifying person may do that on the child's behalf.

Section 6(1) of the Children (Scotland) Act 1995 requires children's views to be sought where a major decision is involved. The act provides that the relevant person must

"have regard so far as practicable to the views (if he wishes to express them) of the child concerned, taking account of the child's age and maturity."

The amendment is therefore in line with other legislation.

Amendment 68 also proposes that the age and maturity of a child under 12 would be assessed by a health professional—not necessarily a psychologist—so there would not necessarily be a delay as a result of involving that particular type of health professional. In addition, the amendment proposes that the court must determine which qualifying person should make the statement on the child's behalf.

Amendment 68 would also require the child concerned to be given the appropriate support either to make the statement themselves or to express their view as to which person does so on their behalf. That is in line with the Children's Hearings (Scotland) Act 2011, which provides for advocacy to be provided to all children who require such support to make their views known when they are involved in the children's hearings system. I believe that that is a useful precedent for legislating for children and young people to be supported to make a victim statement whatever their age.

Sandra White (Glasgow Kelvin) (SNP): I seek clarification on amendment 68 with regard to a child who is under 12. I concur with what everyone has said: we are considering victims.

You said that the child would be assessed by a health professional, not a psychologist. Are you thinking of any specific type of health professional? Who would assess what type of health professional would be involved? I have

concerns about the effect on children under 12 of having to go through certain psychological examinations. Can you expand on that a wee bit?

Elaine Murray: Amendment 68 just refers to a health professional; it does not specify which particular type of health professional. It could be a general practitioner who knew the family well, for example.

Roderick Campbell (North East Fife) (SNP): I will deal with Graeme Pearson's amendment 86 first. It seems to me that there is provision in the Criminal Justice (Scotland) Act 2003 for steps to be taken to allow such oral evidence and that the proper way forward in the first instance is to try some pilot schemes and consider and evaluate how they work.

On Elaine Murray's amendment 68, I agree that the appropriate age is 12, not 14, which would bring the bill into line with the Age of Legal Capacity (Scotland) Act 1991 and the Children (Scotland) Act 1995. That is common ground. Having reached that view, I again take the view that we should see how that operates. The committee did not take any oral evidence on the question of reducing the age below 12.

I am slightly confused by the reference in amendment 68—in proposed new subsection (11B) of section 14 of the 2003 act—to

"where a child is not of sufficient age and maturity."

Age is not supposed to be a criterion, yet somehow or other the amendment is bringing that part back in. Overall, I am confused by the amendment. I do not think that we have given the issue enough consideration. I think that we should just stick to setting the age at 12.

Elaine Murray: The issue is that in other legislation children under the age of 12 who have sufficient age and maturity are enabled to make their wishes known about what happens to them—in this case, they should be able to describe to the court how they feel as a victim. Amendment 68 makes provision for younger children. I was not on the committee at the time, so I accept that you did not take any particular evidence on the issue.

The issue was raised by Children 1st, which has been very much involved in supporting child victims and which thinks that it is important to include in the bill the measures proposed in amendment 68 to enable children under 12, who wish and are able to do so, to make their feelings known, either in person or through an intermediary, such as a parent, guardian or other qualifying person. I do not know whether that provides clarification, but that was the intention behind the amendment.

The Convener: I have a concern that young children might feel that they ought to say something when they do not want to. The existence of such a provision might make them feel that they ought to say something when that might not be the best thing for them to do. I appreciate that an assessment would be done by a health professional such as a psychologist, but—I will be interested to hear what the cabinet secretary says about this—when provision is made to allow something to be done, people sometimes feel that they ought to do it when that might not be in their best interests. Indeed, that might be more damaging than not having closure, to use that awful American expression. I have concerns about amendment 68.

Kenny MacAskill: I will deal first with Graeme Pearson's amendment 86. The powers that are provided are generic, not specific. They are meant to be inclusive, not exclusive. We cannot predict what technology will be like in five years. Five years ago, we could not have envisaged that someone would be able to get their phone out, take a video and put it before a court, but that is the world that we live in. Such things are perfectly feasible. We want to ensure that, as technology evolves, we can adapt to it.

We are quite open to looking at suggestions, but we must do so with the courts, the defence and the Crown. What would happen? Would the script of a statement have to be checked before it was given? Would it have to be run by the court? If someone went off script, would that nullify the trial? Would there have to be a proof in mitigation? Could a victim who went off beam—if I can put it that way—and beyond what was in the script when giving a statement be challenged? There are situations in which the defence is open to a proof in mitigation as regards the defence statement.

I fully accept the principle that Graeme Pearson is applying, which I think is valid, but, as is always the case with such matters, the devil is in the detail. I give him the assurance that I am happy to have discussions with the judiciary and all parties involved to ensure that, if such an initiative is to be piloted, we know what can be said, the constraints that exist and what would happen in particular circumstances, because the last thing that we want is for the victim to end up in a worse position or for there to have to be a retrial because of something that was said or done.

With regard to Elaine Murray's amendment 68, I think that we tend to take a societal view of such matters. That is why we have had a debate in the Parliament on the age at which people can vote in the referendum. A very mature 15-year-old cannot vote, because we have decided that people can vote at the age of 16. South of the border, there was a debate at the weekend about lowering the age of consent. I am not persuaded of that—we have decided that 16 is the right age. In this

case—in relation to victim statements—the right age is 12.

As Rod Campbell indicated, if we decide to change the age of legal capacity, we will be more than happy to review the matter, but I think that, broadly, a societal view is taken of such matters on the basis of how we view a child and their capacity. I think that it is appropriate to tie the age at which a victim statement can be made to the age of legal capacity. If a person can instruct a solicitor, I think that they are capable of giving a victim statement.

I fully understand where Elaine Murray is coming from—her view is that there are very mature young people under the age of 12 who might want to make a victim statement. However, we take a general view on the voting age and the age of consent, and I think that we should take such a view on the age at which an individual can give a victim statement.

Amendment 29 agreed to.

Amendment 86 not moved.

Amendment 30 moved—[Kenny MacAskill]—and agreed to.

Amendment 68 not moved.

Amendments 31 and 32 moved—[Kenny MacAskill]—and agreed to.

Section 19, as amended, agreed to.

Section 20—Duty to consider making compensation order

The Convener: Amendment 69, in the name of Elaine Murray, is in a group on its own.

Elaine Murray: Amendment 69 would require the court to ascertain the views of the victim prior to making a compensation order and would prohibit the making of such an order when the victim has notified the court that they do not wish to receive compensation from the offender. I believe that evidence was taken on the issue at stage 1. The victims of sexual offences, for example, may find payment of compensation for the offence that was perpetrated against them quite abhorrent.

I move amendment 69.

Margaret Mitchell (Central Scotland) (Con): Amendment 69 seems to be sensible. I am minded to support it, after I have heard what the cabinet secretary has to say.

Roderick Campbell: We should be slightly careful about going too far. It is right that courts ought to "consider" things, but we should not be perceived to be tying the hands of the courts and trying to tailor their discretion.

Graeme Pearson: Every time we try to move forward in any way that could be described as radical, we find a million reasons why we need to be careful, or whatever. At the end of the day, it would do no harm to allow a victim to say to the court, "I don't want this person's money". That seems not to be radical and would give some power to victims in situations in which they often feel completely powerless.

Kenny MacAskill: At the moment, courts may consider imposing a compensation order on an offender, but are under no obligation to do so. The intention behind section 20 of the bill is simply to ensure that the court considers imposing compensation orders in relevant cases; that is not to remove its direction to consider all the circumstances. Courts already consider whether it is appropriate in the circumstances to make a compensation order, and the factors that are considered rightly include views that are expressed by the victim.

I am aware that Rape Crisis Scotland and Scottish Women's Aid have expressed particular concern about compensation orders being imposed in domestic abuse or sexual assault cases; victims often do not wish such orders to be made in such cases. I assure the committee that the bill will do nothing to preclude the court from using its discretion and imposing compensation orders only when it considers that to be appropriate. I therefore consider that amendment 69, although well-intentioned, is unnecessary.

I urge the committee to consider the practical implications of amendment 69. It would require the court to seek the views of victims in every case in which compensation might be applicable. That would be an onerous undertaking that seems hardly to be proportionate, especially given that the concerns relate to a specific group of offences. Furthermore, it is unusual for a compensation order to be awarded for offences in this group. To ask every victim whether they want a compensation order could also have the unintended consequence of raising expectations. When victims express a desire to receive compensation and an order is not granted by the court following consideration of all the circumstances of the case, the fact that views have been actively sought might leave victims feeling less empowered, rather than more so.

In summary, the matter can be better dealt with through guidance and training. I ask Elaine Murray to consider withdrawing amendment 69, with my assurance that we will continue discussions with the Judicial Office for Scotland and the Crown Office and Procurator Fiscal Service to ensure that the concerns that have rightly been raised by Scottish Women's Aid and others are addressed.

Elaine Murray: I appreciate that the cabinet secretary and Roderick Campbell have far more experience in matters of the law than I do, but I am slightly confused by their interpretation. Amendment 69 says that

"In considering whether to make a compensation order, the court must take steps to ascertain the views of the victim."

The victim would therefore be asked only when a compensation order was being considered—not in every single case. Victims are given the opportunity to make victim statements and so on, so they are communicated with anyway. Surely being asked about compensation could be part of that communication.

I am not seeking to tie the hands of courts in any way. All we are saying is that if a victim does not want to have a compensation order, one will not be awarded. That might be seen to be unlikely, but the fact that it would be in the legislation would mean that the victim of sexual or domestic abuse would not have to fear that it might happen; they would not need to fear that they would in some way be being paid off for the crime that had been committed against them. I am sure that we can all understand how that could be extremely offensive.

I am not therefore quite sure that I accept the arguments from Roderick Campbell or the cabinet secretary. I am prepared to seek to withdraw amendment 69 at this time, although I have every intention of considering the matter further at stage 3 in order to ensure that the wording is as good as it can be.

The Convener: Elaine Murray seeks to withdraw amendment 69. Are members content with that?

Amendment 69, by agreement, withdrawn.

Section 20 agreed to.

Section 21—Restitution order

09:45

The Convener: We turn to restitution orders. Amendment 70, in the name of Alison McInnes, is grouped with amendments 71 to 73.

Alison McInnes (North East Scotland) (LD): Amendments 70 to 73 would extend restitution orders and the associated fund to all emergency workers. That would mean that an assault on any emergency worker—not just a police officer or staff member—could lead to the offender's being required to make a payment to the restitution fund. In turn, those emergency workers would be able to access the facilities and services that the fund would establish.

Amendments 70 and 72 go together and would extend the bill so that anyone who is convicted of

"assaulting or impeding ... providers of emergency services"

under section 1(1) of the Emergency Workers (Scotland) Act 2005 could be the subject of a restitution order. That would cover people acting for the Scottish Ambulance Service and members of the fire brigade as well as the police.

Sadly, such incidents are not rare. The Scottish Ambulance Service tells me that there are more than 200 incidents of physical assault every year, and there were 80 attacks on fire service personnel in 2011-12, so across the board our emergency services personnel too often encounter threatening or violent behaviour.

I propose further, through amendments 71 and 73, to extend the order and the fund to those who are named in section 2 of the 2005 act, which would widen the provision to include prison officers, members of the Maritime and Coastguard Agency, the Royal National Lifeboat Institution, medical practitioners, nurses, midwives, social workers and mental health officers, but only if they were assaulted or impeded when responding to emergency circumstances.

The Law Society of Scotland supports extending restitution orders to a broader group of emergency workers. It strikes me as being unfair and inequitable that only an assault on a police officer should merit a restitution order, and that only that segment of our emergency services personnel should be able to access the specialist victim support services that the fund will establish.

I move amendment 70.

Roderick Campbell: I absolutely agree with Alison McInnes in theory. It seems to me that there ought not to be a distinction in theory between police officers and other emergency workers, but it is a question of practicalities. The committee had a fairly uniform view at stage 1, and the Government's response was that it is not always easy to identify appropriate beneficiaries for all emergency workers. It is because of the practicalities of doing so that I cannot support amendment 70, although I agree with it in principle.

Margaret Mitchell: I am sympathetic to the intention behind the amendments, but I will listen with interest to what the cabinet secretary says about the practical difficulties that may or may not arise.

Kenny MacAskill: Roderick Campbell has already said a lot of what I would have said. As I have said before, we are sympathetic to the idea of extending restitution orders to workers other than the police. However, we must consider what would actually work. What makes restitution orders workable is the existence of an offence that

is defined in terms of a group of workers—the police—for whom there are specific support services already in place, including the Scottish Police Benevolent Fund and the Police Treatment Centres.

Although offences of assault on emergency workers are defined in the Emergency Workers (Scotland) Act 2005, there is no specific support service or organisation that corresponds to those offences. Respondents to the consultation, and those who have commented subsequently, have not been able to suggest a suitable beneficiary to whom moneys could be paid from the restitution fund. There are some benevolent funds for distinct groups of emergency workers, such as the Fire Fighters Charity, the Ambulance Services Benevolent Fund and the Social Workers Benevolent Trust. Those organisations may or may not be suitable beneficiaries, but in any case they cover only limited categories of workers, and not all of those who are set out in the 2005 act.

Would it be appropriate to hand moneys that were recovered in respect of an assault on a social worker to the Fire Fighters Charity? In theory, the administrators of the restitution fund might ensure that moneys that were received following an assault on a social worker would go to the appropriate trust. However, that would greatly increase the burden on the Scottish Court Service, which would have to split the charges in the 2005 act into categories of worker in order to ensure that money could be appropriately ring fenced when it was paid in to the restitution fund. There would also be a burden on the operator of the fund to ensure that the moneys that were received for certain offences were disbursed to organisations that support victims of those specific offences. We have to question whether such effort would be, or could be, proportionate.

To put the situation into perspective, in 2011-12, there were 3,357 persons with a charge proved under section 41(1A) of the Police (Scotland) Act 1967, and 193 persons with a charged proved in respect of all emergency workers under sections 1 and 2 of the Emergency Workers (Scotland) Act 2005. Splitting down those 193 offenders into categories according to type of emergency worker—there are 12 categories in the act—will produce very low returns. In the two years from January 2010 to February 2012, fines worth £330,000 were levied in respect of the offence in the Police (Scotland) Act 1967, which has been replaced by section 90 of the Police and Fire Reform (Scotland) Act 2012. The Scottish Court Service advises, on the other hand, that there was no fine income at all in 2011-12 and 2012-13 from the charges under the 2005 act because those sentences were all dealt with by community payback orders or imprisonment. It is clear from that that the sums that would be raised from fines arising from assault on emergency workers would struggle to cover the cost of administration.

If it were broken down into the dozen or more funds that might prove to be necessary, such a provision would be far more likely to be an administrative cost rather than offer any benefit. It is open to the courts, where appropriate, to impose a compensation order to benefit a specific victim, which includes emergency workers and other people in public-facing roles, just as it is open to the court to make individual compensation payments to police officers in such circumstances. Although to some extent I recognise—I think that we all do—the justness of Alison McInnes's argument, the practical implications mean that although we can deal with section 41(1A) of the Police (Scotland) Act 1967 on charges because we have volume, crime and a beneficiary, for the other offences we have limited numbers and we do not know who we are dealing with or to whom we would send the compensation—that is even before we consider the costs that we would impose on organisations to administer the fund.

I invite the committee to reject Alison McInnes's amendments.

Alison McInnes: I have listened to the minister's response. It does not seem to me to be beyond the wit of man to find out whether there are union or benevolent funds. That could be done. It is divisive and inequitable to single out the police. I will press amendments 70 and 72, which would extend restitution orders to the Ambulance Service and members of the fire brigade. I will not press amendments 71 and 73.

The Convener: You have moved only one amendment; you are pressing amendment 70. We will deal with the others as we reach them.

The question is, that amendment 70 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 70 disagreed to.

Amendment 71 not moved.

The Convener: Amendment 33, in the name of the cabinet secretary, is grouped with amendments 34 to 38, 42, 90 and 43 to 47.

Kenny MacAskill: Amendments 33 and 35 to 37 are technical drafting amendments relating to the terminology that is used in reference to operation of the restitution fund. They have been lodged in order to clarify that the Scottish ministers have the power to administer the fund, which they may delegate, and that they may make provision by order for the fund's administration.

The operation of the restitution fund—which will receive money that is raised from restitution orders that are imposed for police assault, and will disburse them to the designated recipients—will necessarily involve administrative expenses. Amendment 34 will ensure that those expenses may be defrayed from the fund by adding the Scottish ministers and those administering the fund to the persons to whom payments may be made out of the fund.

Amendments 38 and 43, 45 and 46 are mostly technical amendments to the subordinate legislation-making powers relating to the victims surcharge; they will slightly alter the terminology. As with my amendments on the restitution fund, the amendments clarify that the Scottish ministers have the power to administer the fund, which they may delegate, and that they may make provision for the fund's administration.

Amendment 46 will also remove the reference in new section 253G(6) of the Criminal Procedures (Scotland) Act 1995 to the regulation-making power being used and, in particular, to make provisions specifying persons or classes of person to whom, or in respect of whom, payments may be made out of the fund. I consider that the restrictions in the bill relating to the persons to whom payments can be made are sufficient and that such provisions are therefore highly unlikely to be made.

As with the restitution fund, the operator of the victim surcharge fund will inevitably incur administrative costs. It would be unreasonable to expect the operator to bear the cost of administering the fund himself. Amendment 42 therefore provides that operational expenses may be taken from the fund. Where administration of the fund is delegated to a third party—which is our intention—the Scottish ministers must consent to such expenses being taken from the fund.

Amendments 44 and 47 are minor technical amendments that will allow subordinate legislation under proposed new sections 253F and 253G of the 1995 act to be made in a single instrument.

Amendment 90, in the name of Graeme Pearson, seeks to prevent the victim surcharge fund from being used to supplement or replace other payments that are made out of the Scottish consolidated fund. As I have stated previously, the victim surcharge fund is being established for the specific purpose of providing immediate and practical assistance to victims of crime; it is not intended to be used to replace the current or future Government funding of victim support services. Indeed, it is our intention to delegate administration of the fund to Victim Support Scotland and for it to distribute funds as appropriate, with the Scottish Government having no role in the day-to-day operation of the fund. In those circumstances, payments out of the fund would be made not by the Scottish ministers but by the operator to whom administration of the fund has been delegated. Amendment 90 would be of no effect in those circumstances, because the operator will have no say on how or to whom payments are made out of the Scottish consolidated fund.

In addition, the Scottish ministers currently support a number of victims organisations through payments from the consolidated fund. Amendment 90 could have the effect of preventing payments being made to those organisations from the victim surcharge fund, because they could be seen as supplementary payments to those that were being made from the consolidated fund. There is also a risk that the inclusion of such a provision in the bill would create an implication that the absence of such a provision elsewhere in the bill or other statutes would mean that funds such as the victim surcharge fund could be used to relieve the pressure on the Scottish consolidated fund. I therefore consider amendment 90 to be completely unnecessary, and I ask Graeme Pearson not to move it.

I move amendment 33.

The Convener: So, Graeme Pearson's amendment is "completely unnecessary". That is his cue to speak to amendment 90 and the other amendments in the group.

Graeme Pearson: Amendment 90 has achieved its desired effect—it would be best described as a probing amendment. I was seeking to achieve assurances from the cabinet secretary that the proposed measures are not a means of siphoning funds into mainstream Government budgets. I accept the assurances that the cabinet secretary has given the committee in that regard. It would be helpful if the cabinet secretary could, in concluding—

The Convener: He has concluded.

Graeme Pearson: In his response.

The Convener: You are winding up, eventually.

I beg your pardon—the cabinet secretary has not concluded.

Graeme Pearson: Amendment 46 aims to ensure that future changes to maintenance and to eligibility for payment from the fund are dealt with under negative procedure. I ask the cabinet secretary to explain why he proposed the use of negative procedure.

I have no comment on the other amendments in the group.

The Convener: Does anyone else wish to contribute? If not, then the cabinet secretary may wind up.

Elaine Murray: Convener?

The Convener: I beg your pardon, Elaine. I could not see you—you are out of my sights. You will have to poke me.

Elaine Murray: Do not tempt me.

I have some comments about amendment 34. Scottish Women's Aid, or one of the other victims organisations, had raised some concerns about the amendment. I am not necessarily disagreeing with the amendment, but I would like a little bit of clarification about it. The aim is to ensure that the fund washes its own face, as it were. Is it correct that there are no implications of the amendment greater than ensuring that the fund supports itself?

The Convener: The cabinet secretary now gets to wind up.

Kenny MacAskill: I can give assurances to both Graeme Pearson and Elaine Murray. There is no hidden agenda; the negative procedure is being used because that is normal and standard for such matters. If there was anything untoward in that, the Delegated Powers and Law Reform Committee would have been in touch. What we have proposed is simply the normal procedure.

I can also confirm to Elaine Murray that the provisions are to deal with matters that we perhaps cannot envisage, although there may be some cost involved. There is certainly no intention that we, or anybody acting on our behalf, would seek to view the fund as a cash cow.

10:00

We want the money that has been taken from people who have offended to go to the victims of the offence, and we are working with Victim Support Scotland because it is the best organisation to deal with this matter. We are also aware that victims need money immediately; after all, although money can be allocated from Victim Support's fund, people who make criminal injuries compensation claims tend to receive the money two and a half years after the claim was instigated and perhaps three and a half years after the offence. The measure is about giving a pot of money to Victim Support for the people who need it. I remember being at a meeting of a previous justice committee at which Margaret Smith highlighted the case of a constituent who did not live in a council house and so had to pay for the blood of her son to be cleaned up because there was no provision for that. There is something manifestly wrong in such situations, so we have to resource the likes of Victim Support Scotland.

Amendment 33 agreed to.

Amendment 72 moved—[Alison McInnes].

The Convener: The question is, that amendment 72 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 72 disagreed to.

Amendment 73 not moved.

Amendments 34 to 37 moved—[Kenny MacAskill]—and agreed to.

Section 21, as amended, agreed to.

Section 22—Victim surcharge

The Convener: The next group of amendments is on victim surcharge fund: eligibility. Amendment 87, in the name of Margaret Mitchell, is grouped with amendments 88 and 89.

Margaret Mitchell: Amendments 87 to 89 seek to make the victim surcharge applicable to all offenders, rather than being implemented in the kind of piecemeal way that the Government has proposed. Section 22 requires the court to impose a victim surcharge on offenders in certain circumstances to be set out in secondary legislation, and the funds raised through the surcharge will go into a central victim surcharge fund to provide practical assistance and support to victims who have immediate and unmet needs.

The surcharge is a good idea that is supported by victims organisations and which already

operates in England, Wales and Northern Ireland. However, the Scottish Government could and should be more ambitious. It has made it clear that, in the first instance, the surcharge will be imposed only in cases relating to court fines, but that means that individuals who have been convicted of motoring offences will have to contribute to a fund that is designed to help victims, while rapists, murderers and violent criminals will not be asked to pay anything. That strikes me as a lost opportunity, not to mention a bit of a travesty of justice.

The victim surcharge has been in force in England and Wales since 2007 and, since last year, applies to all forms of sentences, including custodial, community and suspended sentences. Given that the experience of implementing the surcharge south of the border has been good, I see no reason why the Government should delay in rolling it out and ensuring that it applies to more serious criminals as a matter of priority. Amendments 88 and 89 are consequential.

I move amendment 87.

Elaine Murray: I am slightly confused by these amendments, although that might be because I do not have sufficient understanding of how the surcharge works in England. I was not aware, for example, that it applied to all offences. If someone nicks something out of a supermarket, does the supermarket get some sort of compensation? Equally, does someone who offends against the state automatically have to pay a surcharge to the state as victim? I am therefore slightly confused about the intention behind the amendment and how it would apply in very minor crimes and so on.

Roderick Campbell: Like Elaine Murray, I am a bit confused about that position. I am not sure that these amendments would give much flexibility, so I am inclined to resist them.

Kenny MacAskill: I welcome Margaret Mitchell's support for the introduction of a victim surcharge, but I am concerned that amendments 87, 88 and 89 would remove the flexibility for us to test the waters in relation to how the surcharge is applied, which should react to changing circumstances. The provisions on the victim surcharge have been purposely designed to allow us to apply the surcharge in the first instance only to cases that result in a court fine. However, through the very powers that Margaret Mitchell wishes to remove, we will be able to extend the surcharge to apply to other types of sentence in the future, if appropriate. That phased approach will allow the scheme to bed in and its successes to be evaluated before any extension to incorporate other sentences.

It is difficult to describe now the exact circumstances in which we might wish further to restrict the application of the surcharge—for instance, in respect of particular offences—until it has been put in place. However, the powers in section 22 provide us with the flexibility to react to any issues that might arise or to the creation of new offences or changes to criminal procedure. I have particular concerns about the effect of amendment 88, because what it proposes would mean that a conviction would be all that would be needed for a victim surcharge to be imposed, even if no sentence was given to the offender; an offender who was admonished would therefore have to pay a victim surcharge. I think that that is a step too far. Further, the administration of a scheme that had to cover every conviction, regardless of sentence, would be complex, to say the least.

The powers in section 22 allowing Scottish ministers to prescribe offences, sentences and circumstances to which the victim surcharge is not applied were included for a specific reason: to provide us with the flexibility to take a measured and sensible approach to implementing the surcharge in the first instance and to enable us to respond to the evolving nature of the criminal justice system in the future—I think that Elaine Murray touched on that. I therefore urge Margaret Mitchell to withdraw amendment 87 and not to move amendments 88 and 89. I give her the assurance that, whether it is done by me or by a successor justice secretary, some of the points that she has raised will be considered once we have bedded in the scheme.

Margaret Mitchell: I am content to leave amendment 87 as a probing amendment at this stage, with the proviso that what it proposes can be looked at again at stage 3, because there is an important point of principle here. I therefore seek to withdraw amendment 87.

Amendment 87, by agreement, withdrawn.

Amendments 88 and 89 not moved.

Amendments 38 to 42 moved—[Kenny MacAskill]—and agreed to.

Amendment 90 not moved.

Amendments 43 to 47, 49, 48, 50 and 51 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group is on the victim surcharge fund. Amendment 91, in the name of Graeme Pearson, is the only amendment in the group.

Graeme Pearson: Amendment 91, which I hope is a reasonable amendment, proposes the creation of a report, instigated by Scottish ministers or such persons as they have delegated, which should be completed by the end of the 12-month period following the establishment of the fund, and thereafter as soon as practicable after

each subsequent period of 12 months. The report will include information on

"the sum paid into the fund"

and

"the sum still due to be paid into the fund by persons who the court has ordered to make payment of a victim surcharge ... a list of those persons ordered to make payment of a victim surcharge who are yet to make that payment .. the sum paid out of the fund"

and

"an account and assessment of how the sum paid out of the fund has been used."

I think that the general public would be keen to know how such a surcharge fund had developed and what benefits had been achieved in connection with it. Equally, a list of those persons who had yet to make their payment would provide a useful encouragement for those who might otherwise avoid paying the surcharge as ordered by the court.

I move amendment 91.

Kenny MacAskill: I welcome the general principle behind amendment 91 and agree that there should be transparency and accountability in the administration of the victim surcharge fund. Members of the committee will note that the draft regulations relating to the surcharge, which I supplied last week, include provision for the making of quarterly reports to the Scottish ministers. Those reports will include some of the information that Graeme Pearson's amendment mentions, such as the payments that are made into and out of the fund and an indication of how that money has been used. The regulations will not be finalised for some months, and I am happy to consider any suggestions from Graeme Pearson or other members as to what else might usefully be covered in reports from the operator of the fund.

Indeed, discussions are on-going between my officials and VSS—to which we intend to delegate the fund's administration—with regard to what further detail may be necessary. I am happy to consider whether such reports should be published; although that was not specified in the draft regulations, it is a sensible suggestion.

However, I consider that such matters are best covered in regulations rather than in the text of the bill. Section 22 sets out the broad parameters of the fund and leaves the administrative details to subordinate legislation, which will enable more flexibility and allow the detailed operation of the fund to be more easily altered in the light of experience. I see no reason to alter that approach in relation to reporting requirements.

I have specific concerns about some of the areas that amendment 91 says are to be reported on, particularly the requirement under proposed section 22(3)(c) to list those persons who are ordered to make payments of a victim surcharge and are yet to make that payment. It is common practice that those who have been fined and will be subject to a victim surcharge are able to make payments by instalments. At what point would it be considered appropriate that they be included in a list?

There will also be cases in which someone is in arrears for a short period of time but quickly makes up those arrears. The requirement would put a fairly onerous burden on the Scottish Court Service, and all to compile a snapshot that may not be representative of the overall success in collecting the surcharge.

Finally, I have concerns that the publication of the names of individuals who have committed offences and are still to pay into the victim surcharge fund could have significant implications for the rights of the offender under article 8 of the European convention on human rights.

In summary, I support the intention behind amendment 91 but feel that the area would be more appropriately covered in subordinate legislation. I invite Graeme Pearson to withdraw amendment 91, with my assurance that I am happy to consult him and others further on what should be covered in regulations relating to the victim surcharge, and to consider his suggestion that reports be published regularly to ensure transparency in the administration of the fund.

Graeme Pearson: I have heard everything that the cabinet secretary has to say with regard to amendment 91. I am pleased that he is happy to discuss further the intentions behind the amendment and, as a result, I will seek to withdraw it.

Amendment 91, by agreement, withdrawn.

Section 22, as amended, agreed to.

Section 23—Victim's right to receive information about release of offender etc

The Convener: Amendment 92, in the name of Margaret Mitchell, is grouped with amendments 93 and 94.

Margaret Mitchell: Prior to the stage 1 debate, the *Sunday Post* ran an article reporting that sex offenders who had been placed on the register for life but who now, as a result of a United Kingdom Supreme Court decision, have a right to challenge that were being taken off the sex offenders register without their victims being informed.

The bill already gives victims of offenders who are sentenced to 18 months or more in prison the right to receive information relating to the release of the offender. Amendment 92 explicitly states

that victims of sex offenders are able to receive information about the release of an offender who was subject to an indefinite period of notification but who is so no longer as a result of appeal or review.

Section 24 establishes a new right to allow the victims of persons who are given life sentences to make oral representation before the person is released on licence.

I move amendment 92.

10:15

Graeme Pearson: Amendment 93 seeks to ensure that, at the time of sentencing in the courts, victims and their families are made aware of the earliest date of release for the prisoner.

Evidence from victims and witnesses at stage 1 indicated the confusion that they faced when they heard an accused being sentenced to a period of imprisonment but learned later that week or later in the process that a formula was open to the prisoner that allowed discount and changed what the victim understood to be the earliest date of release to a much earlier time. There is no doubt from the evidence that I have heard and the approaches that have been made to me during consideration of the bill that victims and witnesses would value knowing on the date of sentence what the earliest date of release would be. It would not be beyond the courts' power to identify that date, as the prisoner receives it when he enters the prison system later the same day.

Amendment 94 would require the Scottish ministers to provide a minimum period before the release of a prisoner by which a family must be notified of the release. That particularly pertains to those who have been involved in the victim notification scheme. Under that scheme, a letter can often arrive unannounced on a doorstep indicating that a prisoner is being released that day or has been released days before. That has an impact on victims and their families by taking them right back to the original crime and increasing the stress and anxieties that they face.

Amendment 94 seeks to bring some humanity into the process and to empower victims and their families as they seek to play their part in the justice system.

I have no comment to make on amendment 92.

Elaine Murray: I will listen to what the cabinet secretary has to say, but I have considerable sympathy for all three amendments in the group.

All of us who have worked over the years with constituents who have been victims of crime have heard distressing stories about how victims sometimes find out through Facebook that someone is out on parole, as happened to one constituent of mine. In another case, a woman whose young daughter had been sexually abused came round the corner to see her daughter's abuser in the street in front of her. Equally, it is extremely distressing for victims of serious sexual offences not to be advised that somebody is no longer on the sex offenders register.

It feels right that victims should be kept informed when decisions of that type are taken. Indeed, victims should be informed about when somebody is likely to get out rather than believing that the offender has a 10-year sentence and finding that they are out a lot sooner than that without the victim and their family knowing at the time.

The Convener: Do any other members want to comment? I do not know whether Roderick Campbell wants in. He made a little flicker of the hand. It is so subtle.

Roderick Campbell: I am a wee bit confused by it now, so I will leave it to others to comment.

The Convener: I should not have identified Roderick. He is confused.

Cabinet secretary, please deconfuse Mr Campbell, if there is such a word. That would be handy.

Kenny MacAskill: Amendment 92 seeks to amend section 16 of the Criminal Justice (Scotland) Act 2003, which established the system whereby victims can, on request, receive information about the relevant offender. That system is known as the victim notification scheme and applies in relation to offenders who have been sentenced to imprisonment for 18 months or more and in relation to certain sentences imposed on those under the age of 18.

Amendment 92 would extend the categories of prisoner to whom the VNS applies by including prisoners who were given a prison sentence of any length and had previously been subject to an indefinite notification period under the Sexual Offences Act 2003 but had been discharged from that notification period.

There are a number of issues with the amendment. First, it is worded so as to include all persons sentenced to a period of imprisonment or detention who have, at any time, been subject to an indefinite notification period under the Sexual Offences Act 2003 but are no longer subject to it. There is no requirement for the notification period from which the offender has been discharged to be linked to the offence for which the offender is currently imprisoned. It may be that the victim who is seeking information about the offender would be eligible to receive that information due to the fact that the offender has at some time in the past been subject to a notification period imposed for a

completely unrelated offence. That seems hard to justify. Why should the victim of an assault be entitled to information about the offender purely because they have a previous conviction for a sexual offence, while other victims of assault would have no such entitlement solely because of their assailant's differing criminal history?

Secondly, the amendment requires that the offender must have been subject to an indefinite notification period under the Sexual Offences Act 2003. If the intention behind the amendment is to ensure that victims of this category of offender are automatically eligible for the VNS, it appears to be unnecessary. Indefinite notification periods are imposed where an offender has been convicted of a sexual offence and is sentenced to imprisonment for 30 months or more, given an order for lifelong restriction or admitted to hospital under a restriction order for the offence. Accordingly, it is unlikely that any offender who is subject to an indefinite notification period under the Sexual Offences Act 2003 would not be caught by section 16 of the Criminal Justice (Scotland) Act 2003, as all offenders serving sentences of 18 months or more are included by virtue of section 16(1)(a) of that act.

Amendment 93 raises a number of practical questions. To provide clear information to victims about the release of offenders and to ensure transparency in sentencing more generally are worthy aims. However, at the point of sentencing, it will not always be immediately apparent when the offender in question will be eligible for release. For example, some offenders will be eligible for release at the Scottish ministers' discretion on home detention curfew before the halfway stage, and some will be eligible for release on Parole Board recommendation at the halfway stage. Also, some prisoners will need to have their time on remand taken into account before a date of release can be calculated. In most cases where prisoners are serving multiple prison sentences, all the sentences will require to be considered before their date of release is calculated. The system of sentencing can therefore be seen as complex.

Under current arrangements, it is the Scottish Prison Service that calculates the earliest release date for offenders who receive custodial sentences. It does so as offenders are taken into custody following sentence being imposed. Putting in place arrangements that would allow the information to be available at the point of sentence would require the establishment of new processes, which would inevitably have cost implications. At a time of scarce resources, I am not persuaded that establishing a new mechanism to allow this information to be available at the point of sentence would be a sensible or necessary step, so long as we can ensure that the information that is currently provided through the VNS is delivered effectively and timeously.

Members will be aware that we have legislated for a Scottish sentencing council, and one member of the council will represent the views of victims. We are working with the judiciary to establish a sentencing council in the current session of Parliament, and it will be ideally placed to consider and make specific recommendations on how victims understand the impact of individual sentences on offenders, including when individual offenders are first to be considered for early release.

As I have said, the VNS is long established and it allows victims to receive information about release dates. I consider that it is preferable to ensure that the information that is currently available to victims, including notification of the date on which the prisoner is released, continues to be provided consistently and accurately through existing processes without any additional costs arising. In addition, the sentencing council could consider looking at this general area as part of its work programme to assess whether the additional costs of introducing a system would be justified.

Amendment 94, which is also in the name of Graeme Pearson, seeks to set a minimum period for notifying victims before a convicted person is released. At present, when a victim registers on the VNS, the Scottish Prison Service informs them of various critical dates including the earliest date of release. Victims can also make representations under section 17 of the 2003 act if a prisoner is being considered for release on licence. That enables victims to inform the Scottish ministers and, where appropriate, the Parole Board of any concerns with regard to the release of the prisoner and allows the potential impact on the victim to be considered when licence conditions are set.

Victims who are registered on the VNS are contacted about six months before a prisoner is eligible for release and are invited to make written representations. The minimum sentence threshold for registering on the VNS is 18 months, although I have already expressed my intention to lower it further using existing order-making powers.

There will be cases in which the victim registers on the VNS but the prisoner is released fairly quickly because, for example, of the time they spent on remand. Given the vast range of sentence lengths, it makes little sense to set an arbitrary minimum period by which point a victim must be informed of release. I consider, therefore, that the matter is better dealt with administratively through the VNS and am open to considering any improvements that might be made through that route. As the changes in the bill as drafted will ensure that more victims are eligible to register on the VNS, I consider the amendments in question

to be unnecessary and invite Margaret Mitchell to withdraw amendment 92 and Graeme Pearson not to move amendments 93 and 94.

Margaret Mitchell: I am disappointed that the cabinet secretary has not even suggested that there be further discussion on how we can make the victims of sex offenders aware that someone is being released earlier and, indeed, make them a special category. There are ways in which amendment 92 could be improved, but I would hope that the cabinet secretary would seek to work with me on whether an amendment covering the victims of sex offenders could be brought forward.

Kenny MacAskill: I am always happy to work to improve the scheme. Indeed, I have experienced some of the examples that Elaine Murray highlighted. Sometimes these things happen because people get compassionate release to see, say, a loved one who might be dying and those sorts of events cannot be indicated through the scheme. Certain aspects have to be improved; the principle, however, is that we should seek to improve the VNS and I am happy to engage with Margaret Mitchell on that matter.

Amendment 92, by agreement, withdrawn.

Amendment 93 moved—[Graeme Pearson].

The Convener: The question is, that amendment 93 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 93 disagreed to.

Amendment 52 moved—[Kenny MacAskill]—and agreed to.

Amendment 94 moved—[Graeme Pearson].

The Convener: The question is, that amendment 94 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 94 disagreed to.

Section 23, as amended, agreed to.

Section 24—Life prisoners: victim's right to make oral representations before release on licence

The Convener: Amendment 95, in the name of Graeme Pearson, is grouped with amendments 96 to 100.

Graeme Pearson: Amendment 95 and the other amendments in the group seek to ensure that the victim's emotions and needs are taken into consideration when offenders are considered for release. Amendment 95 seeks to allow all victims of serious crime and those who fall under the victim notification scheme an opportunity to make an oral representation when it comes to considering offenders for release.

Amendment 96, in the name of Margaret Mitchell, seeks to extend the right to make oral representation to victims of sex offenders; however, if the committee were minded to support amendment 95, amendment 96 would fall.

The Convener: Not according to my script, Mr Pearson. You might know better than me, but I suspect not.

Graeme Pearson: We will let the thing roll, convener.

The Convener: How very kind.

Graeme Pearson: Amendment 97 seeks to give victims the opportunity to give oral representation directly to the offender via videolink ahead of release if they so wish. However, that would apply only in cases of life imprisonment if amendment 95 is not agreed to. As I understand it, victims are allowed to make oral representations only to an independent member of the Parole Board, who then reports the outcome of that remote representation to the board; however, victims see that as a hurdle in getting their views heard at first hand. Amendment 98 seeks to give the victim the opportunity to make oral representation to the offender and would apply only in cases of life imprisonment. Amendment 99 is technical in

nature and relates to amendment 97, and amendment 100, which is also technical, is linked to amendment 95.

I move amendment 95.

10:30

Margaret Mitchell: Amendment 96 provides that, in cases where a registered sex offender who is or has been subject to an indefinite notification period under the Sexual Offences Act 2003 is eligible for release, the victim can make oral representation to the Parole Board when the life registration is challenged or comes up for review. Basically, the amendment seeks to achieve parity between victims of sexual offences and victims of other serious crime, as there appears to be no good reason why victims of sexual offences should be overlooked in the bill. There is an opportunity here to strengthen the bill. The need for that was highlighted recently in the figures in the "Scottish Policing Performance Framework—Annual Report 2012-13", which show that there are now 3,314 registered sex offenders in Scotland.

Elaine Murray: As with the previous group, I have considerable sympathy with the amendments in this group. We all appreciate that victims of serious crime may themselves serve a very long sentence, so it is appropriate that their feelings and rights are taken into consideration when the perpetrators of such crimes are considered for release.

Roderick Campbell: As with the previous amendments that we discussed, there seems to be a difference of view between those who would opt for a big-bang approach and those of us who would see how things operate before extending the scheme. Under the bill as drafted, the right to make oral representations will apply only to the victims of life prisoners. I tend to the view that we should see how that works before considering whether to extend it further.

Kenny MacAskill: Amendments 95 and 100, in the name of Graeme Pearson, seek to make significant changes to the right to make oral representations to the Parole Board, which is covered in section 24 of the bill. The amendments would remove any restriction on the categories of victims who could make oral representations and would allow that option for all those who can currently make written representations.

The approach taken in section 24 of the bill is to enable oral representations to be made only by victims of life sentence prisoners in the first instance, but the bill includes an order-making power to allow that to be extended to other categories of prisoner, if appropriate, in future. Life sentence cases have been selected initially to reflect the higher likelihood that victims of such prisoners will wish to make representations and to allow the system to bed in before consideration is given to whether it should be extended. Once the uptake and effectiveness of oral representations in life prisoner cases have been evaluated, proper consideration can be given to the inclusion of other categories.

The Parole Board currently has 28 members and deals with approximately 800 cases every year. The provisions in the bill require that a member of the Parole Board who is not involved in the tribunal hears the oral representations. Therefore, it is not difficult to see that extending the right to all victims immediately would most likely render the proposed scheme unworkable and unmanageable within current budgets and staffing levels. I consider that it would be far more sensible to introduce the right to make oral representations using a phased approach, as that would allow for operational problems to be identified and rectified and for the feasibility and desirability of extending the scheme to be considered properly.

Amendment 96, in the name of Margaret Mitchell, would allow victims to make representations about release in cases where a prisoner has been subject at any time to an indefinite notification period under the Sexual Offences Act 2003. I consider that the amendment is too far reaching. It is questionable whether, for example, a victim of an assault should be able to make representations about a prisoner based on a previous offence that had nothing to do with the victim making the representations. Why should victims who have suffered exactly the same harm be treated differently with respect to the representations that they can make simply because one of the offenders committed an unrelated crime previously? As I have said, I am happy to consider extending the availability of oral representations in due course, but we must ensure that any extension is appropriate and workable and that the scheme has had a chance to establish itself first.

Amendments 97, 98 and 99, in the name of Graeme Pearson, would allow victims to make oral representations about release and licence conditions directly to the prisoner via videolink, although it is not clear at what stage in the process that would be done. I consider that proposal to be flawed. The prisoner has no involvement in decisions about his release and any licence conditions that may be attached, so what purpose would there be in the victim speaking directly to the offender about such matters? Furthermore, I fail to see what benefit that would have for the victim. Indeed, it may be counterproductive, giving the victim unrealistic expectations about what could be achieved through such a process, and

could prove to be a traumatic experience, to say the least.

Decisions on release and licence conditions are rightly made by the Parole Board, taking into consideration all the reports on the prisoner's conduct and progress. The victim is invited to make representations to the Parole Board about the release and possible licence conditions, and the bill will extend that to include oral representations for life sentence prisoners.

The prisoner already sees—and will continue to see—the representations that are made by the victim, unless there is good reason to withhold those from them. The amendments will add nothing to the effectiveness of the parole process. The Parole Board's primary concern is to consider the risk of releasing a prisoner, and that risk is best assessed by considering relevant representations by the victim to the Parole Board, alongside other reports on the prisoner that have been prepared.

I therefore urge Graeme Pearson to withdraw amendment 95, and not to move amendments 97 to 100. I invite Margaret Mitchell not to move amendment 96.

Graeme Pearson: I have heard all that the cabinet secretary has to say on the issues, and I am not persuaded by his arguments. We should be seeking to place the victim at the heart of the system and giving them an opportunity to feel that they count and have some say in the way in which justice plays out.

The reason for suggesting that the victim should be able to give oral evidence directly is that any submission from a victim in those circumstances would, rightly, be played out to the prisoner's knowledge. The prisoner should be aware of what is being considered by the Parole Board in making a decision. Any videolink would be viewed by the prisoner in the presence of the Parole Board, which would highlight the openness of the process.

I understand the challenges that such a change in culture would deliver, but there would be a dramatic improvement from the victim's point of view. The evidence that we heard from victims in committee, and in the representations that have been made to me since those evidence sessions, suggests that such a change would be a big and very positive improvement to the system.

I press amendment 95.

The Convener: The question is, that amendment 95 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

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

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 95 disagreed to.

Amendment 96 not moved.

Amendment 97 moved—[Graeme Pearson].

The Convener: The question is, that amendment 97 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

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

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 97 disagreed to.

Amendment 98 moved—[Graeme Pearson].

The Convener: The question is, that amendment 98 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against

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

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 98 disagreed to.

Amendments 99 and 100 not moved.

Section 24 agreed to.

Section 25—Temporary release: victim's right to make representations

Amendment 53 moved—[Kenny MacAskill]—and agreed to.

Section 25, as amended, agreed to.

After section 25

The Convener: Amendment 101, in the name of Graeme Pearson, is in a group on its own.

Graeme Pearson: Amendment 101 relates to section 25 on "Temporary release: victim's right to make representations". It seeks to create an opportunity for victims to indicate the means by which they receive intimation of any proposal for temporary release of a designated prisoner. It provides that

"Any communication providing information by a relevant person to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings must be in such form as the person reasonably requires",

and it outlines the detail of how that requirement can be delivered.

Amendment 101 seeks to create an opportunity for the system to communicate with the victim or the victim's family in a more compassionate way through a means that can be intimated by them at the outset of the process.

I move amendment 101.

Kenny MacAskill: I thank Graeme Pearson for raising the issue. I think that we would all agree that information should be provided to victims and witnesses in a format that suits their needs and in appropriate language that they can understand.

In its stage 1 report, the committee suggested that criminal justice organisations must

"take better care to ensure that the written information they provide to victims and witnesses is in plain English."

In my response, I agreed with that view and advised the committee that I would be happy to work with our justice partners to improve the language that is used in communications.

However, amendment 101 goes considerably further than that by requiring the police, prosecutors and others to communicate in whatever form is reasonably required by a victim or witness, and to take steps to determine the preferred form of communication, presumably prior to the substantive communication.

Although that is a laudable aim, it strikes me that imposing such a strict statutory duty would be fairly impractical and could have potentially significant resource implications. Making a phone call to a victim might be viewed as a reasonable requirement under subsection (1) of the section that amendment 101 seeks to insert and, in many cases, I agree that that would be a reasonable requirement, but it would put a significant burden on any organisation if a high volume of correspondence suddenly had to be dealt with by phone or in face-to-face meetings, if such meetings were requested. The proposed obligation to seek the views of victims and witnesses before communicating with them, regardless of how routine the information that is to be provided is, seems unworkable in practice.

I believe that better training and guidance for those involved would be a more appropriate way of improving communication with victims and witnesses than an impractical statutory obligation. We are already working with organisations from across the justice system, including those mentioned in amendment 101, to look at the victim's journey through the system and how it might be improved through effective implementation of the proposals in the bill and other practical measures. I see the improvement of communications as being part of that wider work. In particular, I would expect it to be considered when organisations develop their standards of service under section 2 of the bill.

Therefore, I urge Graeme Pearson to withdraw amendment 101. I give a commitment that the Scottish Government will continue to work with our justice partners in the area to ensure that any information that is provided to victims and witnesses is clear and easy to understand.

Graeme Pearson: I welcome the fact that the cabinet secretary seeks to improve the current arrangements, but the evidence that the committee received suggests that an amendment such as amendment 101 is required. I received evidence from a member of the public in the north-east who indicated that in her case, many years after the offender's conviction, she received—cold—a letter that took her right back to grade 1. Because the letter intimated the detail of what was to happen in technical language, it took her some days to find out what it meant under the current arrangements and how it applied.

Amendment 101 seeks to place an onus on the relevant services to ensure that they understand the needs of victims who are registered for notification and that they provide such notification by suitable means, whether that is by email, by telephone, by notifying Victim Support or by a letter, if that is what the victim seeks. My amendment would open up the door to a more humane approach to re-engaging with a victim when the circumstance arises.

I press amendment 101.

The Convener: The question is, that amendment 101 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 101 disagreed to.

Sections 28 and 29 agreed to.

Section 30—Commencement

10:45

The Convener: Amendment 54, in the name of the cabinet secretary, is in a group on its own.

Kenny MacAskill: Amendment 54 relates to the provisions in the bill establishing a national confidential forum. While the relevant sections on that were scrutinised separately by the Health and Sport Committee on 5 November, an amendment is necessary to section 30, which this committee is considering, as it affects commencement of the bill as a whole, hence the need to address this today.

The amendment arises from concerns expressed by survivors and other stakeholders in the consultation on the national confidential forum provisions of the bill at stage 1 about the need for the forum to begin work as quickly as possible. The Scottish ministers are also very keen for that to happen, particularly so that older and ill survivors and other former residents are given the opportunity to participate in the forum.

Amendment 54 will enable the appointments process to begin directly after royal assent. The committee will be aware that there is a convention that commencement should not take place until at least two months after royal assent. Therefore, the usual timing would make it unlikely that the NCF could begin to hear the testimonies of survivors and other former residents until 2015, given the time taken for the public appointments process to run its course. Early commencement, on the other hand, would enable the NCF to begin hearings in 2014.

The Scottish Government has considered carefully whether early commencement would adversely affect the rights of any individual or groups of individuals. Our conclusion is that survivors and other former residents will benefit from early commencement and no other parties will suffer a detriment as a result.

I move amendment 54.

Sandra White: I am pleased about the amendment. Having listened to evidence many years ago, we now have a national confidential forum and we are moving even further. It will be excellent if the forum goes forward as quickly as possible.

Amendment 54 agreed to.

Section 30, as amended, agreed to.

Section 31 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. With a large sigh of relief, I thank the cabinet secretary and his officials and the committee. I suspend the meeting until 11.

10:47

Meeting suspended.

10:59

On resuming—

Criminal Justice (Scotland) Bill: Stage 1

The Convener: Let us get back into harness, team. I welcome to the meeting today's first panel of witnesses on the Criminal Justice (Scotland) Bill. Murray Macara, Queen's counsel, is from the Law Society of Scotland; James Wolffe QC is vice-dean of the Faculty of Advocates; Michael Walker is a senior policy officer of the Scottish Criminal Cases Review Commission; and Fraser Gibson is the head of the appeals unit in the Crown Office and Procurator Fiscal Service.

11:00

I would like to take questions from members in segments, as that will help the panel and help the clerks to draft the stage 1 report. We will start with questions on sentencing for weapons offences, then move on to sentencing of offenders on early release, then on to appeals and finally to the SCCRC. Can I have questions on sentencing for weapons offences?

Roderick Campbell: I will kick off with a very basic question. Does the panel think that the courts need increased sentencing powers to deal with offences involving the possession of knives and other offensive weapons?

The Convener: Panel members can self-nominate to answer questions; the microphone will come on and I will call you. Michael Walker is first, please.

Michael Walker (Scottish Criminal Cases Review Commission): No. I defer to Murray Macara on this issue. I am here principally to speak to the issues involving the SCCRC.

The Convener: I beg your pardon. Who wants to answer this question, then? Murray Macara does.

Murray Macara QC (Law Society of Scotland): First, I thank you, convener, for the opportunity to give evidence. In answer to—

The Convener: I hope that you keep that spirit in mind as we get to the end of the evidence session.

Murray Macara: I might as well get the compliments out early.

The Convener: You must have heard that I do not do flattery. On you go.

Murray Macara: The Law Society has no particularly strong views about sentencing. It is not very long since the maximum sentence for carrying a knife or a bladed instrument was increased to four years. I do not know, but I suspect that that maximum sentence has not been imposed terribly often.

Having read the consultation document that accompanied the material that I was supplied with, I can readily understand the public's concern about the prevalence of knife crime and the Parliament's desire to address the scourge of knife crime.

Fraser Gibson (Crown Office and Procurator Fiscal Service): I, too, thank you very much for the invitation, convener.

Sentencing is clearly a matter for Scottish Government policy, rather than for the Crown Office and Procurator Fiscal Service. I note from the policy memorandum that the Scottish Government has outlined its policy on knife crime offences and, of course, as the Lord Advocate has often said, we are committed to tackling the scourge of knife crime in Scotland.

Roderick Campbell: This question is for Mr Gibson in particular. Are you able to say how many offences attract sentences close to the current maximum of four years?

Fraser Gibson: I am not, I am afraid. I do not think that we necessarily hold statistics on that at the moment.

Margaret Mitchell: I am given to understand that the figure might be that just one out of 805 offenders was given a sentence of four years and that 95 received a sentence of less than two years. In view of that, will the bill's proposal to increase the maximum sentence from four to five years, which sounds good and as if it would be more of a deterrent, make a huge difference? If not, what would?

The Convener: I do not know whether anyone on the panel wishes to address that or feels able to do so.

Murray Macara: I do not know whether increasing the maximum sentence from four to five years will make much of a difference. I have no reason to doubt the statistics that Mrs Mitchell has quoted. However, I suspect that the answer lies in culture rather than penalty. Somehow, in some areas of Scotland, the culture of certain people carrying knives needs to be changed. I would think that deterrent sentences can address that culture only so far.

Margaret Mitchell: If the statistics are right that only one out of 805 offenders was given a sentence of four years, surely the maximum deterrent has not been tested sufficiently to justify bumping it up to five years.

Fraser Gibson: Perhaps one point to bear in mind is that anybody who pleads guilty to a crime will get a discount in sentence. Certainly, in cases with guilty pleas we would not expect to see the maximum four-year sentence imposed, even if the judge was discounting that. The actual sentences that have been imposed might not give the full picture.

Margaret Mitchell: Is there a more general point then that we really need the statistics and evidence before us in order to judge how sentences are working and how effective the bill's proposals might be?

The Convener: I do not know whether that is a matter for the Crown Office, but it might be a matter for Mr Macara.

Murray Macara: The material that I have been supplied with—in other words, the policy memorandum—contains a lot of information about the progress that has been made in recent years but I suspect that more research is needed.

The Convener: Just to clarify for the record, what type of cases relating to possession of a knife or offensive weapon would attract the maximum sentence?

Murray Macara: The record of the accused would determine the imposition of the maximum sentence. Undoubtedly, someone sentenced to four years' imprisonment—which, indeed, has been imposed on one occasion—must have a significant record for either carrying knives or violence.

The Convener: In your experience, have any first-time offences attracted the maximum sentence? What kinds of offensive weapons or knives would a person have to be carrying in that case?

Murray Macara: It is inconceivable that a first offender would attract the maximum sentence.

The Convener: So a person wandering about Princes Street with, say, a machine gun would not in theory get the maximum sentence.

Murray Macara: We are talking about knives here, though.

The Convener: We are talking about knives and offensive weapons.

Murray Macara: Someone with a machine gun would be prosecuted under different legislation.

The Convener: Glad to hear it.

Elaine Murray will ask about the sentencing of offenders on early release.

Elaine Murray: Section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 allows a court to order that a person who has committed an offence during a period of early release from a custodial sentence be returned to custody to serve part or all of the period of the whole sentence still outstanding at the point when the new offence was committed. Although sections 72 and 73 alter that in some respects, the policy memorandum suggests that those changes

"do not substantively change the overall powers of our courts in this area".

Do you agree that the proposed changes will have a minimal effect on the courts?

Fraser Gibson: That is certainly my view.

Murray Macara: I agree. In my experience, courts are alert to the fact that the man who is about to be sentenced has been released early and they will generally take into account the provisions in section 16 of the 1993 act. I do not think that this change to oblige the court to take the matter into account will make a significant difference.

The Convener: We are whizzing on here. With regard to the appeals procedure, do you share concerns raised in the Carloway report about delays in progressing appeals in the current procedure? Surely that cannot be in the interests of justice either for the person appealing or for the Crown, which might itself be making an appeal.

Fraser Gibson: There have been a number of cases in the recent past—not, I hope, so much nowadays—in which appeals have taken an excessive length of time to come to a conclusion.

The Convener: What do you mean by an excessive length of time? Are we talking about years?

Fraser Gibson: Indeed. An example of that is the recent European Court of Human Rights decision on the William Beggs case, as a result of which Mr Beggs was awarded a sum of money because of the considerable number of years that his appeal had taken.

The Convener: I am afraid that I do not know that case. How many years are we talking about?

Fraser Gibson: I do not have the details with me, but I think that it might have been as many as five or six.

Michael Walker: I can also tell the committee that an SCCRC referral appeal that was heard on Friday has taken six years to reach the preliminary hearing stage. We are not even talking about a final decision in that case.

The Convener: Do these cases involve people in custody?

Michael Walker: Yes.

The Convener: Do people remain in custody all that time while they wait for their appeal to be heard?

Michael Walker: Generally, yes.

The Convener: Are they ever released pending the appeal?

Fraser Gibson: They are entitled to apply for interim liberation. Obviously, the court assesses the risk that the person in question poses before reaching any decision.

The Convener: What causes these delays? Six years seems an extraordinary length of time.

Fraser Gibson: The European court opinion on Beggs contains a detailed analysis of the cause for the delay in that case.

The Convener: Crumbs—I missed that. Can you give me the bullet points?

Fraser Gibson: I can certainly make that available to the committee. In some cases the delay has been down to appellants seeking to add new grounds of appeal over the years as the appeal goes on, or seeking to recover other documents, which has spun out the legal process to the extent that it takes a number of years. I can think of another commission referral—Graham Gordon—that took a number of years to come to a conclusion.

Michael Walker: It is not always the fault of the court or the process. Sometimes the appellant changes solicitors or legal teams and, each time they do that, the new team comes to the case anew. As Fraser Gibson said, appellants sometimes add additional grounds and the case can seem to spin out of control before it eventually comes to an end.

The Convener: What do the proposals in the bill do to remedy that? Do they go far enough? Should something else be done to accelerate appeals within reason, given that those other issues will remain?

James Wolffe QC (Faculty of Advocates): I belatedly add my thanks to the committee for allowing me to appear today.

No one could justify delay in the disposal of criminal appeals. In Scotland, we are proud of the expedition with which we deal with first instance business in the criminal courts and we should collectively be striving to achieve the same in the appeal court.

The committee should perhaps appreciate that the proposals in the bill, particularly in sections 76 and 77, are specifically focused on the question of late notes of appeal and late grounds of appeal and the like. They do not deal directly with the subsequent progress of appeals. That is very much left to the courts' case management responsibilities and that is firmly within the province of the court.

The specific proposals to deal with late notes of appeal and late grounds of appeal allow the court to permit those to be lodged in what is described as "exceptional circumstances" and the court must then have regard to certain things in deciding whether the circumstances are exceptional.

Wearing my other hat as a council member of Justice Scotland, I draw the committee's attention to the observations of that body in its written evidence to the committee. It makes the point that, on the face of it, the provisions in sections 76 and 77 would restrict access to the appeal court. The court already has a discretionary power to refuse to receive late notes of appeal and grounds of appeal. One would imagine that the court might be relied on to allow such documents to come in only when that is properly justified. Justice Scotland expresses the concern that narrowing access to the appeal court at the stage of an appeal being taken would restrict access to justice by restricting access to a process that puts right miscarriages of justice. It is ultimately tied to the consideration that the committee will have to give to the role of the SCCRC. If appeals are knocked out at that stage, they might simply go to the SCCRC and be considered at a later stage.

Murray Macara: I do not want to introduce a note of complacency but, until now, the questions have focused on the issue of delay and one or two examples have been given of exceptional delay. However, those are exceptional cases. I appreciate that Lord Carloway is concerned about the possibility of delay in the appeals process, but some appeals are processed expeditiously; I am thinking particularly of appeals against sentences that come up within two months or so.

We have a system that is capable of delivering appeals to conclusion very quickly. What must be remembered are the causes of delay. Michael Walker's example of a six-year delay was in an SCCRC referral. Inevitably, a commission referral takes longer than conventional appeals because anyone who is successful in obtaining a commission referral must have exhausted the conventional appeal process before going to the commission.

11:15

Fresh evidence and defective representation appeals inevitably take longer than other appeals. For example, defective representation appeals invariably involve a change of solicitor. Therefore, there are reasons for delay. My concern is that introducing an excessively rigid system could bring about miscarriages of justice. In the wider picture,

it may not necessarily be—I will trot out a phrase that we will no doubt use later—in the interests of justice that an appellant with a good appeal should be denied the opportunity to appeal simply because of an excessively rigid and fixed timetable.

The Convener: Generally, you are not happy.

Murray Macara: Generally not happy.

The Convener: That is fine. Other members will probe why that is the case.

John Finnie: My question is perhaps a bit off script but, given that we are talking about delays, I wonder whether the panel will comment on the circumstances of someone who is convicted, serves a period in custody and then, some years on, seeks avenues of redress, which may be limited, only to find that the Crown no longer retains some or all of the documentation.

The Convener: That matter is not related to the bill.

John Finnie: That is why I gave a preamble and hesitated about asking the question.

The Convener: I am sweeping your question to the side, but you have made your point.

John Finnie: Okey-dokey.

The Convener: We move on to Roderick Campbell. I hope that there is no preamble to your question.

Roderick Campbell: No, I will stick to the bill.

The Convener: You will stick to the point—good.

Roderick Campbell: Sections 79 and 80 modify procedures on the bill of advocation. Is the Scottish Government right to preserve bills of advocation and suspension or should it follow the Carloway line and abolish them?

Fraser Gibson: I am happy to answer that. Bills of suspension and advocation are extraordinary creatures that are, to some extent, a historical artefact, but it is difficult to define exactly all the circumstances that they cover and to put in place a statutory mechanism that would provide a mode of redress for all the circumstances that they cover. That is my understanding of why they have been retained and, albeit to the extent that a statutory alternative can be put in place, the legislation seeks to do that. For example, in seeking to suspend a search warrant in a case that has never gone to trial, it is particularly difficult to find a non-common law mode of redress. There are other odd circumstances a bit like that, so retaining bills of suspension and advocation allows a mechanism to appeal those decisions when abolishing them might remove a right of appeal that exists.

Roderick Campbell: How often are they used? Does anyone have statistics on that?

Fraser Gibson: We will have some figures; I will try to make them available. Bills of suspension are common.

Murray Macara: Yes, the bill of suspension will be used if, at summary level, the conduct of the judges is being attacked because that is the remedy—that is the mode of appeal if that is the issue in the case.

Roderick Campbell: Does nobody else wish to comment?

The Convener: Nobody is indicating that they wish to respond; I will not force anyone to do so.

Alison McInnes: Roderick Campbell has just covered the issue that I was going to ask about.

I draw members' attention to my entry in the register of interests and the fact that I am a council member of Justice Scotland.

Margaret Mitchell: I take what was said about restricting access to justice, but is there not a balance to be had in a little bit of flexibility? Will the panel therefore comment on the Carloway report's recommendations that were not taken up, such as the High Court's power to impose sanctions with the aim of enforcing time limits and procedural orders and, in particular, the power to order particular steps to be taken, such as not making funds available from the public purse?

The Convener: The panel cannot comment on that.

Margaret Mitchell: Without being too prescriptive in relation to the recommendations, I know that the Crown is quite supportive of doing whatever it can to increase efficiency and effectiveness.

The Convener: Perhaps the Crown does not want fines or conditions imposed on it. It might be the Crown at fault. I am not saying that the Crown is at fault—I am just saying that it might be.

Fraser Gibson: I am not sure that it is appropriate for me to comment on that, convener.

Margaret Mitchell: Nobody has any comments?

The Convener: Are there any practical things that the court could do to focus agents on both sides on increasing efficiency? You cannot tell me that no delays can be avoided. There must be delays that could be avoided in the appeal procedure. Should the court perhaps have some means of penalising parties, so to speak?

Fraser Gibson: It is perhaps fair to say, lest the committee comes away with the impression that delays are commonplace in appeals these days, that the court has made substantial progress over the past few years in dealing with delays. It has done that primarily by dealing with business efficiently, by appointing an administrative judge for appeals and by being strict about applying time limits on cases and allowing additional grounds of appeal to be lodged late. That is why sentence appeals are now dealt with expeditiously and solemn conviction appeals are dealt with much more quickly than they were a few years ago.

The court has made some progress in that direction, for which it is only fair to give it credit. That is not to say that other improvements could not be made, but I do not think that it is the Crown Office's place to say exactly what they should be.

James Wolffe: I concur with that observation. Mr Gibson has a much closer and more intimate knowledge of the appeal court than I do, but it would be wrong to give the impression that nothing has been done or is being done by the court in the exercise of its case management powers.

The court can do a great deal by being rigorous in the application of time limits, by exercising discretion carefully and by insisting on explanations that are satisfactory before steps are allowed to be taken out of time. Ultimately, the court needs to bear in mind its responsibilities not only to administer justice but to secure that justice is done within a reasonable time.

The steps that the court is able to take are perhaps not steps that are susceptible to legislation because they depend on the court exercising the powers that are available to it in the course of a case, with a view to securing the effective administration of justice. I concur with Mr Gibson that a great deal of the work can be done through the court's administration powers.

Margaret Mitchell: Can I put it another way, convener?

The Convener: I do not know, but you can try.

Margaret Mitchell: Do you feel that the Carloway recommendations on the court being able to impose sanctions, which would enforce time limits and procedural rules and perhaps help efficiency, are unnecessary? By and large, there is not a problem—that is coming over loud and clear—and I do not think that anything ever works perfectly, so has the Carloway report highlighted unfairly that that proposal should be considered?

James Wolffe: Perhaps I can offer this comment—our difficulty with that particular proposal is that lawyers who are involved in the representation of their clients could be penalised for steps being done out of time in circumstances in which that was not their fault.

If one thinks of a change of agency, for example, a new agent may take the view that it is their professional responsibility to seek to advance a new ground of appeal even though it is very late. The agent may take the view that that is the right thing to do in the interests of their client. It would be unfair, one might think, if such a lawyer were to be penalised simply because their application was being made late.

Margaret Mitchell: The recommendation is that the court can impose measures; it is not that it must impose them. There would therefore be an element of discretion to cover the situation that you outlined. However, where there was no justification the sanction would be there to send the very strong message that there is no excuse for a delay in particular situations.

James Wolffe: One would then have a satellite set of inquiries into precisely how a particular state of affairs came about. The Scottish Government has perhaps wisely taken the view that it does not wish to pursue that particular proposal.

Margaret Mitchell: So, the Carloway review obviously failed to take that into account when it made its recommendation.

James Wolffe: In many of these issues, we are dealing with matters upon which different views may reasonably be taken by different people.

Margaret Mitchell: Much could be said on both sides.

Sandra White: I will pick up on those points about different views from different people, penalties and so on. When a case is moved to another lawyer, the original lawyer may feel penalised if they are not able to bring forward the appeal. Is it the client or the lawyer who would feel penalised if he was not able to make the appeal? If an appeal was made, would that be on the basis of new evidence? What would be the relevant aspects?

You suggest that appeals that take six years to be heard are the exception. I note your comments about people having different opinions. What are the criteria for appeals if a case goes on for six years, particularly bearing in mind situations that involve changing lawyers or a lawyer finding a new piece of evidence? I would like to hear your opinion on that, and on exactly what constitutes a late appeal. Is it the lawyer or the client who is penalised?

James Wolffe: The basic ground of appeal is that of a miscarriage of justice. There are a variety of different ways in which a miscarriage of justice might be said to have occurred. There could be a variety of circumstances in which a particular issue

arises outwith the normal time limit. Ultimately, if an appeal is not allowed to proceed or if a particular ground of appeal is excluded, it is the client—the accused, or the convicted individual—who is losing the right of appeal or the opportunity to appeal.

If a ground upon which one could reasonably conclude that there had been a miscarriage of justice is knocked out of the ordinary appeal process, the person has the remedy, in our system, of going to the Scottish Criminal Cases Review Commission. The commission then has to exercise its judgment as to whether the appeal should be referred back to the appeal court. Ultimately, if a potentially good appeal is excluded from the system, it goes without saying that it is the convicted individual who does not have the opportunity to ventilate that ground in the appeal court who is losing out.

Murray Macara: In this respect, we are talking about appeals against conviction, rather than appeals against sentence. The problem is that we cannot generalise about appeals against conviction. There are straightforward appeals in which the sole point might concern there being insufficient evidence to allow the jury to convict. There might have been a misdirection by the trial judge. Such appeals can and do take place very swiftly.

The problem often arises because the appellant thinks that he has fresh evidence or that his existing solicitor or previous solicitor and counsel misrepresented him. Invariably, those issues require investigation and that is where delay creeps in. Often, what an appellant thinks is a good argument for an appeal with regard to, say, defective representation or fresh evidence does not, in fact, fit within the fairly narrow framework that the courts apply in such appeals. However, nevertheless, to satisfy the client, those matters require to be investigated.

That might be an aspect of the case that the appeal court is reluctant to acknowledge, but the client's wishes have to be followed to an extent in investigating whether the previous solicitor did not represent the accused to an appropriate standard.

11:30

Sandra White: That was the point. Thank you very much for being so concise and clarifying it for me. If the appellant is not happy with the representation, he can appoint another lawyer to appeal the case.

Murray Macara: Invariably, that leads to delay and the system must be able to accommodate that delay. That is simply what I am saying.

Sandra White: Thank you. That has clarified it for me.

The Convener: This area is quite technical for us and I will ask a couple of questions to get at some of your issues. Do I take it that you are not happy with the phrase "exceptional circumstances" popping up throughout section 76 and into section 77? Would you be happy if the bill just said

"the High Court may make a direction only if it is satisfied that doing so is justified"

period and left it to the court to take a view on whether it is justified, rather than introducing a test of exceptional circumstances? You have talked about process and ensuring that cases are managed more efficiently. Would you prefer that the words "exceptional circumstances" were simply not in those sections?

Murray Macara: I would like it toned down.

The Convener: What does that mean? Does it mean that we should take out "exceptional circumstances" or that we should put in other words?

Murray Macara: We should put in another phrase, such as "unless it is satisfied in the interests of justice".

The Convener: It already says:

"only if it is satisfied that doing so is justified".

Instead of "justified", do you want words such as "in the interests of justice"? I am not asking you to amend on the hoof, but do you want something like that?

Murray Macara: Something like that. Everything in law is about setting barriers or thresholds. No doubt the parliamentary draftsmen who were responsible for section 77 were entrusted with the task of ensuring that the threshold was set high in that provision. Our argument is that the bar should not be set quite so high.

The Convener: That applies in section 76 as well.

Murray Macara: Indeed.

The Convener: So something along the lines of "unless it is in the interests of justice" would be acceptable.

I move on to section 78, "Certain lateness not excusable". That seems to me pretty draconian. There is no flexibility at all for the bench on written intimation of intention to appeal or the lodging of a note of appeal.

Fraser Gibson: It seems to me that that provision simply seeks to prevent people from circumventing the earlier provisions. There is a general power of dispensation in section 300A of the Criminal Procedure (Scotland) Act 1995 and

section 78 simply says that it is not possible to use that general power of dispensation to get round the conditions in relation to the sections on solemn and summary appeal.

The Convener: So you are happy. I see happy faces, so that section is okay. I am trying to get to the issues with that fairly technical procedure.

Rod, do you want to come in?

Roderick Campbell: No, convener. I intended to ask a question on section 78, so you have stolen my thunder.

The Convener: Heavens. You have lots of thunder to come, though.

Murray Macara: We are not happy with section 78, because—

The Convener: You are not happy? I thought that you were all smiling at me.

Murray Macara: I am personally not particularly happy with section 78. Some imaginative lawyer will try to advance an argument as to what might constitute "exceptional circumstances" under sections 76 and 77. As Fraser Gibson explained, the purpose of inserting section 78 is to demonstrate what does not amount to an exceptional circumstance: a failure to lodge a note of appeal in accordance with the appropriate time limit.

The Convener: If we remove the words "exceptional circumstances", what impact does that have on section 78?

Murray Macara: I would think that it has an impact on section 78.

Fraser Gibson: I am not sure that it does. All it means is that you would try to use section 300A. All that section 78 is doing is saying that you cannot use section 300A to circumvent the other provision, whether that involves exceptional circumstances or something else. Whether or not the test should be about exceptional circumstances would depend on the terms of the relevant section laying down the time limit for summary or solemn appeals. The Crown's position is that a high test is justified for a late appeal. There should be some reason beyond the ordinary—whether it is classified as exceptional or something else—when someone is seeking to appeal late.

Mr Finnie raised a point about papers being destroyed. That just illustrates why if someone wants to seek remedies, they should do so quickly. No system can operate by perpetually revisiting old cases; it simply has to move on and litigate the current cases, otherwise it will cease to function. There is an onus on people, if they wish to exercise their right to justice, to do it quickly.

It seems to me that, as it is phrased, the exceptional circumstances test, although it contains the word "exceptional", has an element of flexibility. The phrase "exceptional circumstances" is used, but the bill goes on to list the things that the court has to look at in reaching a decision, and part of that is the proposed grounds of appeal, which obviously brings into consideration the merits of the grounds of appeal, the length of time that has elapsed—in other words, how late someone is applying—and the reasons that have been given for their applying late. When you look at the reasons, you can see that the proposal allows the court to perform quite a careful balancing act, weighing how much merit it sees in an appeal against the reasons why it is so late, and to arrive at an accommodation that serves the interests of justice. That is how the court approaches such appeals at the moment—balancing the reasons for lateness against how good the grounds of appeal are before coming to a decision. I would be surprised if the court would substantially depart from that under the new test.

The Convener: How long do you keep papers for?

Fraser Gibson: It depends on the type of case, and it also depends on whether an appeal is marked on time, but we clearly cannot keep everything forever. It is not just a question of papers. Witnesses' memories dim; witnesses die; some forensic evidence degrades. Nothing can exist in perpetuity.

The Convener: I ruled out John Finnie's question about losing papers, and I jumped on him when he was trying to ask what would happen if the papers were not there. However, if somebody is lodging an appeal and one of the exceptional circumstances is that the papers were not available, that ties in with his question. I am just curious to know how long they are kept. Solicitors have to keep certain papers for quite a long time. How long do you keep papers for?

Fraser Gibson: It depends on the type of case.

The Convener: A solemn case.

Fraser Gibson: You asked about "papers"; it depends on the type of papers. Productions, for example, even in a murder case, may belong to a witness. If no appeal is lodged, that witness is entitled to get those things back. They might belong to an accused person, so the Crown does not have a right to hold on to productions or labels in perpetuity, even though in the most serious solemn cases the Crown papers should be retained for a long period of time. It depends what you mean by "papers". It is not necessarily the same thing as evidence.

The Convener: I hear that. We shall come to the SCCRC in a minute. There may be fresh

evidence or it may be felt that there has been a miscarriage of justice, so the court might need the papers some considerable time after conviction.

Fraser Gibson: That is the point that I am trying to make about why people should seek remedies quickly.

The Convener: I have to let John Finnie in now. I apologise.

John Finnie: If there were clarity about a document retention policy, which should apply across the public sector so that the citizen can know how long documents are retained for, there would be no dubiety about why, of a group of documents of similar status, some could be found but others could not, and it would be clear that there was nothing untoward about that.

Fraser Gibson: No system is perfect, no matter how you try to make it so. It simply would not be feasible to hold on to everything in perpetuity. An appellant knows, or should know, the time limits for lodging an appeal. They are there for a reason.

John Finnie: I previously tried to establish whether there was a document retention policy. Is there one?

Fraser Gibson: There is one. I do not have the exact detail of it to hand, but I can make that available to you.

The Convener: You have some homework now.

We will move on to the SCCRC, which is a hobby-horse of mine. During the progress of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill in 2010 as emergency legislation, I tried to delete the entire section that changed the way in which the SCCRC operated and made referrals to the High Court. I do not know whether you are aware of that, Mr Walker.

Michael Walker: I was not aware of that.

The Convener: It would be helpful to me and other committee members if you could remind us of the process that applied before the 2010 act, including the criteria that the SCCRC applied before a referral and how the High Court had to respond.

Michael Walker: Of course, convener. The commission has a dual test. It must ask itself whether there may have been a miscarriage of justice and, as the second part of the test, whether it is in the interests of justice to refer the case to the High Court. What the emergency legislation in 2010 did was to give the appeal court—the High Court—for the first time the power to reject a reference by the commission where the court took the view that it was not in the interests of justice for the reference or the appeal to proceed to a full appeal hearing.

You are right. The commission's position in 2010—and it remains its position—was that there should be no veto of a commission reference by the appeal court in the interests of justice at either stage of the appeal process. The current position is that, as I have just said, the court has the ability shortly after the reference is made to knock out the commission referral. The proposal in the bill is to move that to the end of the appeal process.

I will give you a couple of statistics that I think support the commission's position. In the 14-year period since the commission's inception in 1999, 67 per cent of the referrals that the commission has made to the appeal court have been successful. I think that it is fair to say that the commission has a high strike rate and does not—

The Convener: Does that figure refer to referrals on sentence and conviction?

Michael Walker: Sorry. I should have said that it refers to conviction and sentence. The total number of successful referrals is split almost 50:50 between conviction and sentence.

The point that I was going to make is that that statistic shows in blunt terms that the commission does not clog up the appeal court with spurious referrals. The 67 per cent statistic compares very favourably with that for normal appeals, where the success rate is under 1 per cent.

I will give one other statistic. Since the emergency legislation that gave the appeal court the power came into force, the commission has made 21 referrals to that court, of which the first 20 proceeded to a full appeal. That statistic shows that it is reasonable to infer that the commission does not use its interests of justice test unreasonably.

The Convener: What happened to the expression "finality and certainty" in relation to the SCCRC? It still lurks, does it not?

Michael Walker: "Finality and certainty" is in the emergency legislation. When the commission applies its interests of justice test, it has to have regard to finality and certainty.

The Convener: Did you do that before the emergency legislation?

Michael Walker: We did, convener. It was always part of the commission's remit to do that. The legislation simply put it in statute. What is the definition of "finality and certainty"? That is a difficult question to answer. It would bring in the idea, which Fraser Gibson alluded to, that the proceedings have to come to an end at some point, so the age of the conviction is important. That is a factor that the commission would take into account in deciding whether it is in the interests of justice to refer the case.

Against that, however, a balance has to be struck, because the whole point of the commission's function and its ethos is to allow recourse to someone who has had an appeal and, perhaps many years later, feels that they have suffered a miscarriage of justice and comes to the commission. If the commission takes the view that there may have been a miscarriage of justice in the case, the simple fact that it is old, even with our having regard to finality and certainty, is not a determinative reason not to refer the case.

The Convener: I do not know whether you have the figures on this, but how many cases in which people have considered that there may have been a miscarriage of justice have you not referred in the interests of finality and certainty and the interests of justice? How often has the test been applied and, as it were, prevented a referral?

11:45

Michael Walker: I do not have the second figure to hand. On your first point, the key statistic is that the commission rejects approximately 90 per cent of the applications that it receives, so only a very small number of cases are referred to the appeal court. Of that number—

The Convener: Is the commission refusing those applications on the basis that, in its view, there is no possibility that there has been a miscarriage of justice?

Michael Walker: Yes.

The Convener: I am trying to tease out how far the other test applies.

Michael Walker: I was going to come on to that. It is not common for the commission, where it has concluded that there may have been a miscarriage of justice, to conclude that it is not in the interests of justice to refer the case. I do not have the exact figures on that, but I can certainly get them for you.

The Convener: That would be useful—thank you.

Michael Walker: I can give you a couple of examples of where the commission takes that view. Sometimes an applicant asks the commission to review a particular offence, and the commission looks at the case and decides that there may have been a miscarriage of justice. However, if the person has been convicted of numerous offences in the same indictment or complaint, we may take the view that it is not in the interests of justice to refer the case because that would make no difference to the applicant's sentence.

I will give a more topical example. There have been occasions following the Cadder judgment on which the commission has taken the view that a piece of evidence is inadmissible and that there may have been a miscarriage of justice in a technical sense but has gone on to say that the inadmissible evidence in question was not disputed at trial so it is therefore not in the interests of justice to refer the case.

The Convener: Yes, I see.

Michael Walker: We use that power—albeit sparingly, perhaps. In every case for which we are considering referral we will always take into account the interests of justice. To come back to my original point, we do not feel that the commission, following on from the Sutherland committee, should have its functions and remit—as the Lord Justice-General made clear in a recent case—simply duplicated by the appeal court. As the bill proposes, the appeal court should take its own view on whether it is in the interests of justice to knock out a case.

The Convener: So your position—as I understand it—is simply that you are glad that the gatekeeping role is gone, but that, if there has been a miscarriage of justice, the appeal should be allowed.

Michael Walker: I am saying that, in the vast majority of cases—

The Convener: By the High Court.

Michael Walker: It should not be for the High Court to decide whether it is in the interests of justice. The role was given to the commission, and if the commission decides that it is in the interests of justice—

The Convener: Absolutely—you are pushing at an open door with me in that regard, Mr Walker.

Michael Walker: Okay—I will say no more about it.

The Convener: I have not changed my position since the emergency legislation was introduced. Does anyone else want to ask the SCCRC any questions?

Roderick Campbell: Yes. I would like to clarify something, Mr Walker. It is my understanding that one of the reasons for the inclusion of the gatekeeping role in the emergency legislation was that it was feared that there would be a lot of applications post-Cadder. That situation has not materialised, as Lord Carloway has said.

Michael Walker: Right—it has absolutely not materialised. We received numerous Cadder applications, the bulk of which we rejected. Of those cases that we referred to the appeal court, which numbered fewer than a handful, all were successful. The opening of the floodgates that was predicted did not happen.

The Convener: What do you think of Lord Carloway's argument that, if a case is referred by the SCCRC and we take away the gatekeeping of the High Court and the appeal court, but during the course of the appeal—this is very suppositional—the appellant confesses to another offence, it would not be in the interests of justice to allow such an appeal to be granted?

Michael Walker: That is an interesting argument to consider, and we have thought about it before. If the commission reached the view that there may have been a miscarriage of justice in a particular case—by applying some of the tests that James Wolffe pointed out—and then uncovered new information or evidence, or if the applicant confessed to that particular crime, we would perhaps not consider a referral to be in the interests of justice, albeit that we believed that there may have been a miscarriage of justice.

From what I understand, you are saying with regard to Lord Carloway's example that somehow the confession may be made post the commission's referral—

The Convener: Yes.

Michael Walker: That has never happened, and I do not foresee it ever happening.

The Convener: I thought that there would just be another trial.

Michael Walker: The applicant could certainly be retried.

The Convener: The argument was that it would therefore not be in the interests of justice. I think that Mr Gibson wants to say something.

Fraser Gibson: I think that something similar has happened in England. After the Criminal Cases Review Commission, which is the English equivalent of the SCCRC, referred a case, further forensic work was carried out and DNA evidence was uncovered years later that implicated the appellant in the murder. It was quite a famous case, but I cannot remember the name of it.

Michael Walker: Was it the Hanratty case?

Fraser Gibson: Possibly.

Michael Walker: I do not see that as an argument for retaining the interests of justice test.

Fraser Gibson: But it might have been what Lord Carloway had in mind.

The Convener: I do not think that it would be the same case. Would it not involve a separate crime? Of course, it could be the same case if there were a confession.

Fraser Gibson: The Crown Office supports the retention of an interests of justice test for the court for two reasons. First, it future proofs the system against things like the Cadder case happening again and, secondly, it guards against the possibility of error.

As Michael Walker has said, all the Cadder cases that the commission has referred and which have gone to argument before the appeal court have been successful. What that demonstrates is that in change-of-law cases one has to be careful about finality and certainty. After all, if a case is referred in which the essential corroborating admission is no longer available after the Cadder decision, because that admission was given without the benefit of legal advice, it is inevitable that the referral and appeal will succeed because, by the time we get to the appeal, there will be insufficient evidence. If the court did not have this power, it would not be able to do anything with a case referred in error in terms of the finality and certainty test except quash the conviction. Everyone accepts that the SCCRC does a very valuable job, performs a very valuable function and does an extremely difficult job, but anyone is capable of making an error. Of course, the appeal court recently rejected a referral in the case of Francis Carberry.

Michael Walker: As I understand it, the Carberry decision is still being litigated; Mr Carberry's solicitors have sought special leave to go to the Supreme Court. As a result, I am not sure whether it is appropriate to discuss that case.

The important point is that, when you look at the commission's track record, you just will not see all these mistakes that Fraser Gibson has suggested might or might not happen. In fact, our track record shows precisely the opposite. As for Mr Gibson's very specific and technical point about sufficiency of evidence in the Cadder cases, I have already said that, in many of those cases, the commission applied its own interests of justice test and did not refer the cases to the appeal court. It is not that there has been a change of law, evidence has become inadmissible and the commission has simply referred every case to the appeal court—quite the reverse. The commission looked at all those cases and, in many instances, rejected them. They did not even reach the appeal court. I come back to my point that, in my view, that should be the function of the commission, not the appeal court.

The Convener: So you are the gatekeepers.

Michael Walker: I think so. The establishment of the commission followed the recommendations of the Sutherland committee, which made it quite clear that this particular role should not be given to the appeal court. That is why the commission exists.

Roderick Campbell: How is it equitable that only SCCRC appeals have an interests of justice test and other forms of appeal do not?

Fraser Gibson: The rationale, I guess, is that they are special. For a start, they emerge with time. Some cases arise many years late and in many of those cases a retrial will not be possible. Ultimately, the commission has to consider whether it is in the interests of justice to refer them; that is not a requirement for any timeous appeal, as long as it can be argued that the appellant can raise it and that it can get past sift and be heard by the appeal court.

Murray Macara: The Law Society of Scotland's position is that the commission's approach is an appropriate one. Since the commission was established in 1999, it has established a strong reputation and has great credibility. It sets about its tasks very conscientiously. From 1999 to 2013, it has applied all the appropriate tests: it has looked at whether there has been a miscarriage of justice; it has applied the broad test of the interests of justice; and it has looked at issues of finality and certainty. Our argument is that the commission should be trusted to continue doing that and that the High Court, as the appeal court, should concern itself simply with whether it has been established that there has been a miscarriage of justice.

James Wolffe: That is also the position of the faculty. Lord Carloway said in his review:

"The case for maintaining a gatekeeping role for the High Court would have greater force if there were a perception that the SCCRC had a significant track record of frivolous or inappropriate references and it were thought that some further measure was required to bring greater discipline to their activities. The Review is content to note that there has been no suggestion from any source, nor is there any other reason to suppose, that this is the case. Indeed, it seems to be widely accepted that, despite the occasional lapse, the SCCRC has been a conspicuous success in discharging its duties conscientiously and responsibly."

Michael Walker: I would echo those thoughts.

The Convener: Quelle surprise!

Murray Macara: I wonder whether I can say something else. I know that we are not considering corroboration today—

The Convener: Oh please—do not mention the C-word!

Murray Macara: That is a treat yet to come for this committee. It must be a matter of concern to the commission that corroboration is likely to be abolished or may be abolished, because that could lead to the floodgates opening in terms of the number of applications going to the commission. You can imagine that an individual who was convicted on the basis of a single source of evidence might well be quite aggrieved about that and might well want to pursue whatever remedies are open to them—the only remedy that might be open is an application to the commission. I suspect that if corroboration goes, the commission's work will increase significantly.

The Convener: I already thought that that issue would be coming down the track. Roderick Campbell and Alison McInnes want to ask questions. I will take Alison first.

Alison McInnes: Convener, I am not having a good morning.

The Convener: It is allowed. I often have mornings like that.

Alison McInnes: I was going to discuss section 82, but I think that we have had a very clear exposition of the points of view on it already.

The Convener: Okay. I call Roderick Campbell.

Roderick Campbell: What do panel members think public opinion would be in circumstances where the court took a view that there was a miscarriage of justice but did not think it was in the interests of justice to allow the appeal? I know that it would depend on the case, but are there any general thoughts on that?

Michael Walker: I think that the public would have some difficulty coming to terms with the court at the end of the process finding that there had been a miscarriage of justice but saying, for another reason, that it was not in the interests of justice to allow the appeal. The role of the commission is to try to increase public confidence in curing miscarriages of justice. Will the public have less belief in its role if, at the end of the process, the appeal court simply stamps its foot and refuses to allow the appeal?

The Convener: I am not going to go into the merits or otherwise of corroboration, but do you think that abolishing it might result in a heavier workload for the SCCRC? Are you building that into your projections?

Michael Walker: I am not entirely sure whether we have thought that far ahead. We are entering the realms of a certain amount of guesswork. We have a very close relationship with our colleagues in the English commission. Given that they do not have corroboration, we have asked for statistics about the number of cases that they have. The picture is not clear. They generally deal with a proportionally similar number of cases and referrals to the SCCRC, but in England there are other safeguards—principally, the provision that in a jury case there must be a 10 to 2 majority, which we do not have. You cannot make a like-for-like comparison because it is difficult to find empirical data.

The Convener: Do you think that there would be an immediate impact on your workload?

Michael Walker: We are in the realms of guesswork, but yes, possibly.

The Convener: We have exhausted our questions for you. I thank the panel very much for attending. We will get to corroboration at some point. I will suspend the meeting for a couple of minutes while we change panels, but members should stay put.

11:59

Meeting suspended.

12:01

On resuming—

The Convener: I welcome our second panel of witnesses. Alison Di Rollo is head of the national sexual crimes unit in the Crown Office and Procurator Fiscal Service and Bronagh Andrew is assistant operations manager of the trafficking awareness-raising alliance project at Community Safety Glasgow. Thank you for waiting. We will go straight to questions from members.

Sandra White: Good afternoon. It is nice to see you here. My question is on a procedural matter. The bill will create two statutory aggravations relating to people trafficking, and provisions in relation to aggravating factors in general, where it is proven that someone committed an offence in circumstances in which one of the statutory aggravations is also established. How might the proposed statutory aggravations be used in practice? What difference will they make?

Alison Di Rollo (Crown Office and Procurator Fiscal Service): It probably falls to me to answer that. Aggravation will provide another element in the toolkit for prosecutors on receipt from the police of a case that could be about wide-ranging criminal activity of a sexual nature, of a financial nature or whatever.

Where it is not possible to find sufficient credible and reliable evidence to libel a substantive trafficking offence in section 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 or section 22 of the Criminal Justice (Scotland) Act 2003, the aggravation will enable us to lead evidence and to put to the court and the sentencer a context or background of trafficking that would aggravate the offence and so lead to a more extensive sentence. It will also allow the courts and criminal justice system to record more accurately human trafficking activity in this country.

I am pleased to be able to sit here today in a position where, to use that horrible phrase, the direction of travel—

The Convener: I agree—it is a horrible phrase.

Alison Di Rollo: The phrase is ghastly, but it makes the point that we have made progress in awareness, detection, prosecution and conviction of offenders who are involved in trafficking. We will—one hopes—continue to do that. The proposed aggravation will give us increased flexibility and increased powers to bring evidence to the court to shine a light on that activity so that statistics are more robust and accused persons who are convicted of such heinous crimes are sentenced to longer periods of imprisonment.

Bronagh Andrew (Community Safety Glasgow): I agree with Alison Di Rollo that the aggravation will be another tool in our arsenal in the fight against human trafficking. Many of the women whom we support are extremely traumatised and have little information about the human traffickers, so it can be difficult for investigations to progress. We support the statutory aggravation offence for trafficking women.

Sandra White: I might be straying into another area—I seek your advice on that—but we have seen the recent revelations about young girls apparently being brought up to Scotland for genital mutilation. The bill includes aggravated offences. I am not suggesting that the bill should be rewritten, but do you think that aspects of the bill might pertain to that practice? It has been suggested that young women from England, Wales and other places are being brought up to Scotland for genital mutilation. Could that be considered in the context of the bill?

Alison Di Rollo: I do not think that the bill needs to be strengthened or expanded in that regard; rather, I think that that is a good example of the kind of context in which it could be used.

I will stress something that Baroness Kennedy mentioned in the Equality and Human Rights Commission's report, which is that the aggravation will give us an opportunity to prosecute sexual offences in a wider context because genital mutilation crosses borders between child abuse, sexual abuse and physical abuse. If we had uncorroborated or evidentially weak information that a child had been trafficked in order to be mutilated, I am content that the provisions of the bill would allow us to factor that into preparation of our case and the evidence that we would lead in support of it, because the mutilation aspect is a discrete criminal offence in this country.

I am anxious to get back to my desk, because I am dealing with a trafficking case that involves extremely serious sexual offences. It might be the

right decision to prosecute for the extremely serious sexual offences, which include rape—an offence that attracts life imprisonment—along with either the accompanying substantive trafficking offences, if we can prove them, or with the aggravation that the rapes in question have been committed against a background of trafficking. Your point about female genital mutilation is highly pertinent. The case that I am dealing with strengthens my conviction that the aggravation provision is a helpful one.

I take the opportunity to make a clear statement that I hope will be of assistance to the committee: it will always be in the public interest to bring a substantive trafficking charge, either under section 4 of the 2004 act for exploitation, or under section 22 of the 2003 act for prostitution, where there is sufficient credible and reliable evidence, and we will do so. I make that statement to clarify that the aggravation will not be used as an easy option or a shortcut.

The Convener: I am looking at the bill's definition of "people trafficking offence", which refers to other legislation. I do not have a clear understanding of that definition, which has been extended. One tends to think of it as applying to sexual exploitation or exploitation at work, but I did not think about it in the context of the issue that Sandra White raised. What is the definition of "people trafficking offence" in law? I see that it is an offence under section 22 of the 2003 act.

Alison Di Rollo: Section 22 of the 2003 act is the provision that deals with trafficking in relation to prostitution. There are two key elements to it. That is interesting, because if we fall down on either of them, we will not be able to prosecute under that charge and we may fall back on the aggravation. The first essential element is to prove that the accused has arranged or facilitated

"the arrival in the United Kingdom ... or travel there".

That is the trafficking bit. We need to prove that they have been complicit in moving the person around.

The additional element, as far as section 22 of the 2003 act is concerned, is that we need to prove that the trafficking is for that person to "exercise control over prostitution". That means that they have exercised

"control, direction or influence over the prostitute's movements in a way which shows that the person is aiding, abetting or compelling the prostitution."

It is about controlling, influencing and moving people around.

That can be contrasted with the provisions of section 4 of the 2004 act, on trafficking people for exploitation. Again, the essential element is the trafficking element, which is the facilitation of the arrival in the country of people, or moving them around. That could refer to taxis going from the west end of Glasgow to the south side; we take a very broad-brush approach to that aspect.

The committee will be aware that exploitation could be about slavery or forced labour, or offences under the Human Tissue Act 2004 involving body parts, organs and so on. With regard to forced labour, section 4 of the 2004 act would require us to prove that the complainer was

"subjected to force, threats or deception designed to induce"

them to provide the services.

The Convener: From what you have just said, what my colleague referred to—female genital mutilation—does not come under the heading of people trafficking.

Alison Di Rollo: No. That is a discrete offence in its own right.

The Convener: Yes, I know, but it does not come under the bill's provisions on people trafficking.

Alison Di Rollo: No.

The Convener: I think that we have been endeavouring to see whether we could make a link and bring female general mutilation under the bill as being associated with trafficking. Am I making sense? People trafficking is defined in the bill, but female genital mutilation was introduced as something that might be regarded as an aggravated offence under the bill. Can that be done for female genital mutilation, given that the bill is to do with people trafficking?

Alison Di Rollo: Yes, because what is in the bill does not refer to section 4 of the 2004 act or to section 22 of the 2003 act. That is my reading of it.

The Convener: The bill defines people trafficking.

Alison Di Rollo: Yes.

The Convener: So, it does. I cannot see how the aggravated offence—what my colleague referred to—cannot be extended. Am I misunderstanding it?

Alison Di Rollo: With respect, convener, you are, because we can apply the aggravation to rape, identity fraud, theft and drugs offences. Any offence, such as rape, could be aggravated.

The Convener: What section are you talking about?

Alison Di Rollo: It is section 83(2), which states that

"An offence is aggravated by a connection with people trafficking activity".

Sandra White: So that could mean any offence.

Alison Di Rollo: Yes.

The Convener: I do not agree, but I must not debate it with you. I will have to think that one through, because I think that I am thinking differently. I will let others in now.

John Finnie: My question is for Ms Di Rollo. If I noted it correctly, you talked about awareness, detection and prosecution. I note that you are the head of the national sexual crimes unit, and I know that tremendous work has been done by TARA and the Crown Office and Procurator Fiscal Service. With regard to awareness, I wonder whether the association of trafficking with the sex industry is a challenge. I represent the Highlands and Islands, and I am aware of two instances relating to forced labour and drugs cultivation. I do not think that there is sufficient awareness out there. What is being done to increase awareness that trafficking is not simply an urban prostitution-related issue but a much broader one?

12:15

Alison Di Rollo: Police Scotland, through its national unit, is doing a good deal of work to raise awareness and to encourage reporting—in particular of cases outwith the sex industry, such as you referred to. For example, in respect of youngsters going round in vans on charity collections, or cannabis farms being found in private housing estates, people are generally becoming more aware of the possible connection with trafficking.

Beyond that, as we have heard in a recent conference and in evidence to the committee, it has been recognised that raising awareness is a wider societal issue. I must confess that, as a prosecutor, I sit at the end of the food chain, if you like, and take cases that are reported to us from the police. We help and play a role in securing convictions and gaining publicity for those convictions, so that people are aware that such crimes are happening on their doorsteps.

Bronagh Andrew: Perhaps I can help. Last month, the UK human trafficking centre published statistics for 2012 on use of the national referral mechanism. The statistics show a definite increase in individuals being identified about whom there are concerns that they have been trafficked for labour exploitation. As you know, our colleagues in Migrant Help are funded by the Government to support victims about whom there are concerns that they have been trafficked for labour or domestic servitude. It is unfortunate that the organisation is unable to attend today. I am aware that it is getting busier. The message on trafficking is getting out there.

The Scottish Government has convened a sub-group of the anti-trafficking progress group to look specifically at awareness raising and training. The sub-group is very keen to ensure that there is a wider awareness of the different types of exploitation from which human traffickers profit.

John Finnie: Does the legislation go far enough? Are there other elements that could have been picked up on?

Bronagh Andrew: That is quite a difficult question. In our written submission, we raised concerns that there is in Scots law no definition of human trafficking. Colleagues work to the Council of Europe definition, which has three key elements. Those cover the act of exploitation, including the recruitment, the means, the deception, the coercion and the abuse of a position of vulnerability; the intention to exploit; and the exploitation itself. It would be helpful to have an agreed shared definition that is legally binding.

Following the bill's introduction, two consultations are taking place on legislating specifically for human trafficking. The UK Government is gathering evidence on the need for a modern slavery act and, in the Scottish Parliament, Jenny Marra MSP has issued a consultation on her proposed human trafficking bill for Scotland. Both look at pulling together the disparate legislation and seek to agree a shared definition of human trafficking in domestic legislation.

John Finnie: Clearly, Scots law is distinct. What liaison, if any, is there with other authorities? Human trafficking recognises no boundaries. There were issues in the north of Ireland; there will be issues with the border with England. Is there cross-border co-operation?

Alison Di Rollo: Absolutely. We refer a lot to "operation factor", which involved extremely close co-operation with the Police Service of Northern Ireland. We also have regular dialogue with the Crown Prosecution Service; we recently spoke to it about the possibility of identifying expert evidence to lead prosecutions in Scotland in the way that one might use expert evidence from drugs officers on how that industry operates. We are looking at that and we have very close co-operation, as is increasingly the case across Europe. Indeed, the case to which I return after this session has very much an international dimension, with on-going dialogue through Interpol.

John Finnie: To return to the previous point on the absence of a common definition on human trafficking, while accepting that there are various jurisdictions, surely to have a Europe-wide—for argument's sake—definition would be of benefit?

Alison Di Rollo: That is a matter for the legislature and others. I am content to work with whatever legislative provisions are deemed to be appropriate. I work contentedly with the current legislation. I am not suggesting that a common definition would not be a good idea, but that is more for others.

John Finnie: The lack of a definition is not problematic in your dealings with other jurisdictions.

Alison Di Rollo: It is not, either technically or legally, given the definitions that we are working to.

The Convener: We must move on because I am mindful of the need to finish by 12.30 pm. I call Roderick Campbell to be followed by Elaine Murray.

Roderick Campbell: Ms Di Rollo mentioned that we should not think of aggravations as being a soft option that could be used in preference to section 22 of the 2003 act and section 4 of the 2004 act. I believe that I am right in thinking that there have been only a handful of convictions for people-trafficking offences but are more such cases coming through the system?

Alison Di Rollo: Yes.

Roderick Campbell: Are there substantially more offences?

Alison Di Rollo: There are materially more. I think that between 2007 and 2012 only two people were convicted of trafficking offences in Scotland; that number has increased to seven. I am aware of the increase because, as lead prosecutor, I see all the cases; they come through my unit of specialist prosecutors. At the moment, there are seven cases pending. We have secured additional convictions and there are in train more cases covering domestic servitude, trafficking for prostitution and forced labour. On John Finnie's point, the cases are not focused entirely on prostitution; we are getting cases across the board.

Roderick Campbell: Thank you. That was helpful.

The Convener: Do you have a question, Elaine?

Elaine Murray: I had a question about the need for further legislation, but it has pretty much been answered. I presume that even if there were further legislation the aggravated offences would be useful in prosecutions.

Alison Di Rollo: Yes.

Sandra White: Perhaps I did not make myself clear enough earlier; Bronagh Andrew's response about the European definition of trafficking clarified the matter for me. Trafficking is all about making people move against their will and without their permission.

I will go back to the controversial question of how we might use the aggravation provision; I think that Alison Di Rollo mentioned body parts. Trafficking is about moving people against their will; if you move young women across Britain and up to Scotland because, for example, you think that it is easier to perform genital mutilation, surely that will produce body parts, so classing those as two separate aggravations would help to convict anyone who was involved in such activity. Can you clarify whether that is the case?

Alison Di Rollo: That would depend on the circumstances. I think that I see the point that you are making; if a child was brought to Scotland to be subjected to the offence of genital mutilation, it might or might not be possible to establish a trafficking background. On the convener's point, to bring a child to Scotland for that purpose on an isolated basis rather than on an organised or commercial basis would not necessarily be a trafficking offence.

The Convener: Yes, I think that that is right.

Alison Di Rollo: As far as I am concerned, the fact that a child had been brought from her home country to a strange foreign country to be subjected to female genital mutilation would, in and of itself, be an aggravation and we would seek to lead evidence of that. However, it very much depends on the people responsible and their wider activities whether an aggravation or some other substantive offence could be proved.

The Convener: I am mindful that we must not get into a big debate about the subject, but my point, which referred to the two definitions that you mentioned and the references to the other pieces of legislation, was about someone being brought into the country not just against their will but against their will for a specific purpose, which did not include the issue that was raised by my colleague. I am concerned that you are being trammelled by the definitions. The point is that the people in question were brought into the country not just against their will but for the purposes of exploitation, whether that meant menial work, slavery or sexual exploitation. However, genital mutilation is not covered and I wonder whether, in view of the definitions, that offence would be difficult to prosecute as an aggravation under the bill.

Alison Di Rollo: If that aggravation was not present, it would not be appropriate to prosecute it.

The Convener: I appreciate that but I am talking about the specific purposes. I think that I

will need to read the material again and give it a bit more what I would call thunking.

Alison Di Rollo: We can be confident that we have created a discrete offence in relation to female genital mutilation; we also have discrete offences for trafficking and we will now—God willing—have the additional tool of evidential aggravation, where the evidence supports it. We still need evidence to prove the aggravation.

The Convener: Perhaps not corroboration, but we are not going to mention that word today.

I thank the witnesses very much for their evidence and patience and the committee for their questions.

I say to members before they put away their papers that there are other items on the agenda; however, as we have only five minutes left, I suggest that we take items 3, 4 and 5 next week. We do not have time to consider them tomorrow because we have two panels of witnesses. [*Interruption*.] Apparently we have three panels. Is that not good? Buy one, get one free. With members' leave, we will take items 3, 4 and 5 on today's agenda next week.

Members *indicated agreement.*

The Convener: Tomorrow we take evidence on the Criminal Justice (Scotland) Bill from the Lord President and the Lord Advocate, and on prison visiting committees. I know that you cannot wait. We start at 9.30 am and there will be no bacon rolls.

Meeting closed at 12:25.

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