OFFICIAL REPORT
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Criminal Justice Committee

Wednesday 8 June 2022

Session 6

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Pàrlamaid na h-Alba

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CRIMINAL JUSTICE COMMITTEE
19th Meeting 2022, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)
*Jamie Greene (West Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Pauline McNeill (Glasgow) (Lab)
*Collette Stevenson (East Kilbride) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Keith Brown (Cabinet Secretary for Justice and Veterans)
Patrick Down (Scottish Government)
Justin Haccius (Scottish Government)
Graham Simpson (Central Scotland) (Con)
Brian Whittle (South Scotland) (Con)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 8 June 2022

[The Convener opened the meeting at 09:31]

Coronavirus (Recovery and Reform) (Scotland) Bill: Stage 2

The Convener (Audrey Nicoll): A very good morning, and welcome to the 19th meeting in 2022 of the Criminal Justice Committee. There are no apologies.

Agenda item 1 is consideration of the Coronavirus (Recovery and Reform) (Scotland) Bill at stage 2. I ask members to refer to their copy of the bill, the marshalled list of amendments and the groupings of amendments for this item.

I welcome to the meeting the Cabinet Secretary for Justice and Veterans, Keith Brown, and his officials. I remind the officials that they are here to assist the cabinet secretary during the stage 2 debate and that they are not permitted to participate in the debate. For that reason, members should not direct any questions to them.

We are also joined by two non-committee members who have lodged amendments to the bill: Graham Simpson MSP and Brian Whittle MSP, who is to arrive shortly.

As a reminder, the Criminal Justice Committee will consider amendments to the justice provisions in the bill—specifically amendments to sections 26 and 30 to 32 in part 3, and part 5, including the schedule to be considered immediately after the section that introduces it, and any other amendments specifically on matters relating to justice, including civil and criminal justice. The COVID-19 Recovery Committee will consider all other amendments. Separate daily lists and marshalled lists have been produced for each committee.

Before we begin our consideration of amendments, I politely ask members to make their points succinct and clear when they are speaking to their amendments.

Section 26 agreed to.

Sections 30 and 31 agreed to.

Section 32—Chairperson's functions

The Convener: Amendment 1009, in the name of Jamie Greene, is in a group on its own.

Jamie Greene (West Scotland) (Con): Good morning, colleagues and cabinet secretary.

Amendment 1009 relates to the functions of the Parole Board for Scotland. Section 32 of the bill specifically includes a provision that allows certain functions of the Parole Board to be conferred upon another individual. That has been possible throughout the Covid pandemic, and it is particularly important in the absence of the chairperson, who plays an important and vital role in the proceedings of parole hearings. No one has any problem with that in principle. However, amendment 1009 seeks to do something else. It seeks to ensure that, should the chairperson be absent from a hearing, the scheme that sets out who takes over their functions and what functions they take over also ensures that victims can still attend parole hearings, despite that change in relation to the chairperson.

The amendment states:

> "The scheme must include provisions which set out how those authorised to carry out functions conferred on the chairperson ensure registered victims are able to attend parole hearings in the absence of the chairperson."

It then defines what a "registered victim" is, using existing legislation.

It is quite a short amendment, but it is also quite an important one, because I think that we would all agree that the coronavirus pandemic has made it more difficult for victims to have a voice in the justice system, as processes have moved online, hearings have been delayed and postponed—often repeatedly—and, indeed, victims themselves have contracted Covid and been unable to fully participate in proceedings.

Victims whom I have spoken to have been concerned that changes to the Parole Board and its operations during the pandemic have given them no say in proceedings and no voice through the process. That is backed up by statistics. It was discovered through a freedom of information request that 26 victims made applications to attend parole hearings during the period between March 2021 and October 2021—during the pandemic—and none of those was granted. I do not have wider statistics, but I am sure that what those show would be equally poor.

The reason for those denials is unclear. In fact, many of the victims—some of whom I have spoken to personally—have said that they had been given no reason. It will not be a surprise to members to hear that I believe that, pandemic or no pandemic, chairperson or no chairperson, victims deserve the opportunity to attend hearings in whatever manner, shape or form they take.

One victim whom I spoke to just two weeks ago is still facing repeated challenges in attending parole hearings, which are only now moving from

teleconference to video hearings, none of which is face to face. They have been endlessly and repeatedly cancelled and delayed with no justification.

Graham Simpson (Central Scotland) (Con): You have kind of answered a question that occurred to me when you were speaking. Excuse my ignorance, but I was wondering whether parole hearings have been held virtually. It is clear that they have been. In that case, it seems to me that there is no reason whatsoever why victims should not be able to attend for reasons of public safety. With that in mind, I can think of no reason at all why members would not support Jamie Greene's amendment 1009, which seems eminently sensible.

Jamie Greene: My amendments always are, Mr Simpson. I appreciate your support.

There is a genuine point to be made. People have asked the question: why on earth are people being denied the ability to attend hearings in environments in which there is no physical meeting? We understand that many processes moved online for good reason. We also understand that the bill seeks to extend some of the measures in the eventuality that they are needed. However, my view is that there is no excuse for doing things only virtually these days when, as we can see, the world has opened up again.

I am sure that the cabinet secretary will clarify that there is already a process for how victims can participate in hearings. That process already exists, but it is clear that it is not working. My amendment 1009 does not say that all victims must attend every parole hearing—it does not go that far. I ask that, in the eventuality that the chairperson, who often makes the decision on who can and cannot attend, is incapacitated in any way and their functions are conferred on another, that individual must lay out the process by which registered victims are able to attend hearings, which they clearly are not doing at the moment.

I hope that other members and the cabinet secretary will be sympathetic to the rationale behind my amendment.

I move amendment 1009.

The Cabinet Secretary for Justice and Veterans (Keith Brown): I am sympathetic to the rationale that Jamie Greene has laid out, but the Government and I do not support his amendment for the reasons that I will enumerate. I will restrict my comments to the amendment rather than comment on the wider issues that have been raised.

Victim attendance at parole hearings is obviously a key issue, and I fully support that, but the scheme of delegation for the chairperson's functions is not the appropriate, or even logical, mechanism by which to address the issue, as those are entirely separate matters. Ensuring that victims are able to attend parole tribunal hearings is not a statutory function of the chairperson. Instead, provision for victims to attend hearings is made in the Parole Board rules, which were amended last year to expressly provide for attendance by victims.

The scheme of delegation that section 32 of the bill provides for is about delegating functions conferred on the chairperson of the Parole Board. Most obviously, that means functions associated with heading the organisation. However, the chairperson also has particular statutory functions—for example, in relation to the reappointment of other members of the board. It is for the chair of each parole tribunal rather than the Parole Board to exercise the function of granting or refusing an application by a registered victim to observe a hearing. The absence or unavailability of the chairperson of the Parole Board as a whole does not impact that established process, and nor does it affect the entitlement of a registered victim, if permitted, to attend. It is therefore not clear what amendment 1009 seeks to achieve.

It is true to say that, at an earlier stage in the pandemic, victims were not able to attend hearings, as chairs prioritised the safety of victims and staff. I reiterate that such decisions are taken by the independent Parole Board and not by the Scottish Government. However, the board has since successfully held tribunals with victims in attendance, and the Government will continue to monitor, support and encourage that important function, as carried out by the Parole Board for Scotland and justice partners.

I ask Jamie Greene not to press his amendment.

Jamie Greene: I thank the cabinet secretary for the technical explanation of why the amendment does not fit there. It is interesting that he seemed to imply that he is sympathetic to the rationale behind what I am trying to achieve but, for technical reasons, he does not believe that that is the right place to put it. I question where else in the bill the proposal could go. The bill seeks to extend temporary measures that were implemented during the Covid pandemic in the judiciary. It is clear that there is a deficiency in the process that needs to be addressed somehow and somewhere in the bill—possibly at stage 3.

With the assistance of the parliamentary legislation team, I have tried to include the amendment in a section that relates to the functions of the chairperson. If it is not accurate and technically competent to put it in that place,

there might be another place where we could put it. Perhaps I will propose that at stage 3.

The cabinet secretary did not address the issue; he only disputed the amendment for a technical reason. That leads me to believe that there is still an issue to be fixed. With that in mind, I might work with the legislation team—or, indeed, with the cabinet secretary, if he is willing—to look at how we can ensure that victims are front and centre when the bill comes back to us at stage 3.

Amendment 1009, by agreement, withdrawn.

Section 32 agreed to.

After section 32

The Convener: Amendment 1003, in the name of the cabinet secretary, is in a group on its own.

Keith Brown: The children's hearings system delivers legally binding decisions for children and young people in Scotland who are most in need. It relies on highly trained and dedicated volunteer panel members to deal with 30,000 hearings each year.

Legally, each three-person panel has to include a mix of male and female members. Hearings can be arranged anywhere in the country, sometimes at extremely short notice. In short, it is a logistical challenge that has been met head on by the volunteer community, but the pandemic has impacted on the availability of volunteers and there have been long-standing issues with recruitment of male panel members in particular. Those issues have been exacerbated during the past two years.

09:45

The Coronavirus (Scotland) Act 2020 relaxed the requirement for having male and female panel members for every hearing. The relaxation was allowed to expire on 30 September 2021. However, the situation has changed since the beginning of this year. The number of panel members leaving their volunteer roles, coupled with the number of males being recruited being lower than required, has led us to a point at which the challenge of managing the statutory requirement to have male and female members on every panel is now acute. Continued adherence to the requirement in those circumstances risks delays in decision making to the detriment of some of the most vulnerable children and young people in Scotland.

Members will be aware that Children's Hearings Scotland has written to the committee and the Government asking for legislative action. Amendment 1003 retains the principle that children's hearings panels should have male and female members but it would allow a hearing to go ahead when achieving that is simply not practicable. The amendment thereby ensures that children's hearings can continue to make decisions timeously, and it reduces the overdependence on a small number of volunteers, which, if the situation were to continue, might result in their deciding to leave the service altogether.

The amendment has broad support from stakeholders who work across the hearings system. Through the work of Children's Hearings Scotland, we know that children and young people would value the flexibility that the change would introduce.

As members will be aware, work is under way to consider the future of the children's hearings system. I believe that the change is needed now, until the hearings system working group develops its recommendations for the future.

I move amendment 1003.

Pauline McNeill (Glasgow) (Lab): Cabinet secretary, thank you for outlining the rationale behind the amendment. Initially, on reading it, you might think that you would not want to depart from the general need to get a balanced panel. I am reasonably familiar with the difficulties in getting people to sign up. Will you say more about what the Government will do to correct that, so that we can have mixed panels in the future? How long will the measure be in place before you review it?

Keith Brown: Work will be done through the hearings system working group, which is considering the issue. As Pauline McNeill said, I have laid out that our desire is to return to a situation in which we have that balance. As Pauline McNeill also said, it is true that, for a number of years, we have had difficulties in getting male members. One or two males in my local area were successfully encouraged to join, but Clackmannanshire has a very small pool of people to draw from.

The national convener of the children's hearings system remains committed to diversity in the recruitment of panel members and in relation to the composition of individual hearings, as does the Government. We think that it is optimal to have that balance for obvious reasons.

Sheriff Mackie, who some members will be aware of—he happens to come from my local area, just by sheer coincidence—is leading the review to consider the future of the system. It might be that the issue is considered further against a backdrop of change in the system more generally. However, that is a matter for the independent hearings system working group. We have asked that data on the gender composition of children's hearings panels continues to be

collected, and we will continue to monitor how and when that measure is used.

As is mentioned in the bill, the measure will be temporary, as things stand.

The Convener: As no other member wants to comment, do you wish to wind up, cabinet secretary?

Keith Brown: I have one thing to say. Although the bill includes a number of temporary changes, this would be a permanent change. However, as I have been trying to explain, the whole situation is under review through the hearings system working group that I have mentioned.

Amendment 1003 agreed to.

Section 38 agreed to.

Schedule—Temporary justice measures

The Convener: We move on to the next group. Amendment 1035, in the name of Pauline McNeill, is grouped with amendments 1005, 1006, 1036, 1007, 1010 and 1034. I remind members that, if amendment 1035 is agreed to, I cannot call amendments 1005, 1006, 1036, 1007 and 1010, due to pre-emption.

Pauline McNeill: There has been a lot of discussion in the committee about conducting court business by electronic means. By necessity, that approach allowed us to conduct court proceedings during the pandemic, and I acknowledge that the Government has said that it wants to monitor its effectiveness. We have heard quite a lot of concerns from lawyers groups about whether, in some proceedings, virtual appearances are fair and balanced, when all things are considered. I realise that there is a lot further to go in that discussion.

Amendment 1035 in my name would remove the suspension of the requirement to physically attend court by removing the following wording:

"(1) Any requirement (however expressed) that a person physically attend a court or tribunal does not apply, unless the court or tribunal directs the person to attend physically.

(2) But sub-paragraph (1) does not apply in relation to a hearing in which a person is to give evidence."

The amendment would have the effect of taking out the default position of virtual appearances for all court proceedings. I am probing that provision in the bill, because we need to have on-going discussions about it.

I will probably push amendment 1036, which would prevent appearances in custody courts from being virtual by default. That is mainly based on my experience of visiting the Glasgow custody court. I appreciate that that was just one day, but I am assured that what I saw there is a regular occurrence. It gave me cause for concern about continuing to have virtual appearances in custody courts. I was there on a Monday, when four or five cases were dealt with in an hour. After those cases, because the audio and visual quality was so poor, the court had to be adjourned. I was informed that, the previous Monday, the custody court ran until 9 or 9.30 pm, and that that is not unusual, because of the audio and visual quality.

I also witnessed, by permission, a petition case in which the wrong accused was brought to London Road police station, and the proceedings had to start all over again. I could not actually see the accused. Everything about that just seemed to me to be undermining the process.

Jamie Greene: Amendment 1036 refers to "an appearance from custody". Can the member confirm that her intention is for it to apply to those who have been arrested and are held in a police station and not to those who are in a custodial sentence environment?

Pauline McNeill: Yes.

Jamie Greene: If it is the former and not the latter, we have heard from the police that physical court appearances take them out for a whole day and cause them, and remand officers, concern. Is it not much more efficient to deal with proceedings virtually?

Pauline McNeill: The member is correct that I am referring to people who are being detained in a police station. We have heard evidence on that, but it just seems that the system is not really set up for it, and there is an issue with the quality. The Law Society of Scotland has said that the use of virtual custodies raises significant operational and human rights concerns. The evaluation of the Falkirk pilot in May 2022 was critical of the virtual custody process in the absence of significant additional investment, and stated that the issue of fairness to the accused is fundamental.

There is an important point about physical separation. Many lawyers have complained about the physical separation of the accused in speaking to solicitors. That was accepted as necessary during the pandemic, but why is it necessary now? Do we not want to reinstate the fundamental principle that an accused person should be able to see their lawyer before appearing in the court? That is simply not possible if the accused appears directly from custody in a police station. The situation is far from satisfactory.

Jamie Greene referred to the police. Police Scotland has concluded that it cannot fully support the virtual model without a complete overhaul of the custody process and significant investment in resource. That is telling. For those reasons, I am inclined to push amendment 1036.

I point out to the Government that it strikes me as a costly exercise to have a sheriff, and all the clerks, sit until 9.30 at night. It is a very poor experience for staff—if anyone is interested, and if that matters—to sit all day in a court when proceedings started 45 minutes late because the Crown did not prepare its cases on time.

A lot of issues are slowing down the process, and they need to be looked at. Nonetheless, in my view, virtual hearings are totally unsatisfactory and do not meet the interests of justice. They will not even solve the problem of separation between solicitors and the accused—a solicitor is unable to confer with the accused when one of them is in the police station and the other is not—at least until such time as we can provide a certain level of quality of electronic means to enable that to happen.

For the record, I accept that there are aspects of court proceedings in which, many people say, the use of virtual hearings is perfectly acceptable, where the balance of justice is not interrupted and it makes sense. However, with regard to this particular aspect, I am not convinced that it makes sense.

I move amendment 1035.

Keith Brown: The committee considered issues around virtual hearings carefully at stage 1. It is clear that, although some stakeholders are extremely supportive and would like the use of virtual hearings to be extended further, others have concerns. We need to explore those concerns with them before we make decisions on any permanent measures in future bills, and we are committed to doing that. Indeed, we have already begun, including through the consultation on improving victims' experiences of the justice system that we launched just last month.

I mention in passing that Ken Dalling, the president of the Law Society of Scotland, in evidence to the committee last September, said:

"I am a relative convert to virtual custodies ... that approach seems to be well received by the accused who are appearing, because they do not have to be bussed around."—[*Official Report, Criminal Justice Committee,* 8 September 2021; c 31.]

On the points that Pauline McNeill raised, I accept that we are all working with the best of intentions to try to get the best justice system possible, but the bill deals with measures that we believe to be necessary in order to respond to the pandemic. It may be argued, of course, that larger elements of the pandemic have receded in recent months, but we cannot take that as meaning that the threat from Covid is over. In addition, Covid is likely to be more prevalent in the justice system, in prisons or even among juries, where people are obliged to be in certain spaces at certain times.

In the meantime, the temporary provisions in the bill will enable the use of virtual hearings, which, in the Government's view, remain a vital part of supporting the recovery of our courts. Virtual hearings give courts the crucial flexibility to help them to address the backlog, and they enable the continued use of remote jury centres, which remain part of the Scottish Courts and Tribunals Service's contingency planning.

Virtual hearings have been used extensively for civil procedural business in particular, and the civil courts will continue to rely on the provisions in the bill until new court rules, which are currently being developed by the Scottish Civil Justice Council, come into effect. The continuation of these provisions will also enable partners across the sector to continue to build an evidence base that will allow us to take longer-term decisions on how and when virtual hearings should be used for criminal cases. I am aware from previous discussions with the committee that there are different views, and it is right that we take time to explore those further, certainly with regard to any future permanent changes.

In its stage 1 report, the committee recommended

"that more virtual trials need to take place in the criminal courts",

including through an extension of the virtual summary trials pilot, led by Sheriff Principal Pyle. Again, that relies on the implementation of the provisions in the bill.

For those reasons, I cannot support Pauline McNeill's amendment 1035, which would remove the crucial flexibility on which the criminal justice system has relied, and continues to rely, in its response to mitigating the impact of the pandemic on court users, including victims and witnesses. It would lead to increased delays and undermine the development of an evidence base to inform long-term decisions on the role of virtual proceedings. Even if some people think that the pandemic is largely over, we have always known that the backlog is far from over.

Amendment 1036 focuses specifically on hearings where the accused person is in custody, and would require those hearings to be held in person by default. Pauline McNeill has voiced concerns about the operation of virtual custody hearings, and I know that Police Scotland has previously written to the committee about the issue.

In its letter, it highlighted recent improvements to the technology that supports virtual custody hearings and underlined its commitment to ensuring that custody hearings run as efficiently as possible so that people are not detained in custody for longer than is necessary. Listening to

the experience that Pauline McNeill passed on, it strikes me that the Parliament has had its own issues with the transmission of virtual proceedings.

10:00

It is important to remember that, although there have been challenges with the implementation of virtual custody hearings, as there are with any technological innovation, the provision remains a valuable tool to support safe appearances from custody. For example, if an accused person has, or is suspected of having, Covid, maintaining the provision ensures that the custody hearing can take place safely by video link. Of course, there remains an option for individuals to request an in-person appearance if that is preferred. For those reasons, I do not support amendment 1036. I invite Pauline McNeill not to press or move her amendments.

Amendments 1005, 1006 and 1007 in my name would make it the default position that appearances on undertaking take place in person rather than virtually. An appearance on undertaking means that the police have charged a person with an offence but, rather than keep the person in custody and bring them before a court, the police release the person on an undertaking, which is agreed to and signed by that person, that they will come to court on a particular day. The Crown Office and Procurator Fiscal Service has brought to our attention that there has been some uncertainty about how the current arrangements for virtual attendance in the Coronavirus (Scotland) Act 2020—the first Scottish coronavirus act—should operate in relation to undertaking hearings. In practice, those hearings have continued to have been held in person, and the amendments would put the matter beyond doubt to reflect operational practice.

We will continue to consult justice partners on the operation of the first Scottish coronavirus act provisions as they relate to undertaking hearings and on whether it would be beneficial to move other types of hearing to being in person by default to reflect operational need and practice. If so, we may lodge further amendments at stage 3.

On amendment 1010, in the name of Jamie Greene, I am supportive of gathering and publishing data on virtual trials as part of building up an evidence base that can inform decisions on a permanent approach. However, it is essential that any requirements that we create for the publication of data from the Scottish Courts and Tribunals Service are workable and not unduly onerous for a system that is, as I mentioned, seeking to tackle the backlogs efficiently and effectively.

It is also important that any data that is published is robust, meaningful and focused. As currently drafted, amendment 1010 would capture a sweeping range of cases, including many that we might not think of as virtual trials. For example, it would capture all cases in which a vulnerable or child witness gave evidence by video link as part of standard permitted special measures, which have been in operation for many years and have nothing to do with the Covid legislation or the provisions in the bill. The amendment would also require the courts service to publish information that it does not normally hold, and the courts service has advised us that it would not be possible to deliver the amendment in its current form.

If Jamie Greene is willing to not move his amendment, I will ask my officials to work with the courts service to agree a workable and focused approach to publishing data to improve the evidence base on virtual trials on a non-statutory basis. With that in mind, I ask Jamie Greene not to move amendment 1010.

Finally, I come to Katy Clark's amendment 1034, which would require ministers to "prepare and lay" regular reports

"setting out the progress that is being made in the implementation of virtual courts."

It is important to remember that, as Pauline McNeill has made clear, there is not a consensus on what the future of virtual courts should look like, such that we can progress towards it in a linear way. The committee's stage 1 report recommended that more evidence be built up on the impact of virtual court and tribunal business before any decisions are made on permanent arrangements. We agree with that approach. Our response to the committee's report sets out work that is already under way to gather more evidence on virtual court proceedings. The findings of consultations and research will be published in due course, and they will inform our decisions on next steps.

We do not want to pre-empt the results of that work, nor do we want to cut across the work of the Scottish Civil Justice Council, which has already consulted on proposed new court rules concerning the mode of attendance in civil proceedings and is developing plans to implement changes. Drawing on the evidence and our engagement with partners, if we decide to legislate to put virtual criminal courts on a permanent footing, Parliament will have the opportunity to scrutinise any proposed legislation that we introduce. In addition, members can use parliamentary questions or the committee system to seek information from the Government on its progress in developing policy on virtual courts.

Therefore, I do not support amendment 1034, and I invite Katy Clark not to move it.

Jamie Greene: I thank Pauline McNeill for opening the discussion on this group. It is an important discussion and an interesting one at that.

Amendment 1010 would establish a requirement for the Scottish Courts and Tribunals Service to publish information about the operation of trials in which there is a virtual element. It uses the words "attendance by electronic means" as opposed to the word "virtual", which I accept might encapsulate a wide range of trials that already utilise electronic means. However, in the short timescale that we had, that is the drafting that I came up with.

I understand that the SCTS is extremely busy and overworked and that it has a huge backlog of cases—that is well known. However, amendment 1010 reflects not just our stage 1 report but an important piece of work that will have to be done to establish whether the use of electronic means that were hitherto not used in trials should be continued or made permanent.

The committee's stage 1 report states:

"a greater evidence base is needed about (a) how they work in practice; (b) what advantages they deliver and any disadvantages; (c) the outcomes of virtual criminal trials; and (d) any unintended consequences. This evidence base is needed before a view can be taken as to whether the temporary provisions in this Bill should be made permanent in future legislation."

We already know that there is a wide range of views on the issues. The representative of the Scottish Solicitors Bar Association told the committee:

"I am wholly disappointed by the resulting systems that we are now working with in relation to virtual courts and virtual trials".

He continued:

I can say—on behalf of the vast majority of the profession, I think—that the experience has, unfortunately, been nothing but a resounding failure."—[*Official Report*, *Criminal Justice Committee*, 2 March 2022; c 13.]

I realise that that is a quote from one end of the spectrum, but concerns were also raised about the solemnity of proceedings, which many felt was not present during virtual trials. The Faculty of Advocates expressed some sympathy for that view, in slightly less strong terms. It said that, if implemented, the proposals

"would create problems with access to justice, the quality of justice and inequality."

The concerns are not only in the defence sector; those representing the wider public also expressed concerns. Citizens Advice Scotland told the committee:

"we are concerned that the reliance on digital means of participation in court business risks people being excluded from the justice system. We believe more support is needed to enable vulnerable and digitally excluded groups access to justice."

On the flip side, many support the on-going use of virtual means, including the Howard League and Victim Support Scotland, which also submitted evidence to the committee.

That brings me on to the substance of amendment 1010. I appreciate that the particular information that I am asking for is specific and probably quite wide ranging, but the essence of the amendment is that the committee said that the evidence base should already have been provided—the information should already be out there—and we should have already analysed it before we take a view on whether the measures should be continued. The problem is that we are not in that position at the moment, and we do not have that evidence. The next best thing that we can do is ensure that, under the proposed legislation, the SCTS publishes data that will inform not just the Government and the committee but all the stakeholders who have concerns.

I appreciate that the cabinet secretary has made the offer that, if I do not move amendment 1010, he will work with the SCTS to look at what data and information can be published. Of course, I do not want the SCTS to face an onerous and undue workload or to have to give out sensitive information that should not be published—that is not the intention of my amendment. I would therefore be happy not to move it, but only on the premise that we revisit the wording of the amendment and that the issue comes back at stage 3, not that it is removed altogether and that is the end of the matter.

Although I take what the cabinet secretary has said at face value, it is important that, in reflecting the committee's view at stage 1, we include in the bill what I have set out in an appropriate fashion that will not overly affect the day-to-day work of the SCTS in any way, shape or form. It is not the intention of amendment 1010 to have such an effect. I hope that the cabinet secretary can give that commitment.

Katy Clark (West Scotland) (Lab): Amendment 1034 is a relatively simple amendment that asks for the Scottish Government to provide Parliament with six-monthly reports from January 2023 on the operation of virtual courts, which would enable effective scrutiny. We have already heard from Pauline McNeill about virtual appearances for people in custody. On occasion, those arrangements could be described only as shambolic. The reports should be not so much about the principle of virtual attendance but about how the system is operating in reality,

although issues of principle might also be involved.

Jamie Greene spoke about the disappointing responses that many in the profession gave on the operation of virtual courts and about the concerns that they have raised.

We know that there have been very few virtual courts up until now. The committee has not looked in a great amount of detail at the pilot in the north-east, which involved a relatively small number of cases, but it has heard some evidence about it. Some of the content of the report that we saw was quite surprising. One of the concerns was that such courts would operate against the defence and would result in more convictions but, according to that report, the opposite was the case. However, as I said, the pilot involved a very small number of cases. That highlights that virtual courts might not operate in the way that we think they will operate.

The decisions that we make are important, because we could be making massive changes to the legal system in Scotland.

Jamie Greene: The member is right that we are talking about massive, fundamental changes. In our stage 1 report, we unanimously agreed that digital justice

"should only progress if there is genuine merit in the proposals, rather than simply being a matter of a cost saving or administrative convenience",

and that

"we cannot make fundamental changes to how our court system functions and the rights of individuals involved without full and proper debate."

The problem is that I am not convinced that we have yet had that "full and proper debate". That is why Katy Clark and I are both seeking to amend the bill so that there is more transparency in relation to data on the use of virtual courts and trials. I hope that that debate will happen at some point in advance of our passing the bill.

Katy Clark: That is correct. The cabinet secretary said that the Parliament would have the opportunity to scrutinise proposed legislation that would make virtual courts a permanent fixture of the legal system. If information was shared regularly with the Parliament and the committee, that process would be far more meaningful. As a member of the committee, I know that it took us some time to get information on how virtual courts operated during the pandemic. If a structure was in place that enabled more regular reporting and that required officials to provide that information, there could be more effective scrutiny, and the outcome would be that Parliament would be more likely to make better decisions. That is what this is all about.

In reality, very few cases have gone ahead on a fully virtual basis. Instead, elements of cases have been dealt with on a virtual basis—for example, juries have attended virtually from cinemas. In general, from what I can gather, that seems to have worked well, but there will no doubt be other views on that. It seems likely that some aspects of cases, particularly those relating to case management, lend themselves better to virtual appearances.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Would the member acknowledge that women's organisations that support victims of domestic abuse and sexual violence are very supportive of virtual trials?

10:15

Katy Clark: Yes, and there is a very strong case for them in some situations. We have heard already about the kinds of evidence that are already taken virtually, and I do not think that anything that I am saying would undermine provisions on that.

What I would say is that we cannot presume what the outcome of cases will be, given what happened, for example, in the pilot in the north-east, which was predominately domestic abuse cases. That actually had a high level of acquittals. That might not mean anything, given that it was a very small number of cases, but it shows that we cannot make presumptions about what we think will be the implications of virtual courts, and that they need to be evidence led. The more evidence that the Parliament and the committee has over a longer period, the more likely we will come to the right decisions.

One of the points that Rona Mackay is making is that victims and those giving evidence might find virtual courts an easier and, we hope, less traumatic experience, although it would no doubt still be a very difficult experience for them. That is one of the aspects that we have to look at.

We also have to look at the outcomes of cases, so we need proper evidence with which to move forward.

Potentially, the amendments in this group will make very significant changes to the system. Virtual attendance may lend itself well to case management hearings, but where witnesses and the accused have to give evidence, we might need to be clearer about what the implications are and whether it is possible for the evidence to be tested as well virtually as it would be in an open court.

As the cabinet secretary says, there is not a consensus on how virtual courts should be implemented. The cabinet secretary previously

said that virtual courts would proceed only if there was agreement on all sides and from all parties.

Graham Simpson: Why did you pick the end date of 31 January 2023 for the first reporting period?

Katy Clark: The cabinet secretary can correct me if I am wrong, but I believe that that is the date when the provisions on virtual courts will initially come to an end, although the officials may want to come in on that point. I can be corrected later if I am wrong, but I believe that that is the case.

Basically, for as long as the provisions are in place, amendment 1034 would require the Scottish Government to lay before Parliament a report every six months. That would enable Parliament to discuss how it is going.

One of the concerns is that it might be very difficult to get virtual courts up and running if the cabinet secretary wants to get agreement on all sides, as that may be difficult to reach. That is exactly the information that should be available to Parliament to debate. If the provisions are not being implemented because defence agents and the prosecution will not agree to them, we need to have that discussion.

I am not prejudging the nature or content of the reports. I am saying that it is appropriate that the Parliament has the information available to it. If the cabinet secretary is not minded to accept amendment 1034, I ask him to consider how he could ensure that the Parliament is fully included and that as much information as possible is shared with it.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Some of the amendments in this group reflect the evidence that we heard in committee. I sympathise with Pauline McNeill, but, given what Rona Mackay said in her intervention on Katy Clark, I think that amendment 1035 goes too far. Virtual and remote hearings are useful in some circumstances, such as those involving domestic abuse or other crimes of that nature. On the other hand, there are human rights issues regarding trials always taking place virtually, and we heard concerns about that. The Government amendments 1005 to 1007 strike the right balance. I say that in support of them. I hope that Pauline McNeill will not press amendment 1035 or move amendment 1036.

Pauline McNeill: Amendment 1036 is specific to appearances from custody in police stations. It does not interfere with any of the other discussions about the balance for victims in the system. Victims are not involved in that process. If someone appears from custody physically, they get to see their solicitor, they appear in court and, arguably, the process goes more smoothly. For a period, we did not do that. I thought that you might be unclear about that. For that reason, amendment 1036 is the amendment that I am interested to press.

Fulton MacGregor: I know that and was coming to it, but thanks for that clarification. I am aware that amendment 1036 is about people who are in custody, but we are talking about the various angles on that. Jamie Greene mentioned to you the police concerns about resourcing. The Government amendments 1005 to 1007 strike the right balance and I support them.

On Jamie Greene's amendment 1010 and Katy Clark's amendment 1034, it goes without saying that we all want reporting mechanisms in place that allow us to get a sense of what is going on. We have had a couple of years of doing virtual trials, hearings and appearances in court but it is still not a load of time. Therefore, the cabinet secretary's offer to Jamie Greene is valuable. I hope that Jamie Greene will take that up when he considers whether to move amendment 1010. There should be no doubt that the Government and all members of the committee want to get the best information about how virtual appearances and hearings are working.

I support the Government amendments 1005 to 1007. A good offer has been made to Jamie Greene.

Pauline McNeill: I strongly support Katy Clark and Jamie Greene in trying to get a commitment from the Government. There needs to be an evidence base not just on the experience of witnesses, victims and the accused, but on the outcome of cases. It is important to have that debate.

I am keen to move amendment 1036, and I will say a few things about why. I would be happy to take an intervention from the cabinet secretary. I want to be clear in my own mind because some of the timescales are confusing.

The Law Society of Scotland is clear. It has been said that

"The physical separation of the accused, their solicitors and the courtroom has had a deleterious impact on the overall process. The separation has made it harder for the solicitors to communicate effectively before and during hearings with the Crown".

I have not heard anything to indicate that the Government is concerned about that. It is surely not satisfactory in anyone's book.

If the timescale was shorter, I might say that we should put up with the situation for a bit longer. I need to clarify the timescale. I thought that it was 2023 or, potentially, up to 2025. It would help me a lot to know the answer.

Keith Brown: It is 2025. That is the proposal.

Pauline McNeill: I thought that you would say that. Surely the Government cannot seriously be saying that it would put up with an unsatisfactory situation that the Law Society of Scotland has highlighted until 2025. It is not right that an accused person cannot consult their solicitor, never mind the second issue.

There has been a commitment to improve the technology but will it improve before 2025? Are there more immediate plans than that?

Jamie Greene: My question is more of a technical one. The problem with amendment 1036 as drafted is that it simply removes an appearance from custody as an exclusion altogether, which means that it cannot happen. Notwithstanding the concerns that you have validly raised, if an accused who is held in custody agreed to and was happy with virtual hearings, would it not be better to have some flexibility in that respect? Perhaps the issue can be addressed at stage 3.

Pauline McNeill: The member is quite right. I am not opposed to flexibility; I am trying to prevent the kind of automatic virtual appearance that we seem to have at the moment. If the Government was prepared to consider the default position, that would be preferable, but my concern is that it will just say, "It has been agreed by the Scottish Parliament that we can take it up to 2025 and then make the default virtual." No one will be satisfied with that.

I suppose that it will not be the same in every court, but I have seen the quality of the link in Glasgow sheriff court. If we cannot get it right in the biggest court in the country, what is it like in other places? The cabinet secretary can correct me if I am wrong about that.

I do not know whether the cabinet secretary wants to say anything else before I conclude. I am inclined to move amendment 1036, but Jamie Greene has made quite an important point. It is not my intention not to allow flexibility, but it is my intention not to allow the Government to go to 2025 and then say that virtual appearances are satisfactory, just because we have backlogs. That would concern me a lot.

Keith Brown: I can respond to that, if it will help. The timescale in the bill goes up to 2025, but, if the bill is passed, that will have to be agreed by Parliament annually. Those further checks will apply.

Moreover—and I realise that this will not deal with the entirety of Pauline McNeill's concerns—I reiterate the point that everyone concerned is trying to improve the practical implementation of this system, and we are finding our way towards that. I will come back shortly to the points raised in the amendments in the name of Jamie Greene and Katy Clark, which cover the same issues, but I say again that we are trying to improve things. There is no question of our sitting back and accepting the flaws in the system.

As for the point that Jamie Greene has made, I have to be honest and say that I just do not know whether what he has suggested is possible. If I have understood it rightly, he is proposing that we pull out the part of the provision that covers consultations between a client and their defence solicitor. Again, I do not know whether that is possible, but I undertake to have discussions with officials to see whether we can work with Pauline McNeill on these matters before stage 3. I cannot commit to bringing anything forward, but I can commit to having those discussions, if that would be helpful.

Pauline McNeill: That would be helpful. I am going to take it in good faith that the cabinet secretary knows where I am coming from, just as I know where he is coming from. For Jamie Greene's benefit, my understanding was that the amendment that I asked to be drafted sought to remove virtual appearances as the default. As it was not my intention not to allow flexibility, I want to be sure about what such an amendment does.

If the Government is willing to open channels and have further discussions—I would, for example, even accept a shorter time period or the Government having much more responsibility to review the provision before 2025—I am, on that basis—

Keith Brown: That is not what I am offering. What I have said is that, with regard to Jamie Greene's suggestion of pulling out a particular category of activities—as Pauline McNeill has mentioned, the discussions between clients and solicitors—I do not know whether that is possible or practical. I am willing to discuss with officials whether it is and to have a meeting with Pauline McNeill, if she will find that useful, but I cannot commit to doing that at this stage.

Pauline McNeill: Okay. On that basis and in good faith, I will not press amendment 1035 or move amendment 1036.

Amendment 1035, by agreement, withdrawn.

Amendments 1005 and 1006 moved—[Keith Brown]—and agreed to.

Amendment 1036 not moved.

Amendment 1007 moved—[Keith Brown]—and agreed to.

Amendment 1010 not moved.

10:30

The Convener: We move to the next group. Amendment 1037, in the name of Russell Findlay,

is grouped with amendments 1038 to 1040. I remind members that, if amendment 1037 is agreed to, I cannot call amendment 1038 due to pre-emption.

Russell Findlay (West Scotland) (Con): These four amendments relate to fiscal fines and the emergency provision to increase the rate of the fines from £300 to £500. I will start with amendments 1040 and 1038: agreement to these amendments would, in effect, negate the need for amendments 1037 and 1039.

Amendment 1040 would ensure that victims of crime are notified when a fiscal fine offer has been accepted. It would make it a duty of the Crown Office to inform complainers of the outcomes. Furthermore, where rejection of a fiscal fine occurred, the procurator fiscal would be obliged to inform a complainer of the result of subsequent prosecution—or non-prosecution, as the case may be.

We have a fundamental concern about the lack of transparency with regard to fiscal fines. As things stand, the public have no way to find out about disposal and nor do the victims, unless they seek that information. According to the Crown Office, they are told only that an alternative to prosecution was pursued. Many will not even know that there has been a disposal. Some of those cases relate to serious crimes, including violent crime.

Amendment 1038 relates to increasing the limit from £300 to £500. It seems inevitable that so doing could bring into scope crimes of an even more serious nature. The problem that we have is that we just do not know. We do not know because the evidence to the committee from the Crown Office and the Scottish Government has been unclear about whether the fines would apply to more types of offences. Frankly, there has been a scarcity of data on which we can make that decision. However, it seems inevitable that an increase to £500 has the potential to increase not just the seriousness of offences but the number of fiscal fines.

There is another issue with regard to fiscal fines, because, if accepted, they do not count as criminal convictions. I am not sure whether many victims are aware of that difference or whether it has been properly explained to them.

My concern is that the greater use of the fines on the basis of Covid justification, with no real measure or analysis of people's understanding of them or their implementation, could undermine public faith in justice and, as I have already touched on, fewer victims will even know that their case is disposed of.

Rona Mackay: Can you clarify what your alternative to fiscal fines is? Are you suggesting that there should be a custodial sentence instead of fiscal fines?

Russell Findlay: I do not think that it is one or the other and the debate today is not about an alternative to fiscal fines. Fiscal fines exist; this is about extending their scope. The amendments would require a proper explanation to be given to victims.

As for the alternative being a custodial sentence, there are many things in between a fiscal fine and a custodial sentence.

Katy Clark: My understanding is that, if fiscal fines did not exist, the prosecution would have to decide whether to prosecute a case and whether they felt that they could prove the case in court and it was in the public interest to take that forward. Is that your understanding of the position?

Russell Findlay: I am just coming to that.

Katy Clark: My apologies.

Russell Findlay: That is fine.

Last June, the Deputy First Minister, John Swinney, gave evidence to Parliament to the effect that, if an individual were to refuse the offer of a fiscal fine, that would be

"treated as a request by the alleged offender to be prosecuted for the offence",—[*Official Report*, 23 June 2021; c 64.]

so fiscal fines have been sold to the public as an alternative to prosecution.

However, there is some data in the public domain which shows that around 30 per cent of rejected offers saw no further action being taken by prosecutors, which somewhat undermines what Mr Swinney told Parliament. The specific data is that, in 2018-19, for 39 per cent of those who refused offers of fiscal fines, nothing further happened in those cases, which is quite a substantial number. The following year, that figure rose slightly to 40 per cent.

There are already concerns about how fiscal fines are used, how they are communicated, and how the presumption to prosecute does not actually occur. Extending their scope in relation to their value and the lack of communication around that may fuel those concerns. I think that it sends a message to people who have committed those crimes that they may be able to break the law. They may take the gamble if they know that, by rejecting the offer of a fiscal fine, there will be no consequences for them whatsoever, which we have seen from the figures. That is a betrayal of victims of crime.

Going back to the values issue, if the Government is adamant that the limit of the fine

must be increased from £300 to £500, as has been the case so far with the Covid legislation, we need to know a lot more about what types of crimes it encompasses and how those decisions are reached. The public and the committee would need proper, meaningful data to make that decision, and that is lacking.

For those various reasons, I would be interested to hear some response from the cabinet secretary.

I move amendment 1037.

Pauline McNeill: I am very sympathetic to what Russell Findlay is trying to achieve here. I have felt over the years that, when there is a request or a proposal to extend fiscal fines, it is important that, as legislators, we are clear about the parameters of how that is used. I think that it has been difficult to get that information in the past. I also think that it is fair, in those circumstances, for victims to be told.

I know anecdotally of cases in which people have said, "Well, I did have a defence, but I just thought that, rather than go through the court process, I would accept a fiscal fine."

Russell Findlay: That is another side of the coin; it speaks to the same issue, which is that we do not know enough about how fiscal fines are used. For example, we do not know whether some people think that they can, in effect, get away with a crime by refusing a fiscal fine, or whether some people are, for the sake of convenience, accepting wrongdoing that they do not believe that they were ever guilty of.

Pauline McNeill: I agree with the member whole-heartedly on that—there is a bigger picture, and that is the point that needs to be addressed. Anecdotal evidence suggests that people pay their fiscal fines because, even though they have a defence, they think, "Well, paying a fine is easier than going through a court process."

The figure of 39 per cent may include people who wanted to go to court and did not pay the fiscal fine because they felt that they had a defence. There are a lot of different factors involved. However, in principle, I agree that we need more information in that regard.

We have been here before, many years ago, when we extended the bar from £100 to £300. The Parliament is being asked to confer extensive powers, albeit on a temporary basis. If they were to be conferred on a permanent basis, I would certainly be voting against increasing the bar to £500.

Jamie Greene: With regard to amendment 1038, on raising the bar for fiscal fines to £500, the cabinet secretary needs to answer a fundamental question. Are we talking about increasing the amount from £300 to £500 from a purely financial point of view—in which case I would have absolutely no problem with it—or does it in any way encompass offences that previously would not have been included?

That question brings us to the point of the issue with amendment 1038: at the moment, we do not know. If we knew, that would be helpful. If the argument is being made that raising the bar would allow us to dispose of more offences more efficiently and quickly in order to get through the backlog, and for all the other reasons that I suspect that we will hear, we need to know what types of offences will be included if the fine is raised to £500.

It is not as simple as saying that the amount is being increased from £100 to £300 and now to £500. If there is a knock-on effect on the types of offences that are encapsulated by the new bar, that is an entirely different matter. It should, therefore, absolutely be subject to proper scrutiny and debate, which we have not had and are yet to have.

What my colleague is trying to do is probe whether it is the case that fiscal fines may be used only where they were already an option, in the sense that we would not be changing the scope of where and when fiscal fines can be used.

On the point about people who refuse a fiscal fine option, they really are taking a gamble, but it is quite a statistically well-informed gamble. If there is a chance that four in 10 people would not be prosecuted after refusing a fine, that should be a matter of concern to us.

Is it the case that procurators fiscal are not proceeding with those cases through any other means of disposal simply because of their workload resulting from the backlogs that we spoke about earlier? Again, we have not taken any evidence as to why so many of those cases are not followed through when a fine has been rejected. Is it simply that the case is not strong enough? If so, why has the case even got to the stage at which the person is being offered a fine? If there is a case, is the issue that the procurator fiscal simply does not have the capacity or the resource to take it forward? I suspect, from those to whom I have spoken, that the latter is more true.

Amendment 1040, on victim notification, is entirely appropriate. It remains unacceptable that a complainer is not told about the outcome of such offers. They should not necessarily be told about the nature of the offer, as there may be reasons why that should not be made public to complainers or victims, but the fact that they are not told at all is itself a sorry matter, and more so when such an offer has been rejected, with regard to what happens thereafter. In my view, they are

completely entitled to that information, and trying to assert that that is on the statute books is—

Russell Findlay: Will the member take an intervention?

Jamie Greene: Yes, I will.

10:45

Russell Findlay: In respect of amendment 1040, notwithstanding the issue of Covid emergency legislation, does Jamie Greene agree that the two provisions in the amendment should be part of the legislation anyway?

Jamie Greene: Indeed—that should be happening anyway; it is ridiculous. The point is that we are using the legislation that is before us, which is obviously already making changes that are in the interests and for the convenience of other justice stakeholders, to make a change that is in the interests and for the convenience of victims, who are another set of stakeholders in the justice process. If we can use the bill as an opportunity to improve outcomes for victims, so be it; I am happy for the bill to be the vehicle.

I look forward to what the cabinet secretary has to say in response.

Fulton MacGregor: Given our debates during previous committee sessions, Russell Findlay and Jamie Greene will probably not be surprised to hear that I have huge reservations about the amendments in this group.

On amendment 1040, I disagree with what Jamie Greene has just said. The whole purpose of a fiscal fine is that, once it has been offered, the individual will not go through the due court process in which they are found guilty or innocent. Therefore, although I have sympathy with the idea of victims getting to hear about what has happened in their case—who would not?—if somebody accepts a fiscal fine, that is a non-conviction disposal. [*Interruption*.] Wait a second, Mr Findlay. It remains on their record for two years and can be used as a source of information only in quite exceptional circumstances, such as another appearance at court.

If individuals are told that information, an unintended consequence of amendment 1040 could be that the result for the individual who receives a fiscal fine could be the same as if they had been convicted in court from the point of view of the impact on them in the community. Various examples could be given. There might be situations in which folk might not have a lot of sympathy with that, but there could also be situations in which a young teenager has got himself involved in bother and that could have a massive impact on the rest of his life.

The whole purpose of the Crown Office and Procurator Fiscal Service having access to such disposals is so that it can use its judgment on when to divert people away from prosecution.

Russell Findlay: Does the member not agree that it is a fundamental element of transparency and open justice that victims of crime—whether a serious or a less serious crime—should be entitled to basic information as to how the case was disposed of?

Fulton MacGregor: I get where you are coming from. You have continually highlighted and worked on the issue, and I respect that. However, with regard to amendment 1040, the fiscal fine is a fundamental part of the justice system that allows a diversion from prosecution. There has to be a balance. At some point, a line has to be drawn in relation to what the rest of the community can be told. If somebody accepts a fine of that nature, they are essentially accepting that they do not need to go to court and have their innocence or guilt proven.

I have real concerns about amendment 1040. I am not saying that there is no merit at all in what you are saying, but amendment 1040 would make a massive change to how we do justice in this country.

Similarly, on amendment 1038—I will speak only to amendments 1040 and 1038—

Graham Simpson: Will you take an intervention?

Fulton MacGregor: On amendment 1040?

Graham Simpson: Yes.

Fulton MacGregor: Okay; I had not started on amendment 1038.

Graham Simpson: I have been listening to the debate with great interest. Based on what you have said, I put it to you that, if you were the victim of a crime—I hope that you never are—you would want to know what had happened in that case. If police had arrested somebody, you would want to know that. You would not necessarily need to know their name—in fact, you would not need to know their name—but you would want to know what had happened in that case. Is that not the point of amendment 1040?

Fulton MacGregor: I think that the member is trying to overpersonalise it. He does not know whether I have been a victim of an offence and he does not know what my reaction was or would be to finding out information. Trying to bring it down to that level by directing that question to me is probably not appropriate.

Graham Simpson: Will the member take another intervention?

Fulton MacGregor: I have not finished what I was going to say. Some people would want to know and others would not, but that is not the point of amendment 1040.

Graham Simpson: It is.

Fulton MacGregor: If somebody goes right through a court process and is found guilty or not guilty, that is public information, so the public are aware of that and would find out what the disposal was. The whole purpose of fiscal fines is to avoid prosecution, so we need to draw the line somewhere on the information that we share. Does the member not accept that? I will allow him to come back in with an intervention.

Graham Simpson: Thank you. Let us not personalise it; let us talk not about you, but about general victims of crime.

You made the point that any victim of crime just wants that basic level of information. If I was a victim of a crime, I would want to know what had happened in that case, and I would want the police to tell me what they were doing. If it got further than the police—in this case, we are talking about a fiscal fine—all that people would want to know was what had happened. Surely that is not unreasonable.

Fulton MacGregor: As I have already said about amendment 1040, I am not saying that the principle of what Graham Simpson is saying does not have some merit, but that is not where the issue fits into our criminal justice process, which is why I have concerns.

I also have concerns about amendment 1038, because it could restrict the offences for which the Crown Office and Procurator Fiscal Service could offer fiscal fines. During evidence, we heard concerns about a potential increase in the gravity of the offences that fiscal fines could be used for, but we have to trust the Crown Office and Procurator Fiscal Service to act in the interests of justice, as I believe it always does. Therefore, I do not support amendment 1038.

Keith Brown: Before I turn to individual amendments, I will make a couple of general comments. I reiterate that the measures that we are discussing are temporary measures that we are seeking to extend. We have already increased the limit of fiscal fines to £500. That has perhaps not been fully clear.

Some of the questions that have legitimately been raised can be answered only by the Crown Office and Procurator Fiscal Service. I cannot answer for the service in relation to those matters.

Different jurisdictions have tried to deal with such matters in different ways but, in Scotland, it has been our practice to make sure that the powers in question are exercised by the Crown Office and Procurator Fiscal Service. Fines can be issued directly by the police in England and, I think, in Wales, so we have taken a different approach in that regard.

Amendments 1037 and 1039 seek to remove provisions that were originally made through the Coronavirus (Scotland) Act 2020 that enabled alternative action to prosecution to continue to be taken in a wider range of summary cases as an alternative to prosecution in court.

Amendment 1037 seeks to remove the provision in the bill that retains, for a further period, the increase in the maximum level of available fiscal fine from £300 to £500. That measure has been in force since 7 April 2020 and represents a small but important part of the wider response to the on-going recovery of the justice system from the significant impacts of coronavirus, which are expected to last for a number of years. An increase in the available upper limit of fiscal fine to £500 has allowed a greater number of cases to be diverted from summary court proceedings, without the need for court procedure and associated appearance at court. Crucially, that has freed up the courts and prosecutors to deal with more serious cases, and it has eased the burden on the courts as they deal with the backlog that built up during the pandemic. We are not talking about a theoretical or hypothetical situation. That has had a direct effect on our ability to deal with the backlog, the witnesses, the victims and everyone else who is involved in those cases.

Amendment 1039 seeks to remove the provision in the bill that provides for a revised scale of fixed penalties. As members will be aware, any penalties that a prosecutor offers must reflect the scale that is prescribed under the Criminal Procedure (Scotland) Act 1995. The Coronavirus (Scotland) Act 2020 introduced a new temporary fiscal fine scale to give effect to the increased upper limit of £500.

The bill makes further minor adjustments to the fiscal fine scale by introducing a temporary, more balanced nine-point scale. The new scale includes the seven levels of fiscal fines of up to £300 that were available to prosecutors before the 2020 act and adds two levels of fiscal fine up to the new maximum of £500.

The revised scale provides for more balanced increments and, crucially, ensures that there is no increase to the level of fiscal fine that is offered in individual cases that would have been dealt with in the same way before the pandemic. That allows for proportionate penalties to be issued by prosecutors for lower-level offences, while providing a higher maximum penalty for appropriate cases.

Retaining the Crown Office and Procurator Fiscal Service's ability to divert a greater number of cases from the courts through the measure is an important and proportionate part of the wider approach to enabling the justice system to recover from the impact of coronavirus.

In accordance with the guidance issued by the Lord Advocate, prosecutors have been directed to first consider offering a direct measure, particularly a fiscal fine, in relation to appropriate cases that would otherwise have proceeded in justice of the peace courts.

Russell Findlay: At the start of your response on this group of amendments, you said that some questions can be answered only by the Crown Office and Procurator Fiscal Service. However, we still do not know—you might be about to come on to this—whether the scope of the offences has been broadened. If it has, what offences have been added to those that can be considered?

Keith Brown: I have started to cover that, and I am about to cover it a bit more. However, to the extent that any of that remains unclear, those are questions for the Crown Office and Procurator Fiscal Service, on which I do not want to intrude.

I will repeat my previous point, because it is directly relevant to Mr Findlay's point. In accordance with the guidance issued by the Lord Advocate, prosecutors have been directed to first consider offering a direct measure, particularly a fiscal fine, in relation to appropriate cases that would otherwise have proceeded in justice of the peace courts. That measure will be used only when independent prosecutors consider it appropriate to do so in the public interest, having regard to the individual facts and circumstances of each case and COPFS's prosecution code. I know that the committee has taken evidence from COPFS on the issue—perhaps that helps with some of the points that have been raised so far.

I confirm that fiscal fines are not mandatory penalties—safeguards are built into their operation. Anyone who is offered a fiscal fine as an alternative to prosecution might refuse such an offer by giving notice to the court to that effect. That refusal is treated, as we have heard, as a request by the alleged offender to be prosecuted for the offence. The fiscal will then decide what action to take in the public interest. That measure allows, where appropriate, for a greater range of cases to be dealt with outwith the court setting, and it remains an important part of the on-going recovery of our justice system from the impacts of coronavirus.

Jamie Greene: Is the cabinet secretary comfortable with the prospect that, where a fiscal fine is offered to a person who is accused of something and then rejected on the premise that they say that they are not guilty of the offence and they want to be tried properly, no further action is taken? We are not talking about a small proportion of cases; in a large proportion of cases, no further action is taken. Does that not suggest that it is worth the gamble for someone to reject the fine?

Keith Brown: That is a question for each individual involved in the process. All that I would say is that, as has been mentioned already, the question of what further action is to be taken is down to the fiscal. I cannot stand in the place of the fiscal.

It is also true to say that, recently, there was a case in which no further action was taken in relation to around £4 billion of business support—the support that was set up under the Coronavirus Act 2020—being fraudulently claimed. Fulton MacGregor made the point that lines have to be drawn. Governments must decide where those lines are drawn. I would not have drawn that line in that case.

However, the decision as to whether to pursue a case further is one for the fiscal, and I do not want to get involved in fiscals' areas of responsibility. As I have said, the measure allows for a greater range of cases to be dealt with.

I ask the committee to reject amendments 1037 and 1039.

Amendment 1038 seeks to restrict usage of fiscal fines, following the increase in the maximum value of fiscal fines to £500, to offences for which fiscal fines were already an option prior to the increase. I assume that that is intended as an alternative to amendments 1037 and 1039, which would remove the new upper limit.

11:00

However, it is a long-standing part of criminal procedure, dating back to the mid-1990s, that fiscal fines are available for use by the Crown Office, subject to the general restriction that they can be used only for offences that are capable of being tried summarily. That did not change at all in the Coronavirus (Scotland) Act 2020. As such, as a matter of law, no offences are now capable of receiving a fiscal fine for which fiscal fines could not be used prior to the 2020 act. The one exception to that is any offences that have been created since April 2020, and that would include coronavirus-related offences.

The first limb of amendment 1038 would have no meaningful practical effect. The second limb would require the Crown Office to provide the Scottish ministers with details of offences in relation to which fiscal fines were used prior to the increase to £500. It is not clear to me what use the Scottish ministers are to make of that information.

It is perhaps intended to support consideration of how the intended effect of the first limb of amendment 1038 is to be monitored. However, it is constitutionally inappropriate for the Scottish ministers to be required to assess independent prosecutorial decision making in the manner that might be suggested by the amendment. More fundamentally, because no meaningful practical effect would be achieved by the first limb, that makes the second limb redundant.

Throughout the pandemic, the Crown Office provided the justice committees with regular detailed reports on the usage of its fiscal fine powers. The Crown Office is happy to continue to provide such information as might be sought through, for example, correspondence or parliamentary questions.

Pauline McNeill: I accept that it is a matter for the Lord Advocate and the Crown Office and Procurator Fiscal Service but, as a legislator, I have had arguments over the years that they ought to provide more information because, at the end of the day, we are being asked to make a decision that might impact on the people whom we represent.

I do not disagree with anything that you have said, cabinet secretary, and it might be said that it is a matter for the committee, if it is concerned about this at all, to ask the Crown Office to clarify the situation for stage 3. However, I am clear in my mind that it is not unreasonable for us, as legislators, to ask the Crown Office this question: if we were to extend the fine to £500, albeit on a temporary basis, what breadth of summary offences would it be used for? I have to say that, in my experience, such requests have been refused, and I want to put it on the record that I disagree with the Crown Office if its position is not to provide us, as legislators, with some transparency about how it would use an extra £200.

Also for the record, I totally acknowledge Fulton McGregor's contribution. Fiscal fines are really important for all the reasons that he has mentioned. My only disagreement is that, as legislators, we are entitled to have an understanding before we press our buttons and say yes or no to the powers that we are giving the Crown Office to prosecute people or not. It is wrong for us to be in the dark on that.

Keith Brown: The letter that the committee received in response to the stage 1 report from the Crown Office gave a detailed breakdown of how fiscal fines are being used, including fines of up to £500. I think that, taken together with what I have just said about the use of such powers dating back to 1995, and about their being applied to the same range of offences—with the addition of offences that have been created over the past couple of years, mainly as a result of coronavirus restrictions—that will give a degree of clarity.

I am sure that Pauline McNeill will understand that I cannot answer for the Crown Office in relation to this matter. All I will say is that if there is a practical reason why the Crown Office feels that it is not possible to provide that information, I am happy to try to work with the committee on that. I cannot speak for any policy decisions that the Crown Office might make, but I am happy to work with the committee if there is a practical block to any information being provided.

Amendment 1038 is, in my view, defective, because it does not achieve what it seems to want to achieve. In any event, I oppose it on policy grounds, given the long-standing discretion, going back to at least 1995, that the Crown Office has had as independent prosecutors in using fiscal fines. For that reason, I ask the committee to reject amendment 1038.

Amendment 1040 seeks to introduce victim notification requirements for the Crown Office in cases that are dealt with by way of fiscal fines. First, it creates a proactive duty on the fiscal to inform the complainer when a fiscal fine has been accepted by an alleged offender in a given case. Secondly, the amendment creates a proactive duty on the procurator fiscal to inform the complainer when a fiscal fine has been rejected by an alleged offender and the outcome of any proceedings that result from such a rejection. It might well be the case that amendment 1040 is well intentioned, but I cannot support it.

As we heard from the Crown Office through its written response to the committee's stage 1 report, it has existing statutory obligations under section 6 of the Victims and Witnesses (Scotland) Act 2014 to advise all victims of all case outcomes on request. That includes cases that are dealt with through alternatives to prosecution such as a fiscal fine or cases in which a decision to take no further action has been made. In other words, any complainer who wishes to know the outcome of a case, including fiscal fine cases, can ask the Crown Office.

Brian Whittle (South Scotland) (Con): Will the cabinet secretary give way?

Keith Brown: Yes.

Brian Whittle: I am grateful.

Having listened with great interest to what the cabinet secretary has said, and having listened to the discussion between Fulton MacGregor and Graham Simpson, I have to say that we should be thinking about this from the victim's perspective. If they take the significant step of reporting a crime, it is entirely reasonable for them to expect to be kept informed of any progress. In fact, it is more

likely that few victims would want an opt-out clause or system because they did not want to understand or know what happened to the accused person. It is entirely reasonable to have a system that informs a victim of such an outcome, and I cannot for the life of me understand why you would not put one in place, cabinet secretary.

Keith Brown: We will have to disagree on that. I have laid out the Crown Office's current position, but perhaps what I am about to say might help Mr Whittle in relation to the points that he has raised.

In addition to what I have already said about people being notified of or being able to find out the outcome of cases, I can tell members that the Crown Office will be launching a new digital witness gateway service later this year. In fact, it is included in the year 1 delivery plan for our vision for justice. In that first year, delivery will focus on providing access to statements for witnesses and confirming witness availability for trials. However, the Crown Office has made it clear that further services and functionality will be added as part of planned continuous improvements. That will include exploring the communication of case outcomes to victims through the gateway.

There might be situations in which the proactive communication of case outcomes, as has been referred to by Mr Whittle and others, would be considered appropriate over and above the Crown Office's existing practice. I think that, instead of our requiring the Crown Office to do that as a matter of law, the issue is most appropriately dealt with in a holistic way through the planned initiatives that the Crown Office has already committed to exploring in the very near future.

In practice, the majority of fiscal fines are deemed accepted by the offender. That means that unless the alleged offender refuses the conditional offer by giving notice to the clerk of the court within a period of 28 days from the day that the fiscal fine is issued, they will be deemed to have accepted it. In the event that payment is not made, there is separate enforcement by the court service.

The resource implications of the Crown Office monitoring the acceptance of fiscal fines in that context and proactively identifying relevant complainers in the manner required under amendment 1040 would be considerable, especially before the planned work on the digital witness gateway is carried out. It would put additional pressure on the Crown Office at a time of significant resource pressure across the justice system and when it is trying to deal with a substantial backlog—which I repeat has not gone away, although it is somewhat reduced.

That might be of some comfort to Mr Whittle and others who have raised concerns with regard to the Crown Office seeking to adapt and evolve its interaction with witnesses and victims. For all the reasons that I have mentioned, I invite Russell Findlay not to move amendment 1040.

Russell Findlay: We have had a very fulsome debate. Starting with amendment 1038, I am appreciative of the cabinet secretary's explanation of why it is—I think that this is the word that he used—defective. On the basis of that explanation, I am minded not to move the amendment at this stage, but I think that the committee and the general public are entitled to know a lot more about what the increase will mean in real terms for victims and perpetrators of crime. Hopefully, the Crown Office might pay heed to the various concerns that have been raised here today and make that information available to us, specifically the nature of the offences that fall under the application of fiscal fines and whether they have been broadened due to the Covid powers that have been in place for a couple of years.

On amendment 1040, it is worth putting on the record that although at points during the debate it sounded like we had some principled opposition to fiscal fines per se, that is not the case—they serve a useful purpose in the justice system. However, it is fundamentally wrong that there is no simple mechanism for or proactive way of telling people who have reported a crime the outcome of those proceedings.

Jamie Greene: Will the member take an intervention?

Russell Findlay: Yes.

The Convener: In the spirit of keeping time, can I discourage interventions so that we can deal with this group of amendments?

Russell Findlay: I will be very quick, convener. Pauline McNeill made some interesting points about some accused people perhaps taking a fiscal fine for the sake of convenience, which is the flip side to those who are accused not taking one as a bit of a gamble. It strikes me that the way in which fiscal fines are being used risks turning the justice system into a game of bluff, which is in nobody's interest.

I think that amendment 1040 is absolutely valid and necessary, and I encourage members to support it.

The Convener: Would you like to press or withdraw amendment 1037, Mr Findlay?

Russell Findlay: I will withdraw it, convener.

Amendment 1037, by agreement, withdrawn.

Amendments 1038 and 1039 not moved.

Amendment 1040 moved—[Russell Findlay].

The Convener: The question is, that amendment 1040 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Clark, Katy (West Scotland) (Lab)
Findlay, Russell (West Scotland) (Con)
Greene, Jamie (West Scotland) (Con)
McNeill, Pauline (Glasgow) (Lab)

Against
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)
Stevenson, Collette (East Kilbride) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0. As there is an equality of votes, I as convener will use my casting vote to vote against the amendment.

Amendment 1040 disagreed to.

The Convener: That concludes this group of amendments. I suspend the meeting for around 10 minutes for a comfort break.

11:13

Meeting suspended.

11:21

On resuming—

The Convener: Welcome back. Before we move on to the next group, I again politely ask members to be as succinct as possible in making their points in the debate and speaking to their amendments. If I feel that it is necessary in the spirit of good timekeeping, I will come in.

The next group is on time limits in criminal proceedings. Amendment 1011, in the name of Katy Clark, is grouped with amendments 1012, 1013, 1001, 1014, 1041, 1015, 1042, 1016, 1043, 1017, 1044, 1018, 1045, 1019, 1046, 1020 to 1022, 1047, 1048, 1027, 1028, 1002, 1056 and 1004.

I remind members that, if amendment 1041 is agreed to, I will be unable to call amendments 1015, 1042, 1016, 1043, 1017, 1044, 1018, 1045, 1019 and 1046, due to pre-emption. I also remind members that there are direct alternatives in the group, as shown in the groupings paper. Direct alternatives may all be moved and decided on, and the text of whichever is agreed to last will appear in the bill.

Katy Clark: With the exception of amendment 1021, which is on reporting, all the amendments that I have lodged in the group are probing amendments that relate to the current extension of time limits, which the Scottish Government suggests should continue. The examples that I will give are illustrative. I will not speak to every amendment, because there are so many of them, but I will provide a flavour of them.

Allowing the bill to pass would have the effect of extending the 11-month pre-Covid time limit for the time from appearance and petition to pre-trial hearing to 17 months, as provided for in the emergency legislation. The lead amendment in the group suggests that, instead, that period should be increased to only 13 months. I will provide another illustrative example. The emergency legislation extended the time for which someone was allowed to remain on remand until the pre-trial hearing from 110 days to 290 days. Amendment 1016 proposes that that should be allowed to increase to only 200 days.

The periods that I have chosen are arbitrary and not evidence based because I have not seen any evidence to justify why, for example, 290 days are required to prepare between the time when someone is taken into custody and the pre-trial hearing. The purpose of amendments 1011 to 1020 is to try to tease out from the Scottish Government the reasoning and justification for why the amount of time that is specified in the bill is necessary.

It must always be said that, in Scots law, there is provision for time limits to be extended on cause shown. It is therefore always possible to go to court to make a case as to why the Crown does not have sufficient time and needs further time to prepare the case for trial. However, the effect of the legislation that has been in place during Covid is that the amount of time for which people are held in custody before they are taken to court and their case is heard has been extended significantly. Many organisations have raised human rights concerns and many consider the time extension to be draconian. The issue before us is whether the extensions are necessary and will continue to be so during the period for which the bill's provisions will be in place if it is enacted.

The backdrop is that we still have the highest number of people in prison in Europe. I say "still" because it is an historical issue, and it is important for the Parliament to explore it. Why is it that, historically, Britain in general has had high numbers of people in prison, but Scotland in particular has always had higher numbers of people in prison than the rest of the United Kingdom and, indeed, the rest of Europe? We also have an historical problem of high remand rates, which increased staggeringly during the Covid pandemic. We were informed in evidence a number of weeks ago that the remand rates in Scottish prisons are currently at 30 per cent. We were previously told that the figure was 27 per

cent. It would be interesting to know whether it has increased again.

The extension of the time limits will almost inevitably lead to an increase in prisoner numbers. We already have a huge problem with prison overcrowding, and it will simply not be possible to build more prisons and create more prison spaces under the timescales in the bill.

Some people are found not guilty at trial after lengthy periods in custody or receive lesser sentences than the period for which they were held on remand. The committee has spoken about that previously and mentioned it in previous reports. Also, given that there is always a tendency in almost any establishment for people to work to deadlines, the concern must be that, if the deadlines are longer, there will be less pressure to ensure that cases are prepared as speedily as possible.

Amendments 1011 to 1020 are probing amendments. They are not evidence based, in the sense that I have not taken evidence on or been able to justify the time limits that I propose. However, I submit to the committee and put it to the Government that the Government has also not presented evidence as to why the time limits in the bill are necessary. Indeed, many people in the legal profession insist that the amount of time that is provided for is not needed by the Crown or the defence. The impact of the time limits on the system has been very significant and it has in large part resulted in some of the problems that the committee has discussed on many occasions.

I might come back to the issue at a later stage but, at this stage, I ask the Scottish Government to justify why the specific lengths of time extension in the bill have been sought, are in place and should be continued.

11:30

Amendment 1021, which is on reporting, is similar to the amendment on reporting that I spoke to earlier, but it relates to the issue of remand. As I said, we already have the highest remand figures in the whole of Europe. I will not rehearse all the arguments about that, as members have already heard them.

Amendment 1021 seeks to require the Scottish ministers to lay before the Scottish Parliament

"as soon as practicable at the end of each reporting period",

which is every six months, a report that sets out the number of prisoners who are being held on remand, the average length of time for which prisoners are being held on remand pre-trial and information on disposals—in other words, whether people received a custodial sentence or a non-custodial sentence, or were found not guilty. The first period for which that requirement would be in place would be the period from royal assent until 31 January 2023.

We have already discussed in relation to virtual trials the significance of information that relates to the scrutiny process. For the Parliament to effectively scrutinise very serious issues around which there are significant human rights concerns, not just for the accused but for all who are involved in the process, including the victim, the more information that can be provided to and shared with the Parliament, the better. The inclusion of such a requirement in the bill would send a strong message to the civil service and the justice system about the level of scrutiny that the Parliament expects to have in relation to such decisions.

I move amendment 1011.

Brian Whittle: My amendments 1001 and 1002 relate to persons who are accused of a sexual offence, the victims of alleged sexual crimes and their journey through the judicial system.

The issue goes back a number of years. I have worked with several constituents who have faced such circumstances, and in the previous session of Parliament I was on the Health and Sport Committee, which, as part of its consideration of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill, took a great deal of evidence from victims of such crimes. Similar evidence was taken in relation to the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill.

It is not overstating things to say that victims' journey through the judicial system is extremely arduous and that the system is very poor in that respect. Covid has exacerbated the situation exponentially, with victims' cases being put back time and again. That causes stress and it has an enormous impact on their mental health, which is hard to witness. The trial of the accused in the case of one of my constituents has been put back five times with the result that she now feels unable to continue and the case has been quashed.

Reporting of the crimes that we are talking about is already very low, with conviction rates being even lower. The current system does little to encourage victims to come forward and to support them in doing so—in fact, I think that it does exactly the opposite. Many accused persons are using the Covid emergency to their advantage, to the detriment of the victim.

Over the past few years, Parliament has discussed such matters frequently, including as part of its consideration of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill and the Forensic Medical Services

(Victims of Sexual Offences) (Scotland) Bill. I have even had a meeting on the issue with the Lord Advocate. It is accepted across the board, and across the chamber, that there is a significant issue that has yet to be addressed. Despite that acceptance, however, there has been no movement on the issue to date. I therefore ask the committee to consider my amendments.

What I am trying to do is to indicate to the courts that, specifically in trials involving people who are accused of sexual crimes, given the stress that the victims of such crimes experience and the effect on their mental health, it should be possible for the period in which such trials can be held to be extended only in exceptional circumstances in which such an extension is justified. We cannot allow the accused to use such extensions to their benefit. I am looking for the committee to give a level of protection to the victims of such crimes, and I hope that members will agree to my amendments.

The Convener: I call Pauline McNeill to speak to amendment 1041 and other amendments in the group.

Pauline McNeill: I thank Katy Clark and Brian Whittle for their amendments. This group of amendments is important because we are being asked to agree to far-reaching time limits for all cases, and that will have a significant impact on victims and accused persons.

There were significant delays to court trials prior to Covid. I am also aware that judges were granting, quite liberally, extensions on cause shown for virtually any reason at all; if no courtroom was available, they would grant an extension. I was therefore already concerned, and, in fact, I discussed it with the cabinet secretary at some point. Scotland was once proud of its time limits. For good reason, it had reduced the limit for trials to begin to 110 days and 140 days for trials in the High Court, and we are now being asked to extend those limits to a maximum of 320 days until 2025. That applies to every single case, so I ask members to think about that.

It was open to the Crown and the Government to argue that, since judges have been liberal on extending time limits until now, it could be done case by case. That is an alternative to the proposed changes. If any member thinks that the extension is justified because we have a backlog, the alternative is to say that, if certain trials cannot proceed, arguments can be put before the court for individual cases. However, the Government has chosen not to do that. As Katy Clark said, those time limits will be used. Make no mistake that people work to deadlines, and so they will use the limits.

The legal profession made the point that the Crown will not disclose what priority it will give to cases, and some might say that there is good reason for that. I am sympathetic to it, because I understand that there are so many variables—including whether the court, evidence and witnesses are available—but it means that an accused person could be sitting in Barlinnie jail not knowing if their case will be called next week or in 320 days.

I do not think that it is acceptable for victims, either, as Brian Whittle said. Some victims of sexual crimes have said that they would not be inclined to proceed with their case if there were significant delays, and the Government has to take that into account.

I will speak to each of my amendments to explain why I have chosen the timescales on them, but first I want to contribute to the general debate.

The committee has discussed remand prisoners many times. Scotland has the worst remand figures in Europe—they are utterly horrendous—and when we questioned the Scottish Prison Service, which, I accept, does a very good and difficult job, it said that some remand prisoners double up in cells. I checked with the chief executive of the prison service, and she confirmed that. That means there are issues with the prison estate. We need to consider the health of prisoners. Those things will give me cause for concern if the proposed limits are used until 2025. I know that the cabinet secretary will say that we need some slack in the system, and I accept that, but I do not accept that we need those particular time limits.

Amendment 1042 amends the time limit in relation to remand and service of the indictment from 260 days to 110 days in solemn cases—it was 80 days, before the coronavirus pandemic. That is the one amendment that I think is worthy of consideration by the Government. Why would the preparation of a case require 260 days? It might be said that that question needs to be put to the Crown, which is fair enough, but I am raising the question now.

Why does the Crown need to go up from 80 days to 260 days to prepare a case? Everything will flow from the indictment. If the 260 days are used, the preliminary trial and the trial itself will obviously take place much later down the line.

I have suggested an extra 30 days. That might be classed as arbitrary—let us see—but I acknowledge that some extra time is needed. I just do not accept that a 260-day period is required to make the system work.

Amendment 1043 amends the remand time limit until High Court pre-trial from 290 days to 170

days. I have used the arbitrary figure of an extra 60 days.

Amendment 1041 is a Law Society amendment, which provides that there should be no extensions. I thought that we should put that in the group for discussion for completeness. I favour having some time limits, but not the ones suggested in the bill.

Amendment 1044 reduces the remand time limit until a trial goes to the High Court from 320 to 200 days. The period was previously 140 days.

Amendment 1045 amends the remand time limit until sheriff court pre-trial hearing from 290 days to 170 days. Prior to the pandemic, that period was 110 days.

Amendment 1046 amends the time limit for remand until trial for solemn cases from 320 days to 200 days. That was previously 140 days. That amendment provides for significant extra time.

I am sympathetic to Brian Whittle's amendments, which I will comment on. Members should feel free to intervene on me.

Brian Whittle is quite correct. We have made a lot of progress in reducing time delays for cases involving sexual offences, which have a disproportionate effect on women and children. However, I was not clear what "sexual offences" means in his amendments. Is that the full range of sexual offences in solemn procedure cases? I am sympathetic, because of the disproportionate effect on women and children. However, other solemn procedure cases, such as those for serious assaults that involve injury to someone's face or body, are also very stressful for those victims.

There will obviously be practical issues with court availability and availability of defence. We have had discussions about the latter with the Faculty of Advocates, which is concerned that it is losing people from the bar who are not being replaced. That was probably already having an impact on the availability of counsels to proceed with trials.

Some of those issues are fixable. There is an on-going debate with the Government about fees and investing in defence as well as prosecution. It is much more lucrative to go for a job at the Crown Office now because it pays more. At the moment, it is less lucrative to stay in the defence profession.

All in all, it is not satisfactory for a Parliament to agree to extended time limits with no commitment on how something is to be fixed, no explanation of why the Crown needs so long to prepare a case, no real progress on the conditions of prisoners on remand, and no real commitment on how the various cases will be dealt with in a very lengthy process.

Jamie Greene: I thank members for their contributions thus far. I have a couple of short comments to make. There are probably things that we can agree on. All the amendments in the group, including mine, are very well intended.

Nobody wants cases to time out. That is not a scenario that any Government wishes, and that has necessitated extensions, unwelcome as they are to everyone in the system. It remains the fact that there was a considerable backlog of cases before the pandemic and it is entirely true that the pandemic has added to the pressures on the courts and all partners in that process.

11:45

Equally, however, I hope that we all agree that nobody wants temporary extensions to become the new norm. We have heard concerns about there being a bit of mission creep, with statutory maximum time limits continuing to be extended for substantial periods of a couple of years for the wrong reason. For me, the right reason would be to ensure that cases did not time out due to circumstances, while the wrong reason for extending for long periods of time would be to deal with backlogs, given that they would be matters of resource, capacity and capability in the court system. As for whether it is right to extend criminal procedure time limits in that way, I have to say that I believe that the extensions are lengthy—320 days is a substantial period of time—and I hope that we will agree that the measures must be temporary and that the limits must drop back.

We are arguing that this proposal is the best way of doing this, because if we do it the other way and make the case-by-case approach the default, as Pauline McNeill has alluded to, it would undoubtedly lead to a huge volume of traffic in the system, with the courts and those involved in the process seeking to extend thousands and or even tens of thousands of cases.

The Convener: Can you speak to your specific amendment, Mr Greene?

Jamie Greene: This is all about my amendment, convener. I am highlighting the reason for the concern in this respect.

Because of that concern, which was best illustrated by Brian Whittle when he talked about the human interest, or the victims, and the types of cases involved, and, indeed, the points that Pauline McNeill and Katy Clark raised about the human rights elements such as the numbers on remand and in prison and the associated problems, I think it is important that the Government considers whether all those provisions on time limits remain necessary.

Katy Clark: Will the member take an intervention?

Jamie Greene: I will, in a second, but it is important that I address my amendment first.

The way in which we can address this issue is via amendment 1022, which seeks to insert a duty to carry out a

"Review on extension of this chapter".

In other words,

"Scottish Ministers must undertake a review at the end of each reporting period on the operation of the provisions in this chapter",

which covers criminal procedure time limits and their extension. The amendment goes on to say:

"A review ... must consider whether the provisions in this chapter remain necessary."

That is the important line.

I have specifically asked for the review to be carried out every three months. It could be argued that that would be onerous, but I point out that the original coronavirus legislation that we passed put a statutory duty on the Government to carry out a review every two months, and it became quite normal practice for the Government. I therefore do not think that three months is an unreasonable period of time.

I will take the intervention, if there is time.

Katy Clark: I have a specific question on your argument about cases timing out. Something that concerns me about amendment 1001, which relates to time limits on proceedings on sexual offences being extended in "exceptional circumstances", is the risk of timing out or other unintended consequences. Have you given thought to that? Perhaps the cabinet secretary could also come back on that. Would the impact be as has been described, or could there be unintended consequences?

Jamie Greene: It is not for me to speak to other members' amendments, but even if there were unintended consequences as a result of the wording that Mr Whittle has proposed, I am still sure that that would not be the intention. I am sure that the intention is to raise awareness of the fact that the victims of those types of crimes are suffering.

As I have said, such extensions affect both parties. They affect the accused, who are often being held on remand, and the victims, who are having to wait a year or so. I actually find it quite shocking that victims are pulling out of continuing with cases because of the timescales. They should never have been put in that position, and we should all work together to stop that happening.

In essence, what I am saying is that, whether we feel that the extensions are unnecessary, illegal or morally justified—depending on what side of the argument we are on—the Government has a duty to consider where the extensions remain necessary on a three-monthly basis, for as long as they remain in place, with a view, I hope, to getting back to the statutory norms that we were used to before the pandemic.

Keith Brown: This is a large group, with 26 amendments. I have gone through my speaking notes and taken out as much as I could, but, as members will expect, the Government must make its position known to committee members, so please bear with me.

Let me make a couple of general points. I acknowledge the points that have been made about remand; indeed, that is why we consulted on the issue. I hope that we will get the support of all members and parties on the action that we intend to take to try to reduce the numbers on remand.

A number of the amendments—indeed, all of them, I am sure—are well intentioned. On some, we will try to be helpful—on others, perhaps less so. I am sympathetic to finding ways of ensuring that cases can proceed more quickly.

Let me come back first of all to Jamie Greene's point. We believe that this approach is necessary to reduce the backlog; the question is whether, if it does not have that effect and the backlog continues, the extended time limits become—as I think someone said—the new normal. That is not my intention. We should revert to where we were before. As Pauline McNeill has said, we were one of the leading jurisdictions in the world when it came to time limits, and that is where we should be. Jamie Greene has said that the Government has a duty; all of us, including the committee, have a duty to make sure that we push the backlog down so that we can revert to normal—and I repeat that the normal that we want to get to is where we were previously, albeit that we might have learned lessons along the way.

On Brian Whittle's points, I concede that the experience of the justice system can be brutal for many people, whether we are talking about sexual crimes or other crimes. We mentioned that in "The Vision for Justice in Scotland" and we are looking for ways of improving the situation. There is the example of the man who went to court to attend the trial of someone accused of murdering his son, only to find that he had to sit just a few feet away from the accused person. There are so many ways in which the system can inadvertently retraumatise people, and we are trying to deal with that.

For the reasons that I gave when I gave evidence to the committee, I cannot support attempts to remove or reduce extended time limits where such action would significantly and adversely affect time and resources for progressing trials. Progressing trials, in my view, is the absolute number 1 priority, not least for the reasons that Jamie Greene has given. The situation affects everyone involved in the process.

As members are aware, necessary restrictions on court business were put in place in March 2020 in response to the coronavirus pandemic, resulting in the build-up of a large backlog of cases in the system. There was a backlog before, and it has more than doubled in the interim.

It is important that the committee keeps in mind that the time-limit extension provisions are intended to assist the justice system in managing the backlog of cases that has built up during the pandemic; they are not the cause of the backlog. That is an important point, given some of the comments that have been made. Removing or reducing the length of the time-limit extension provisions will not create any additional court capacity, and it will not result in cases being heard more quickly. It is important that that point is made. [*Interruption*.]

The Convener: I would rather that the cabinet secretary made progress than that he took an intervention.

Keith Brown: I recall that interventions in an earlier debate were covered in subsequent remarks. Perhaps it might help if I can get through my remarks, convener, although of course it is up to you to allow an intervention to be taken.

The purpose of extending the time limits is, in large part, to ensure that scarce prosecutorial court and defence resources are not diverted towards preparing and adjudicating on large numbers of applications to extend the statutory time limits on a case-by-case basis. That was the whole rationale in the first place. If we allowed such diversion to happen, we would reduce the system's capacity to progress cases and, as a result, it would take additional time for cases to come to court than would otherwise be the case.

We continue to support justice agencies to take action to address the court backlog that the pandemic caused. A justice recovery fund of £53.2 million has been established to aid recovery and we have extended funding for remote jury centres for an additional three months to ensure that capacity is maintained as the court service transitions back to having juries in court.

However, justice agencies have made it clear that it will take several years to bring timescales for the overall case load back to pre-coronavirus levels. In that light, it would be entirely counterproductive to amend the bill to reduce the length of any time limit extension or to remove the extension entirely, if that impacts on the number 1 priority of throughput of cases.

It is not just me who is saying that—I think that Katy Clark made the same point. The committee will also recall that, in her evidence to the committee, Kate Wallace of Victim Support Scotland expressed concerns that if time limits were not extended, cases would time out, denying justice to victims. She said:

> "if the time limits were not extended until the system had recovered and we got things back under control, I would be concerned that cases would end up timing out. That is the very opposite of what we want. Victims are very concerned that they will not see justice done."—[*Official Report, Criminal Justice Committee,* 23 February 2022; c 18.]

For that reason, I ask Ms Clark and Ms McNeill not to press or move their amendments.

However, amendments 1047 and 1048, in the name of Pauline McNeill, seek to revert to the situation brought about by two specific changes that were made to time limits relating to adjournments in cases that arise post conviction. Neither of those areas—pre-sentence reports and breach hearings—affects the trial process, and they are therefore distinct from the other time limit changes. These amendments would mean that the court could still adjourn a case again if necessary, as the original time limit would apply only to the length of a single adjournment, and the particular time limits would not impact on the throughput of trials. For that reason, the Scottish Government supports amendments 1047 and 1048. They are proportionate and go a small way towards enabling the courts to revert to pre-coronavirus time limits, which I think that we would all support, but not at the expense of the throughput of criminal cases.

Amendments 1001 and 1002, in the name of Brian Whittle, and amendment 1056, in the name of Pauline McNeill, seek to elevate the threshold of the test that is used by the court in assessing whether to extend the time limit. That area has not been changed by any of the coronavirus legislation, and these amendments would represent entirely new policy that has not been considered by this committee or anyone else. I would be concerned—

Pauline McNeill: May I intervene on that point, cabinet secretary? I apologise for not addressing this matter previously.

Do you share my concern that, if Parliament agreed to the time limits, the court could still use the 1995 act cause shown provisions to extend them further? That is why I have lodged my amendment—it would make the test higher. Will the Government not even consider what would

happen if we found that cases were being extended beyond 320 days? The cause shown test is a very low threshold.

Keith Brown: I have made the point that, if we are to have such a change, it deserves to be considered on its own merits, and the work should be done beforehand. I am not saying that the member has not raised a valid point, but it would have to be considered on its own merits by the committee and by the Government.

I would also be concerned about the unintended consequences of agreeing a new policy in such a sensitive area of criminal procedure. Unfortunately, the backlog of cases that has built up as a result of the pandemic means that cases are taking longer to reach court. I recognise that that impacts in particular on complainers, witnesses and accused people who are awaiting trial, especially in sexual offence cases, and that these amendments are intended to address that problem. I would note, though, that these issues, and the effects of the pandemic, are not unique to the Scottish judicial system.

However, I am concerned that amendments 1001 and 1002 could have consequences that I think Mr Whittle would not intend. The exceptional circumstances test is, in fact, a much higher bar than the existing cause shown test. It has to be assumed that such a new test would create a presumption that applications to extend the statutory time limits, whether made by the prosecution or by the defence, would ordinarily be refused, and that they would be granted only in exceptional circumstances. When a judge refuses an application to extend a statutory time limit, there are two possible outcomes: the case proceeds to trial as it stands, assuming that a trial date has been fixed, or it falls.

Brian Whittle: Will the cabinet secretary take an intervention?

Keith Brown: I am happy to come back to the member at the end of my remarks.

It is important to consider the consequences of such a change, remembering that it is the most serious sexual offence cases, including all charges of rape, that are tried in the High Court. If an application for extension is made by the Crown Office, because a case is not yet ready for trial, and is refused, the Crown Office might well have no choice but to decide that the evidence required to prove the case beyond reasonable doubt is simply not in place, and the trial will therefore have to be abandoned. As Kate Wallace has said, that would risk leaving complainants feeling that justice had not been done. It would also mean that people who are accused of the most serious crimes could escape justice and might offend again.

If, on the other hand, the application was made by the defence, it would perhaps be more likely that the trial would proceed if the application was refused. However, if an application to extend the time limit had been made, for example, to secure more time to identify key witnesses, there is a risk that proceeding with a trial would increase the risk of a miscarriage of justice.

Whatever the position with regard to which party in the proceedings requests an extension, it is clear that the interests of justice might not be served with the much higher threshold of the time limit test that the amendment provides. For those reasons, I invite Mr Whittle not to move amendments 1001 and 1002.

12:00

I am afraid to say that the same concerns arise with amendment 1056. It is worth noting that it is wider in scope than the other two amendments, allowing the courts to extend the statutory time limits under section 65 of the Criminal Procedure (Scotland) Act 1995 in any case tried on indictment either in the sheriff court or the High Court only “in exceptional circumstances”. It is not limited to sexual offence cases. Because of the potentially severe unintended consequences that I outlined in response to Mr Whittle’s amendments 1001 and 1002, I invite Pauline McNeill not to move amendment 1056.

Amendment 1021 would require the Scottish Government to report to Parliament every six months on statistical matters relating to the remand population, including the size of the remand population, the average length of time that prisoners are being held on pre-trial remand and the number of prisoners given a custodial or non-custodial sentence, or found not guilty, who were held on remand prior to trial. I can see the merit in reporting on the remand population, given the concerns about the length of time that some prisoners have been held on remand prior to trial. However, I do not think that amendment 1021 quite works, as it is not clear exactly what the duty that falls on Scottish ministers to report on the size of the remand population and the average length of time prisoners are held actually is. It could be a snapshot at the end of the reporting period, say, or a rolling average—the amendment is not clear on that point.

Equally, I am not persuaded that the information on the disposals given in cases where the accused was held on remand prior to trial is necessarily a useful piece of information. Accused people can be held on remand for a variety of reasons that are not necessarily related to the seriousness of the offence that they have been charged with. For example, they might have breached their bail conditions or there might be a

concern that they will not turn up to court if they are released on bail.

I also understand that the current information technology systems used by the Scottish Courts and Tribunals Service are not set up in a way that would enable that information to be obtained. Therefore, I would ask Ms Clark not to move amendment 1021, but I am happy to seek to work with her to see whether an amendment to address those issues could be developed in the short time that we have ahead of stage 3.

Amendment 1022 would require the Government to provide a quarterly review of the necessity of continuing extended time limits to the Scottish Parliament. As section 42 of the bill lays out, if the Scottish Government wished for the extended time limits—or indeed any of the temporary justice measures—to remain in force beyond 30 November 2023, the statutory instrument providing for that must include a statement of reasons for such a move. Therefore, the interests and scrutiny role of the Parliament are protected for extensions beyond the initial period provided for in the bill to 30 November 2023. Amendment 1030, which I will discuss in a later group of amendments, might also be relevant in this area.

Convener, I have tried to make clear that extended time limits are, in my view, a necessary measure, which other jurisdictions have also had to resort to, while the criminal court system recovers from the backlog created by the pandemic.

Katy Clark: In speaking to my amendments, I referred to Crown and defence capacity in relation to time limits, but are you saying that court capacity is the main driver for needing to extend the time limits?

Keith Brown: The time limits need to be extended so that the entire system can cope. Also, as I have been saying, there are constraints on the court service in relation to getting the information that you have been seeking. Generally, though, the time limits are justified by the strain on the entire system.

Of course, I do not want the extended time limits to be in place any longer than necessary, but I am not convinced that amendment 1022 meaningfully adds to the reporting requirements that are already contained in the bill. Along with the need to justify to Parliament any continuation of extended time limits beyond 30 November next year, it is of course always open to any MSP to ask parliamentary questions to obtain information on any aspect of the operation of the justice system that might influence any decision to extend or expire those provisions. For that reason, I ask Mr Greene not to move amendment 1022.

To go back to the point about remand, I think that the Scottish Prison Service will be able to provide that information to the committee if the committee asks for it, although the service will always say that the number that it gives is just the number on any given day.

Amendments 1027 and 1028 seek to provide that the extended statutory time limits in sections 65(3), 147(1) and 200 of the 1995 act, which relate to cases where the accused is being held on remand prior to trial or sentencing, will automatically expire one year after royal assent. It with the other temporary justice measures, those time limits could not be extended by statutory instruments.

We simply do not know what the situation will be with the backlog of cases in the summer of 2023 but, if amendments 1027 and 1028 are agreed to, the effect would be to expire the time limit extensions relating to remand cases, regardless of the scale of the backlog of cases at that point. As I have said, removing the extended time limit provisions before the backlog created by the pandemic has been reduced sufficiently might actually increase the length of time that people spend on remand prior to trial. For that reason, I ask Katy Clark not to move amendments 1027 and 1028.

Amendment 1004 in my name makes transitional and saving provision in relation to the time limit extension provisions in the Coronavirus (Scotland) Act 2020. The bill very slightly changes the length of certain extensions to time limits as expressed as a number of days rather than a number of months, as was provided for in the 2020 act. That is being done to make the provisions easier to understand. Amendment 1004 therefore makes transitional provision to avoid a single case having two different time limit regimes applying at different points in the criminal process.

The Convener: Mr Whittle, did you want to come back in?

Brian Whittle: Thank you, convener.

I think that the cabinet secretary misses a huge point. As Pauline McNeill has alluded to, if you go into a court and watch court proceedings, you will find that it is normal for defence lawyers to walk into court and say that they need more time to prepare their case for their client. During Covid, they have been doing that multiple times and have been allowed to do so. All that I am asking for in my amendments is that we indicate to the court that the bar for extending the period has to be higher than that.

That would reduce the backlog that we so want to reduce. If we keep extending cases, as defence lawyers are allowed to do at the moment, the backlog will not be reduced. As I have said,

victims of horrendous crimes are dropping out of proceedings, because of stress and mental health issues. My amendments are not about trying to reduce the capability of lawyers to defend or prosecute, but about making sure that there has to be a reason for extensions and that they are not just granted as a matter of course.

The Convener: If no other members wish to come in, I call Katy Clark to wind up and say whether she wishes to press or withdraw amendment 1011.

Katy Clark: I was interested in the cabinet secretary's points about the justifications for the time limits that are being sought. I am sympathetic to the problems that definitely exist with the court estate, and I might write to the cabinet secretary to seek more information on where the pressures are. I appreciate the difficulty in addressing some of those issues in a speedy way. It has to be said that the time limits that the Scottish Government seeks are extensive and we would want further justification as to why they are required, but I will not press or move any of my amendments on the time limits today.

I am grateful to the cabinet secretary for his comments in relation to amendment 1021. As we might be able to come back to that issue later, I will not move that amendment at this point.

Amendment 1011, by agreement, withdrawn.

Amendments 1012 and 1013 not moved.

Amendment 1001 moved—[Brian Whittle].

The Convener: The question is, that amendment 1001 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Findlay, Russell (West Scotland) (Con)
Greene, Jamie (West Scotland) (Con)

Against
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)
Stevenson, Collette (East Kilbride) (SNP)

Abstentions
Clark, Katy (West Scotland) (Lab)
McNeill, Pauline (Glasgow) (Lab)

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

Amendment 1001 disagreed to.

Amendment 1014 not moved.

The Convener: I call amendment 1041, in the name of Pauline McNeill, which has already been debated with amendment 1011. I remind members that, if amendment 1041 is agreed to, I cannot call amendments 1015, 1042, 1016, 1043, 1017, 1044, 1018, 1045, 1019 and 1046 due to pre-emption.

Amendments 1041, 1015, 1042, 1016, 1043, 1017, 1044, 1018, 1045, 1019, 1046 and 1020 to 1022 not moved.

The Convener: I call amendment 1047, in the name of Pauline McNeill.

Pauline McNeill: I will move this and amendment 1048, convener. I hope that I did not mishear members saying that they would support them.

Amendments 1047 and 1048 moved—[Pauline McNeill]—and agreed to.

12:15

The Convener: That concludes the debate on that group of amendments.

Amendment 1049, in the name of Russell Findlay, is grouped with amendments 1023, 1050 to 1055 and 1057. I remind members that, if amendment 1049 is agreed to, I cannot call amendments 1023 and 1050 to 1055 due to pre-emption.

Russell Findlay: All eight of my amendments in the group relate to the emergency release of prisoners in the event of another Covid outbreak. I will try to deal with them in a sensible order. Amendment 1050 is a stand-alone amendment that would create a requirement that any prisoner who might be subject to early release in future due to a Covid outbreak undergo a Covid test. It came as a surprise to me that that had not been the case, although it was explained that, understandably, the mechanisms were not in place at that time. In any future pandemic, they should be. It seems to defy any public health logic to send people from an institution into communities across Scotland without a test.

With regard to amendments 1049 and 1057, we know that, under emergency measures, 348 prisoners were released early at the start of the pandemic. That decision was made by the Scottish ministers. That figure included 21 prisoners who had been convicted of serious assault. There is a fundamental point of principle at play here. We are opposed to the general ability of ministers to intervene in sentencing. Those sentences were handed out by sheriffs or judges, and sentences should be a matter for the judiciary, not politicians. The early release of prisoners at the stroke of a ministerial pen is wrong in principle.

There is also the issue of reoffending. Their early release was presented as a matter of public health, but I would argue that that was a gamble on public safety. We discovered that 142 of those who were released early under the emergency

powers reoffended within six months. The usual yardstick for measuring reoffending is 12 months, so the actual number of those who reoffended was almost certainly higher. The Scottish Government might say that that provision is about protecting people in prison, but these people are in prison for good reason—primarily as punishment, to protect the public and for rehabilitation. I would argue that the Scottish Government ought to fix the prison estate and ensure that the environment is safe and has the capacity to deal with any future outbreaks and therefore not give the possible impression that Covid is being used as a pretext to get prisoner numbers down by stealth.

Just a few weeks ago, the Scottish Government revealed that hundreds of prisoners had been given early or temporary release due to incorrect risk assessments caused by a computer problem. That included eight prisoners serving life sentences, so I suggest that public faith has already taken a bit of a knock. It is also worth stating that the emergency powers are not in the hands of criminal justice professionals—such as prison governors, who have the experience to make the decisions—but Government ministers. If it was governors rather than the Government, it might be a different matter.

The strongest opposition to the powers relates to the impact on victims. The committee took evidence from victims' organisations, which were scathing about early release. Earlier, the cabinet secretary quoted Kate Wallace of Victim Support Scotland.

Keith Brown: Is the member's position that he is opposed to the ability of ministers to intervene in sentencing in relation to release? Does that apply only to the Scottish ministers, or does he object to the same power being used by UK ministers?

Russell Findlay: I will stick to what is relevant to the powers of the Scottish Parliament and what I am here as a member to discuss. We are here to discuss the specific issues of these amendments.

Kate Wallace, who the cabinet secretary quoted earlier, said that the impact of those early releases was far greater than the 348 cases, because victims

"did not know who was going to be released."

Her organisation and others received what she called a "massive upsurge" in calls from victims who she described as being "petrified". They struggled to cope with the volume of calls that they received. She was also critical about the lack of information sharing or support for victims, who she described as

"traumatised by the thought of the perpetrators in their cases being released from prison early."

She added that

"No regard whatsoever was paid to that."

Understandably, she was clear that

"we do not agree with decreasing the length of time"—[*Official Report*, *Criminal Justice Committee,* 23 February 2022; c 11-12.]

that is served. Marsha Scott of Scottish Women's Aid shared some of those concerns and made a more general point that sheriffs seemed to be getting pushed into alleviating pressures in the system, rather than considering victims' rights.

I move on to amendments 1051 to 1055. If it is the case that ministers retain the powers to release prisoners, which they have now, amendments 1051 to 1055 would seek to ensure that certain categories of prisoners would be exempt from such release. It is my understanding that the Scottish Government has said that none of the 348 who were released early were convicted of domestic crimes, but the legislation does not exempt such prisoners from any future early release. The other amendments that I mentioned would ensure that other types of prisoner were not able to be released under that power. That includes those who are convicted on indictment, those convicted of crimes of violence, those convicted of sexual crimes and, as already stated, those convicted of domestic crimes.

For all the reasons that have already been laid out, we would rather that ministers did not have those powers full stop, but if they do, it seems sensible and proper that prisoners who are convicted of those crimes should be exempt, and that is what our amendments seek to do. I hope that the cabinet secretary will give that some consideration and, if he does not, I hope that other committee members will vote for the amendments, not least given the strength of the evidence that we have heard from the victims organisations.

I move amendment 1049.

The Convener: I call Jamie Greene to speak to amendment 1023 and other amendments in the group.

Jamie Greene: This will be a record-breaking short speech. My amendment would ensure that a prisoner could not be released more than six months before their scheduled release date. It is a one-line amendment and is fairly self-explanatory. The rationale for it will become obvious to committee members. A prisoner being released any more than six months before the scheduled release date runs the real risk of rendering the sentence meaningless, and for all the reasons that have been eloquently expressed by my colleague on his amendments, it feels intrinsically unfair and unjustifiable in that context. For that reason, I will move my amendment.

Keith Brown: The committee considered the emergency prisoner release power during stage 1. It is clear that some stakeholders support that power; I note in particular that the chief executive of the Scottish Prison Service, Teresa Medhurst, stated that the use of the power in May 2020 enabled the Prison Service to manage the risk and spread of infection in prisons at that time by increasing the single-cell occupancy rate.

It is clear that others had some concerns, including around the provision of information to victims. Certainly, if we were to ever use the power again—I stress that I am not aware of any current plans to do so in general—we would want to learn from the experience in May 2020 and ensure that improvements to the process were put in place. That would include improved communication with victims.

Ensuring the security and good order of our prisons and the health and safety of prisoners and prison staff is absolutely critical and is a responsibility that the Prison Service and I take very seriously.

The emergency prisoner release power—which I remind the committee has been used only once by the Scottish Government since it was introduced under the Coronavirus (Scotland) Act 2020—is intended to support that essential principle by providing a means to release groups of prisoners if the impact that coronavirus is having, or is likely to have, puts the security of prisons or the safety of prisoners or prison staff at risk.

As I have already said, the Scottish Government has no current plans to use the power again, but we have all seen how unpredictable coronavirus and its variants can be and the significant impact that coronavirus outbreaks have on the prison regime. Retaining the provisions allows action to be taken immediately, which could save lives and allow the continued safe operation of our prisons. That is what we are talking about: saving lives and looking after the health of the individuals involved.

Unlike the UK Government, the Scottish ministers currently have no legal power to instruct early release to protect the safe operation of prisons for any other reason. I am grateful to Mr Findlay for the clarification that he is talking only about the Scottish ministers. I will leave open the question of why that is a power that can easily be exercised without objection by UK ministers, but not by the Scottish ministers. It is my responsibility to look after the Scottish Prison Service, which is why we are seeking the powers.

Russell Findlay: Will the minister accept an intervention?

The Convener: I will allow the minister to continue.

Keith Brown: Without those provisions, we would be required to introduce emergency legislation if the impact of coronavirus placed the security of prisons at risk. Emergency legislation would take time that our experience of the pandemic shows that we could not afford.

For those reasons, I cannot support amendments 1049 and 1057, which would remove the ability for the Scottish ministers to release groups of prisoners in response to the impact that coronavirus was having, or was likely to have, on the security and good order of prisons and the health and safety of prisoners and prison staff. I therefore invite Russell Findlay not to move those amendments.

I turn to amendment 1023 in the name of Jamie Greene. The amendment seeks to limit the application of the prisoner early release power, so that prisoners cannot be released any earlier than six months prior to their scheduled release date. I am happy to support the principle of the amendment and highlight that the regulations that allowed the use of that power in May 2020 restricted release to individuals within 90 days of their scheduled release date. However, there are some significant problems with the way that amendment 1023 is drafted. For that reason, I cannot support it today, but I would like to work with Jamie Greene, if he is willing, to lodge amendments at stage 3 that will achieve what is intended. I therefore invite Jamie Greene not to move amendment 1023.

Amendment 1050, in the name of Russell Findlay, would prevent individuals who have tested positive for coronavirus from being released under the emergency release mechanism. I know that Mr Findlay raised that issue during stage 1.

It should be noted that testing is not mandatory in the community and I am of the view that we should not make it mandatory as a condition of release. SPS worked hard during the pandemic to ensure that the Covid-related restrictions placed on prisoners were proportionate and, as far as possible and as a number of committee members have said, reflected the restrictions placed on the wider community. That was certainly the view of Her Majesty's Inspectorate of Prisons for Scotland. That helped to protect the good order of prisons and the health and wellbeing of prisoners and prison staff.

I assume that the amendment is intended to protect public health. That is an intention that I support. However, if members of the general public are not required to undertake Covid testing for the purposes of protecting public health, it is not proportionate to require prisoners to do so. If it were the case that a prisoner had tested positive, or, in the absence of a test, was nevertheless reasonably believed by the SPS to be infectious

with Covid, the release power would be used to delay their release until they ceased to be infectious. That approach was taken in 2020 and is the approach that we would intend to take in future.

Also, as currently drafted, amendment 1050 could prevent any prisoner who has ever tested positive for coronavirus being released under that power, which I am not sure is the effect that Mr Findlay intended.

For those reasons, I do not support amendment 1050 and I invite Mr Findlay not to move the amendment.

The remaining amendments in the group, all in the name of Russell Findlay, would exclude various categories of prisoner from emergency release by regulations. I cannot support any of those amendments today, because they all suffer from the same drafting error and would have the effect of preventing someone from being released in an emergency if, at any point in their lives, they had been convicted of an offence of one of the kinds that his amendments mention, even if the conviction had been spent decades ago. That would be a completely unreasonable position to take—it might even be an unlawful one—and I do not think that it is what Mr Findlay intended. I assume that he means only to stop the release of people who are actually serving sentences for the offences that his amendments mention.

12:30

I would be pleased to work with Mr Findlay to produce, for stage 3, properly drafted versions of his amendments 1052 and 1053, which would exclude from the emergency release mechanism anyone serving a sentence for a domestic abuse offence. Indeed, I would like to go further and also exclude anyone convicted of an offence aggravated by domestic abuse. That is exactly what we did in the one set of regulations made under the power in the emergency act. I therefore ask Mr Findlay not to move amendments 1052 and 1053 so that we can work to bring them back, in better shape, at stage 3.

I cannot support amendments 1051, 1054 and 1055 at all.

Amendment 1051 would exclude from the emergency release mechanism anyone who has been convicted on indictment. The thought behind that seems to be that the crime of a person who was prosecuted on indictment is inherently more serious than that of someone who was prosecuted summarily. That is too simplistic. It is, of course, right that a prosecutor's decision about whether to prosecute someone summarily or on indictment will be based on their assessment of the seriousness of the crime. However, such an assessment, which is made before a trial has begun, might not reflect what comes out in court. It is wrong to assume that everyone who has been convicted on indictment has committed a crime that is worse than that of anyone convicted summarily, or that those who have been convicted on indictment are inherently more prone to recidivism than anyone convicted summarily. Using the administrative choice that was made about which procedure to prosecute someone under is simply too blunt an instrument for deciding which prisoners should be released early in the face of a deadly virus. I therefore urge members to reject amendment 1051.

Amendments 1054 and 1055 would exclude from early release people who have been convicted of crimes of violence and sexual crimes. The amendments do not define those terms, which do not have any generally accepted legal meaning. Agreeing to them would therefore introduce considerable uncertainty into the law. It would be a dereliction of the Parliament's responsibilities to pass such ambiguous legislation.

Amendments 1054 and 1055 are not only problematically unclear; they are unnecessary. The bill already excludes from emergency release the most serious sexual and violent offenders. It provides that the power cannot be used to release those serving extended sentences for sexual or violent offences, nor can it be used to release anyone subject to a supervised release order, nor anyone subject to notification requirements under the Sexual Offences (Scotland) Act 2009. As Mr Findlay himself said, on top of those restrictions it gives prison governors the power to deny emergency release to any prisoner who is considered a risk to an identified person.

There is no need for amendments 1054 and 1055, and they do not work technically. I therefore invite Mr Findlay not to move them.

The Convener: I call Russell Findlay to wind up and press or withdraw his amendment.

Russell Findlay: I will start with amendment 1050, on the requirement, or otherwise, for prisoners to undergo Covid tests. I heard what the cabinet secretary had to say. Given that the measure is supposed to be about preventing the spread of Covid, it is logical that prisoners could be Covid positive when they are released back into communities. I will therefore move amendment 1050.

I concede that the wording of amendments 1051, 1054 and 1055 as they are framed presents problems. I am grateful to the cabinet secretary for explaining that to me. On that basis, I am inclined not to move those amendments at this stage.

I am grateful to the cabinet secretary for his willingness to at least consider or discuss how amendments 1052 and 1053 might work in practice. I look forward to taking him up on his offer.

Finally, on amendments 1049 and 1057, which are the two main amendments in my name, for all the reasons that I raised in my initial remarks—which I do not think we have time to rehearse—I still believe that the powers envisaged in the bill are not necessary, and I urge members to vote against them.

The Convener: Just to confirm: do you intend to press amendment 1049?

Russell Findlay: Yes, and amendment 1057.

The Convener: The question is, that amendment 1049 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Findlay, Russell (West Scotland) (Con)
Greene, Jamie (West Scotland) (Con)

Against

Clark, Katy (West Scotland) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
McNeill, Pauline (Glasgow) (Lab)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)
Stevenson, Collette (East Kilbride) (SNP)

The Convener: The result of the division is: For 2, Against 6, Abstentions 0.

Amendment 1049 disagreed to.

The Convener: Amendment 1023 has already been debated with amendment 1049.

Jamie Greene: I understand that the cabinet secretary said that he would work with me to bring the issue back at stage 3. [*Interruption*.] He is nodding at me. In that case, I will not move the amendment.

Amendment 1023 not moved.

Amendment 1050 moved—[Russell Findlay].

The Convener: The question is, that amendment 1050 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Findlay, Russell (West Scotland) (Con)
Greene, Jamie (West Scotland) (Con)

Against

Clark, Katy (West Scotland) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
McNeill, Pauline (Glasgow) (Lab)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)
Stevenson, Collette (East Kilbride) (SNP)

The Convener: The result of the division is: For 2, Against 6, Abstentions 0.

Amendment 1050 disagreed to.

Amendments 1051 to 1055 not moved.

The Convener: Amendment 1024, in the name of Graham Simpson, is grouped with amendments 1025, 1026 and 1008. I remind members that, if amendment 1024 is agreed to, I cannot call amendments 1025, 1026 and 1008 due to pre-emption.

Graham Simpson: It has been an interesting day, and I am glad that I have sat through the meeting.

This is a relatively small but important group of amendments. Members know that I sit on the Delegated Powers and Law Reform Committee, which scrutinises every piece of legislation and produced an excellent and balanced report on the bill. However, prior to that, we held a mini inquiry into the use of the made affirmative procedure during the pandemic. That inquiry shaped the recommendations that we arrived at for the bill. The made affirmative procedure can be used in relation to five powers in the bill, one of which this committee is concerned with today: the power to free prisoners early.

I will remind members what the made affirmative procedure does, because that gives the background to the reasoning behind my amendments 1024 to 1026. The procedure allows a Scottish statutory instrument to be made and to come into force even though it has not yet been approved by the Parliament. That approval comes later. Law is made with no scrutiny and no parliamentary backing—there is no vote. The procedure was not commonly used before 2020, but it became very common after that.

In the DPLR Committee's report, we held to four principles, the first of which was:

"Given the lack of prior parliamentary scrutiny and risks to legislative clarity and transparency in the made affirmative procedure, use of the affirmative procedure"—

which, of course, allows such scrutiny—

"should be the default position in all but exceptional and urgent circumstances. Legislation making provision for the made affirmative procedure must be very closely framed and its exercise tightly limited."

Secondly,

"The Parliament will require an assurance that a situation is urgent. Provision in primary legislation will need to encompass a requirement to provide an explanation and evidence for the reasons for urgency in each case where the procedure is being used. There should be an

opportunity for debate in a timely fashion and open to Members to seek to contribute".

That does not happen at the moment.

Thirdly,

"Any explanation provided by Scottish Ministers should also include an assessment of the impact of the instrument on those affected by it and Ministers' plans to publicise its contents and implications. This could include details of the relevant Scottish Government website where links to the instrument, including where relevant any consolidated version of the instrument it amends, as well as any associated guidance, can be found."

People find it quite difficult to find their way through the legislation.

Finally,

"There will be a general expectation that legislation containing provision for the made affirmative procedure will include provision for sunset clauses to the effect that (a) Ministers' ability to use the power will expire at a specified date and that (b) any instrument made under the power will be time-limited."

We recommended that the Scottish Government lodge amendments on each power that can be used through the made affirmative procedure to ensure that the following requirements would be included. Scottish ministers should provide a written statement, prior to the instrument coming into force, that contains an explanation of and evidence showing why the Government thinks that it needs to be made urgently. Moreover, when using the made affirmative procedure, Scottish ministers should include an assessment of the impact of the instrument and ensure that statutory instruments made under the powers are subject to a sunset provision. Nevertheless, the committee restated that it expects the default position to be that the Scottish Government use the affirmative procedure

"in all but exceptional and urgent circumstances."

My amendments in this group merely reflect the committee's unanimous view.

The effect of amendment 1024 would simply be that any such regulations could be made only through the affirmative procedure, which is my preference. If the committee agrees to that amendment, the others in the group fall. If that does not happen, we move on to the other amendments.

Amendment 1008, in the name of Keith Brown, merely allows a minister to provide an explanation of why they think the made affirmative procedure should be used. If members have read the amendments in the group, they will have immediately realised that that amendment does not go as far as the others. It would be very easy for a minister to say, for instance, "We need to act quickly. That's what the experts are telling us." That would be the explanation. They could dress it up a bit, but if Mr Brown's amendment is agreed to and mine are not, that is what the Parliament will be left with.

My amendments put Parliament front and centre in deciding whether the Government has got it right. When we are dealing with something as serious as freeing prisoners early, it is not good enough just to say, "We need to do this—okay?"

Amendment 1025 states:

"Ministers"

must

"have made a statement to the ... Parliament"

with

"an explanation, and"—

crucially—

"evidence, as to why ... regulations need to be made urgently".

More importantly, it says that Parliament must agree to that.

12:45

Amendment 1026 is similar, but it calls for

"an assessment of the impact"

of the regulations, and it includes a sunset clause with a figure of one year.

I think that I have got this right. The Government is sympathetic to the idea of sunset clauses in general, but it has not—as far as I can tell—put a figure on the limit, as I have clearly done. I think that one year is a reasonable timescale.

I hope that that is a good summary for the committee that helps members to understand the reasoning behind the amendments.

I move amendment 1024.

The Convener: I call the cabinet secretary to speak to amendment 1008 and other amendments in the group.

Keith Brown: As I discussed in relation to the previous group of amendments on emergency release, it is important to note that the Scottish Government has no current plans to utilise the power to release prisoners early, but, as we have discussed, it is necessary that we retain the power to take prompt and effective action if it becomes necessary to do so to protect the safe and effective operation of our prison system and the health and wellbeing of prisoners and prison staff.

Amendments 1024 and 1025, in the name of Graham Simpson, would significantly impair the Government's ability to take necessary and proportionate action to ensure safety in prisons. For that reason, I cannot support either

amendment. Amendment 1024 would remove entirely the option of using the made affirmative procedure for emergency release regulations. The result would be that, no matter how dire the situation, emergency release regulations would have to go through the draft affirmative procedure, and the added time that it would take to complete that procedure would delay the implementation of the release process. If the Parliament was in recess, it could take even longer. When good order in our prisons and the lives of prisoners, prison staff and their families might be put at risk, delaying action on that scale would simply not be appropriate.

The same problem arises with Mr Simpson's amendment 1025, which would allow the made affirmative procedure to be used, but only after a ministerial statement in the chamber and the Parliament voting to approve its use by resolution. Again, especially during a parliamentary recess, that would build delays into the process in a way that would risk lives and good order in our prisons. I am sure that that is not what Mr Simpson wants, and it is not what the Delegated Powers and Law Reform Committee has called for. I invite Mr Simpson not to press amendment 1024 and not to move amendment 1025.

Amendment 1026, in the name of Graham Simpson, would, broadly, do two things. It would create new process requirements for the Government to meet if emergency release regulations were produced under the made affirmative procedure, and it would make any regulations that were produced under that procedure subject to a one-year sunset clause.

A one-year sunset clause on emergency regulations is of questionable value. In practice, the whole point of emergency release regulations is to free up capacity in the prison estate rapidly, so it is hard to imagine that regulations would be made to have effect over a period exceeding one year. For example, releases under the Release of Prisoners (Coronavirus) (Scotland) Regulations 2020 were effected over a 28-day period.

It is also odd for a one-year sunset period to be attached specifically to regulations produced under the made affirmative procedure. Regulations under the made affirmative procedure cease to have effect unless they are approved by resolution of the Parliament within 28 sitting days of their being made, so, by definition, any regulations that were still in effect one year after being made would have been approved by the Parliament, just like regulations that are made under the draft affirmative procedure, but Mr Simpson does not seem to think that those regulations need to be made subject to a one-year sunset clause.

I appreciate that applying a sunset clause to regulations under the made affirmative procedure was a general recommendation of the Delegated Powers and Law Reform Committee in relation to the bill. The Government's response to the COVID-19 Recovery Committee indicated agreement with that underlying principle, but with the caveat that it would be appropriate only in relation to the nature of the power in question. As I have just said, such a measure does not seem appropriate in respect of regulations on the early release of prisoners.

Amendment 1026 would also add some process requirements in relation to regulations that were produced under the made affirmative procedure. Amendment 1008, in my name, would do the same, and members will not be surprised that I invite them to support my amendment over Graham Simpson's amendment.

Both my amendment 1008 and Graham Simpson's amendment 1026 call for regulations under the made affirmative procedure to be accompanied by a statement explaining why the regulations need to be made urgently under that procedure.

I have considered the issues that were raised during stage 1 by the Delegated Powers and Law Reform Committee and the COVID-19 Recovery Committee. Therefore, as signalled in the Government response to the committees, amendment 1008 provides for an explanation of urgency if the made affirmative procedure needs to be used in urgent circumstances. I consider that my amendment 1008 fully addresses the points that were made by scrutiny committees at stage 1 and should be preferred.

Members will be aware that the parliamentary authorities are working with Government officials on a protocol for an expedited draft affirmative procedure in appropriate cases. In line with other discussions on how such a statement should be provided with regard to other aspects of the bill that could be subject to the made affirmative procedure, I suggest that it would be appropriate to use a similar process to the one that has been used over the past two years for the Covid public health regulations. That process involves the minister writing to the Presiding Officer and committee conveners explaining the circumstances.

I invite members to support amendment 1008, in my name, and I ask Mr Simpson not to press amendment 1024 and not to move amendments 1025 and 1026.

Jamie Greene: I thought that, rather than intervening, I would let the cabinet secretary make his case. However, I have one comment.

The argument seems to be that, in an emergency, the affirmative procedure would simply take too long and would affect the policy intention of an instrument. How long is too long? How long would the affirmative procedure take in practice, and how long has it taken historically? I question whether it would take too long.

If the argument is that amendments 1024 and 1025 would mean that, if the Parliament was in recess, nothing would happen for months on end, I dispute that. We found during the coronavirus emergency that, in such emergencies, Parliament can be recalled and can sit virtually or otherwise to pass legislation, including regulations that are subject to the affirmative procedure. The amendments could easily be fixed on a technical level to ensure that they applied only when Parliament was sitting and that there was sufficient time to give the affirmative procedure its due process.

In the past, the Government has expedited regulations and law-making powers when that suited it, so we know that the process can be shrunk not just to days but almost to hours. Therefore, I dispute the argument against Mr Simpson's amendments.

Graham Simpson: I thank Mr Brown and Mr Greene for their comments. Sadly, Mr Brown seems to wish to reject all my amendments in the group—even though they are perfectly reasonable, as he well knows—on the basis that he thinks that they would add delays into the system. However, in the same speech, he noted that Parliament is already considering a protocol to deal more quickly with the affirmative procedure. That stemmed from the work of the DPLR Committee, and we are, indeed, considering the matter.

I will follow up on Mr Greene's comments. The Parliament has shown that it can act extremely quickly when necessary, so we could and should have an expedited affirmative procedure. It should allow what I suggest in amendment 1025: that ministers come to Parliament to give a statement and that we debate—ministers would have to present evidence—and vote on the matter. That is what we are in Parliament to do. Currently, ministers do not have to do any of that. They can do what they like. No evidence is taken and there is no vote until an instrument is in force.

Through amendment 1025, I am merely trying to correct a parliamentary wrong. I will move that amendment.

With amendment 1024, as I explained earlier, I am saying that we should not be able to use the made affirmative procedure; we should just use the affirmative procedure. I will stick to that.

However, I will give ground, unlike Mr Brown, on amendment 1026, because I accept that applying a blanket one-year sunset clause across the bill might be wrong. Perhaps we should have some flexibility, so I will not move amendment 1026, but I will press the other amendments.

The Convener: The question is, that amendment 1024 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Clark, Katy (West Scotland) (Lab)
Findlay, Russell (West Scotland) (Con)
Greene, Jamie (West Scotland) (Con)
McNeill, Pauline (Glasgow) (Lab)

Against

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)
Stevenson, Collette (East Kilbride) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0. There is an equality of votes. Therefore, as convener, I will use my casting vote to vote against the amendment.

Amendment 1024 disagreed to.

Amendment 1025 moved—[Graham Simpson].

The Convener: The question is, that amendment 1025 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Clark, Katy (West Scotland) (Lab)
Findlay, Russell (West Scotland) (Con)
Greene, Jamie (West Scotland) (Con)
McNeill, Pauline (Glasgow) (Lab)

Against

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)
Stevenson, Collette (East Kilbride) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0. There is an equality of votes. Therefore, as convener, I will use my casting vote to vote against the amendment.

Amendment 1025 disagreed to.

The Convener: Mr Simpson, do you wish to move amendment 1026?

Graham Simpson: I will not move amendment 1026. I do not know how long you are planning to continue for, but my work is done after this amendment. If you are continuing, I would be

grateful if colleagues would press Mr Whittle's remaining amendment.

Amendment 1026 not moved.

Amendment 1008 moved—[Keith Brown]—and agreed to.

Schedule, as amended, agreed to.

Section 39 agreed to.

Section 40—Expiry

Amendments 1027 and 1028 not moved.

The Convener: Members will be pleased to know that that brings us to the final group of amendments for today. Amendment 1029, in the name of Jamie Greene, is grouped with amendments 1030 to 1033.

Jamie Greene: It sounds like a lot, but it is not. I will deal with amendments 1031, 1032 and 1033 first. On the face of it, these are technical amendments, but they seek to achieve some of what Mr Simpson was trying to do, which is to revert scrutiny of the regulations from the negative procedure to the affirmative procedure. Regulations made under sections 39, 40 and 41 are currently split between two different procedures, so that is the rationale for those amendments. I do not think that we need to rehearse too much the arguments for why that is helpful and appropriate, given the debate that we have just had.

13:00

I will briefly address the other two amendments in the group. Amendment 1029 is on the expiration of the temporary justice measures and their subsequent potential extension. As we know, the measures in the bill that are temporary, as opposed to permanent, are due to expire on 30 November 2023. However, ministers may, by regulation, defer that expiration date by one year, until no later than November 2025. That is fine—we have debated that, too. Amendment 1029 seeks to ensure that such extension may not take place without consultation with victims organisations, to seek their views on such modifications. Again, it will not come as a huge surprise to members that I feel that that is appropriate, given the effect that the extension will have on such organisations, which have been widely quoted in relation to a wide range of issues in our debate. I hope that it is not a contentious proposal, given the subject matter that we are considering.

However, amendment 1030 is slightly different. It would add a new section, "Review of temporary justice measures", after the bill's provision on the expiry of such measures. Subsection (1) of the proposed new section sums up the position quite nicely by saying that ministers

"must review and report on the operation and effectiveness of the temporary justice measures in this Act."

They must then publish a report on the review, lay a copy of it before Parliament and

"consult such persons as they consider appropriate."

I have intentionally left that wording quite loose—for example, I have not gone into great detail about what should be in the report. We have already had debates about being overly restrictive or specific about what reports can or cannot do and about the people to whom ministers should or should not talk. However, I feel that, if we are to extend the temporary justice measures until 2025—which is a long time away—it would be appropriate that ministers conduct a review of the measures' operation and effectiveness, report back to Parliament and give members a chance to scrutinise them properly in due course.

I move amendment 1029.

The Convener: No other member wishes to come in. Cabinet secretary, do you wish to comment?

Keith Brown: I will try to be brief, convener.

For the past two years, we have provided regular reports to Parliament on the operation of the provisions in the coronavirus acts. I recognise that Jamie Greene's amendment 1030 seeks to maintain similar oversight and transparency, and I am supportive of that principle. I also accept absolutely the importance of continuing to engage with victims organisations on the measures, which Mr Greene's amendment 1029 seeks to provide for. However, the drafting of any additional consultation and reporting requirements will need to be considered carefully to ensure that they complement and work alongside the existing provisions in the bill, which already require ministers to provide Parliament with a statement of reasons when seeking to extend measures included in the schedule. I therefore invite Jamie Greene not to press his amendments and instead to work with us on a stage 3 amendment that we are able to support.

Amendments 1031, 1032 and 1033 would make regulations suspending, reviving and expiring early the temporary justice measures subject to the affirmative procedure. I do not support those amendments. The Scottish Government is committed to expiring temporary provisions enacted to respond to the Covid pandemic when they are no longer necessary or proportionate. We also have a responsibility to ensure that the right measures are in place, at the right time, to support our justice system as it recovers from the backlog. Mr Greene said earlier that the Government can

take such steps when it suits it. It certainly suits the Government to take action, in the face of a deadly virus, to protect the health and safety of individuals.

Using the negative procedure for the powers in sections 39 and 41 supports the Government's aims. It provides the flexibility to suspend, revive or expire provisions swiftly, in response to changing or unforeseen circumstances, while still allowing for parliamentary scrutiny. A decision to expire, suspend or revive provisions would be led by the evidence at the time. Using the negative procedure means that we can take action that will come into effect quickly, when the evidence supports doing so. Using the affirmative procedure could mean that our response to the evidence would be delayed and that measures would not be in place when they were most needed or would be in force for longer than was necessary. In particular, applying the affirmative procedure to the regulations would mean that provisions that were no longer necessary could not be switched off during the months of the Parliament's summer recess without the Parliament being recalled. The Delegated Powers and Law Reform Committee has not called for that in relation to the bill, nor is it what the Parliament wanted in relation to either of the two emergency coronavirus acts.

I therefore do not support amendments 1031, 1032 and 1033, and I invite Jamie Greene not to move them.

Jamie Greene: I welcome the comments that have been made on amendments 1029 and 1030. We all want amendments that are fit for purpose, and I will work with the Government on these particular ones.

That said, the points that I have made on amendments 1031, 1032 and 1033 are important, so I will move them. Again, the Government is seeking to make a technical argument about the affirmative procedure taking too long, but the effect is that it simply avoids the Parliament's due scrutiny of its proposals.

Amendment 1029, by agreement, withdrawn.

Section 40 agreed to.

After section 40

Amendment 1030 not moved.

Section 41 agreed to.

Section 42—Regulations under this Part

Amendment 1031 moved—[Jamie Greene].

The Convener: The question is, that amendment 1031 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Clark, Katy (West Scotland) (Lab)
Findlay, Russell (West Scotland) (Con)
Greene, Jamie (West Scotland) (Con)
McNeill, Pauline (Glasgow) (Lab)

Against

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)
Stevenson, Collette (East Kilbride) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0. As there is an equality of votes, I, as convener, will use my casting vote against the amendment.

Amendment 1031 disagreed to.

Amendments 1032 and 1033 not moved.

Section 42 agreed to.

After section 42

Amendment 1002 moved—[Russell Findlay].

The Convener: The question is, that amendment 1002 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Findlay, Russell (West Scotland) (Con)
Greene, Jamie (West Scotland) (Con)

Against

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)
Stevenson, Collette (East Kilbride) (SNP)

Abstentions

Clark, Katy (West Scotland) (Lab)
McNeill, Pauline (Glasgow) (Lab)

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

Amendment 1002 disagreed to.

The Convener: I call amendment 1056, in the name of Pauline McNeill.

Pauline McNeill: I will not move the amendment on the basis that I need to consider for stage 3 whether it introduces new policy.

Amendment 1056 not moved.

Section 43 agreed to.

After section 43

Amendment 1004 moved—[Keith Brown]—and agreed to.

Section 44—Effect of early release from prison or young offenders institution by virtue of regulations

Amendment 1057 moved—[Russell Findlay].

The Convener: The question is, that amendment 1057 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Findlay, Russell (West Scotland) (Con)
Greene, Jamie (West Scotland) (Con)

Against

Clark, Katy (West Scotland) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
McNeill, Pauline (Glasgow) (Lab)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)
Stevenson, Collette (East Kilbride) (SNP)

The Convener: The result of the division is: For 2, Against 6, Abstentions 0.

Amendment 1057 disagreed to.

Section 44 agreed to.

After section 44

Amendment 1034 not moved.

The Convener: That ends stage 2 consideration of the bill.

The legislation team will now produce a version of the bill as amended, showing all the amendments made to the bill by the committee. That will be available to members within the next few days.

I take the opportunity to thank all those who have assisted the committee during its scrutiny of the bill.

I suspend the meeting for a few minutes before the next agenda item.

13:10

Meeting suspended.

13:14

On resuming—

Online Safety Bill

The Convener: The next item of business is consideration of the Online Safety Bill legislative consent memorandum. I welcome back Keith Brown, the Cabinet Secretary for Justice and Veterans, and I welcome Patrick Down from the criminal justice division of the Scottish Government.

I refer members to paper 1 in their packs and invite the cabinet secretary to make a short opening statement.

Keith Brown: The overarching purpose of the UK Government's Online Safety Bill is to establish a new regulatory regime to address illegal and harmful content online. In particular, the bill creates new duties on providers of internet services to deal with illegal and harmful content and activity, and it confers new powers on Ofcom to act as the online safety regulator responsible for enforcing the legal requirements that are imposed on service providers.

13:15

The power to legislate on the subject matter of the bill is almost entirely reserved to the Westminster Parliament. However, the bill extends the executive competence of the Scottish ministers in two very narrow areas, which is why the LCM is required.

First, it provides a power for the Scottish ministers to amend by affirmative order the list of education and childcare providers that are exempt from the legislative framework for the regulation of user-to-user internet services. I will briefly explain the reason why those services are exempt. Many education and childcare providers are subject to existing duties to safeguard children that require them to protect children online. Exemption ensures that the regulation of online safety is proportionate and that those education and childcare providers are not subject to duplication of regulatory oversight by Ofcom. The power enables the Scottish ministers to ensure that the descriptions of education and childcare providers can be updated to reflect any future changes to how such services are provided or to take account of different safeguarding duties applicable to such providers in Scotland.

Secondly, the bill extends the executive competence of the Scottish ministers by providing a power to amend the list of child sexual exploitation and abuse offences in part 2 of schedule 6 to the bill. The bill places a duty on providers of internet services to proactively

remove content posted by users of their sites that would amount to a child sexual exploitation and abuse offence. Those include, for example, offences concerning indecent images of children. The power will enable the Scottish ministers to update the list of offences to account for any future reform of the law in that area, instead of having to rely on those changes being made in the Westminster Parliament. That reflects the fact that the underlying criminal law in the area is devolved, making it appropriate that the power sits with the Scottish ministers.

I am happy to take members' questions.

The Convener: Do members have any questions about the memorandum?

Pauline McNeill: I acknowledge the importance of the legislation. In various debates regarding violence against women, we have highlighted the importance of cybercrime and of the harms that can happen online. I note, for example, that 70 per cent of girls aged 12 to 18 have been sent unsolicited nude images of boys or men.

Do you agree that it is important to monitor how effective the legislation is in the long run? If it is to be worth anything, we must ensure that it will protect women and girls from unsolicited images. I am sure you agree that it is part of the unfortunate umbrella of violence against women and girls.

Keith Brown: I very much agree with those sentiments. However, the bulk of the legislation is reserved. The two areas that we would want to monitor would be those very narrow ones. I am sure that, in general, everyone will be looking at how effective the legislation is, for the reasons that Pauline McNeill has outlined.

The Convener: Does any other member want to come in?

Russell Findlay: Has the Scottish Government asked the UK Government for any changes to the bill, or is it content with the wording as it stands?

Keith Brown: I might get Mr Down to add to this answer. That dialogue with the UK Government is not yet finished. There is still more work to do.

Patrick Down (Scottish Government): To repeat what the cabinet secretary said, we are still in discussion with UK officials about possible changes that could be made to a number of technical areas through the amendment and scrutiny of the bill at Westminster.

The Convener: As no one else wants to come in, I thank the cabinet secretary. Please stay with us for a couple more minutes as we formally consider the LCM.

The committee will now formally consider the legislative consent memorandum on the Online Safety Bill. Do members wish to highlight any issues that they would like to have included in the committee's report on the LCM? I see that they do not. That being the case, does the committee agree that the Scottish Parliament should give its consent to the relevant provision in the Online Safety Bill, as is set out in the Scottish Government's draft motion?

Members *indicated agreement.*

The Convener: Are members content to delegate to me the publication of a very short factual report on the outcome of our deliberation on the LCM?

Members *indicated agreement.*

The Convener: The issue now moves to the chamber for all members to decide on, on the basis of our report.

We will have a very short suspension to allow Scottish Government officials to swap over.

13:20

Meeting suspended.

13:20

On resuming—

Subordinate Legislation

Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No 2) Regulations 2022 [Draft]

The Convener: The next item of business is consideration of evidence on an affirmative instrument: the Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No 2) Regulations 2022. I thank Keith Brown, the Cabinet Secretary for Justice and Veterans, for remaining with us for this agenda item. I also welcome Justin Haccius, the unit head of access to justice at the Scottish Government. I refer members to paper 2, and I invite the cabinet secretary to speak to the instrument.

Keith Brown: Thank you for the opportunity to speak to the committee about the Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No 2) Regulations 2022. The regulations have been brought forward primarily to support the proposed replacements for the temporary measures that were introduced to support legal aid providers at the beginning of the pandemic by way of the Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Coronavirus) (Scotland) Regulations 2020, with permanent provisions with equivalent effect.

The measures that were introduced in the 2020 regulations benefited legal aid providers by providing for enhanced interim fee arrangements to support cash flow as well as provision to facilitate greater delegation between solicitors to assist with the management of cases and court appearances.

The provisions in this instrument align with the Scottish Government's intention to make permanent changes to the Legal Aid (Scotland) Act 1986 by way of the Coronavirus (Recovery and Reform) (Scotland) Bill—namely an enhanced provision of interim fee arrangements to support cash flow to legal aid providers. The regulations also provide that a person who is being prosecuted under summary procedure and who has been liberated by police to appear at court on an undertaking may appoint a solicitor of their choice to advise or act for them even when a duty solicitor is made available, increasing access to a solicitor of their choice.

That is a brief overview of the regulations and their context. I am happy to try to answer any questions that might arise.

The Convener: Thank you. Jamie Greene has a question.

Jamie Greene: I have a brief question, given that the only evidence that the committee is taking is from the Government. Could the cabinet secretary summarise or paraphrase how the legal profession has received the change and whether the permanent changes that are proposed have been positively received or otherwise?

Keith Brown: It slightly predates my time as cabinet secretary, but I understand that these were asked for and welcomed by the profession. However, I ask Mr Haccius whether he can confirm that.

Justin Haccius (Scottish Government): Yes, the changes have been welcomed in general. The regulations allow for earlier payment and interim payments, so that solicitors can receive payments during the course of delayed or more extended proceedings.

The Convener: As there are no more questions, I invite the cabinet secretary to move the motion.

Motion moved,

That the Criminal Justice Committee recommends that the Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2022 [draft] be approved.—[Keith Brown]

Motion agreed to.

The Convener: Thank you for attending, cabinet secretary. You may escape now.

That concludes our meeting. The next meeting of the committee will be on the morning of Wednesday 15 June, when we will hear from the new Scottish Biometrics Commissioner, Dr Brian Plastow, on his draft code of practice on the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes in Scotland.

Meeting closed at 13:24.

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