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Criminal Justice Committee

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Session 6

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CRIMINAL JUSTICE COMMITTEE
12th Meeting 2025, Session 6

CONVENER

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

DEPUTY CONVENER

*Liam Kerr (North East Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)
*Sharon Dowey (South Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Pauline McNeill (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Maggie Chapman (North East Scotland) (Green)
Angela Constance (Cabinet Secretary for Justice and Home Affairs)
Russell Findlay (West Scotland) (Con)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 2 April 2025

[The Convener opened the meeting at 09:16]

Victims, Witnesses, and Justice Reform (Scotland) Bill: Stage 2

The Convener (Audrey Nicoll): Good morning, and welcome to the 12th meeting in 2025 of the Criminal Justice Committee. We have received no apologies.

Agenda item 1 is continued consideration of the Victims, Witnesses, and Justice 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 document.

I welcome Angela Constance, the Cabinet Secretary for Justice and Home Affairs, and her officials to the meeting. Later on, we will also be joined by other members of the Parliament, including Maggie Chapman and Russell Findlay.

We will stop at points this morning to allow for short comfort breaks. I do not want to curtail debate on this very important bill, but I ask members and the cabinet secretary to be as succinct as they can be while still making their points clear.

Section 39—Jurisdiction: sexual offences

The Convener: We start with the group of amendments on the jurisdiction of the sexual offences court. Amendment 157, in the name of Pauline McNeill, is grouped with amendments 180, 181, 69, 182, 183, 198, 199, 215 and 218.

Pauline McNeill (Glasgow) (Lab): A number of these amendments seek to amend elements of the sexual offences court, including what it will be able to do and what crimes it will be able to deal with.

On amendment 157, my intention and how things have come out might be two entirely different things, as is often the case, but my intention was to ensure that the crime of rape would be presided over only by a High Court judge. I appreciate that the cabinet secretary might say that that is what she would expect, but it is really important, when we are legislating, to nail down the detail on the expectations under the law. I would not be happy if the door were to be left open to any discretion whatever.

Amendment 69 seeks to leave out murder as a crime that could be tried in the sexual offences court. The senators of the College of Justice have said that murder should be tried only in the High Court and that "the anecdotal nature" of paragraph 280 of the policy memorandum

"gives no confidence that this ... constitutional change has been thought through properly."

Paragraph 280 in the policy memorandum states:

"There are known cases in which sexual abuse perpetrated by an accused is alleged to have escalated over time, against multiple complainers, ultimately leading to a murder. Given the experience of the surviving complainers and the nature of their evidence ... the policy objective is to afford those complainers the benefits of the case being prosecuted in the Sexual Offences Court."

On that, the senators stated:

"While this is undoubtedly true, there are not many such cases and the anecdotal nature of para 280 gives no confidence that this major constitutional change has been thought through properly. The appropriate place for charges of murder and attempted murder is the High Court. Murder is the most serious charge in the criminal canon. It is that charge which should determine the forum. The suggested change ignores the fact that in the very few cases where sexual offences are alleged against a surviving complainer, it is likely that the case will be tried before a judge who is also a judge of the sexual offences court and that most if not all of the benefits of that court will be able to be afforded to such a complainer."

They continued:

"We remain firmly of the view that life imprisonment and OLRs"—

that is, orders for lifelong restriction—

"should be the exclusive province of the High Court."

It would be a mistake if, in trying to sort out the status and importance of the sexual offences court, we in any way diluted the importance of the High Court of Justiciary, which will still be the highest court. I am happy to be contradicted on that, but I would challenge such a view. Under the Scotland Act 1998, the High Court of Justiciary will remain the highest court. It is a requirement of the Scotland Act 1998, and its integrity should be protected.

I move amendment 157.

The Convener: I call the cabinet secretary to speak to amendment 180 and other amendments in the group.

The Cabinet Secretary for Justice and Home Affairs (Angela Constance): The amendments in this group feature a mixture of substantive and technical amendments related to the offences and cases that the sexual offences court—the SOC—will have jurisdiction to hear.

My position is that the SOC should be given a broad jurisdiction to ensure that its benefits are extended to as wide a cohort of victims of sexual offences as possible, while ensuring that the way in which that is done protects the court's

resources. It will then be for the independent prosecutors, acting with the delegated authority of the Lord Advocate, to decide whether to indict specific cases to the SOC, based on the facts and circumstances of that case. It would disadvantage victims if we were to place arbitrary restrictions—in my view—on the cases that the SOC can hear.

We have just heard from Pauline McNeill on her amendments 157 and 69, and I appreciate her comments on her intentions. I have a different perspective on the matters that she raises, and I am particularly concerned about the impact that amendment 157 would have if agreed to.

Amendment 157 would restrict the SOC to being able to hear only cases that can be prosecuted on indictment in the sheriff courts. In effect, it would mean that the SOC could not hear cases that included an offence of rape or murder, on the basis that those offences cannot be prosecuted in the sheriff courts.

I have significant concerns about the suggestion—whether it be Ms McNeill's intention or otherwise—that the SOC should be prevented from hearing rape cases. Rape is, without question, the most serious sexual offence that can be committed against an individual and, as such, it is victims of that offence who arguably stand to benefit most from the specialist trauma-informed approaches that will be at the heart of the sexual offences court.

We will not have a credible or effective sexual offences court that will deliver for the very victims for whom it is intended to deliver if rape is excluded from its jurisdiction. Depriving victims of rape access to the SOC while victims of other sexual offences benefit from the important reforms that it will introduce seems to me to be without justification and would serve only to exacerbate existing challenges that those victims face when interacting with the courts and the criminal justice system. I would also add that sheriffs sitting as temporary judges can currently preside over rape cases in the High Court. I therefore strongly urge members to reject amendment 157.

I also ask members of the committee to reject Ms McNeill's amendment 69, which would remove murder from the SOC's jurisdiction. Following the committee's stage 1 report, I have carefully considered whether the SOC should be able to hear an offence of murder where it appears on the indictment alongside a qualifying sexual offence.

I respect that there is an argument for and against that. However, I remain of the view that there is a clear rationale for empowering the SOC to hear murder cases when combined with sexual offences charges on the same indictment. Indeed, that view was articulated at stage 1 by the Lord Advocate, and she gave the committee specific examples of such cases, which she has recently repeated in correspondence to the committee. On balance, I have heard no compelling rationale for depriving such victims of the specialist, trauma-informed approaches that will be a key feature of the SOC.

I acknowledge the view that the role of the High Court of Justiciary, as Scotland's superior criminal court, means that it is the proper place to hear cases that feature an offence of murder. However, on balance, I believe that our paramount concern should be the experience of complainers and that we should not be constrained by court hierarchies and tradition. Historical function and status have not delivered the system that we want for victims of sexual offences. I want all victims and survivors of sexual offences to be able to have their case heard in a forum that is specifically designed to support them.

I now turn to my amendment 218, which will ensure that the new evidence exception to the rule on double jeopardy applies to all cases that are prosecuted in the SOC. The new evidence exception will allow the Lord Advocate to apply to the High Court to set aside an acquittal where the statutory test that is set out in section 4 of the Double Jeopardy (Scotland) Act 2011 is met.

That test broadly relates to the emergence of new and compelling evidence that was not available at the time of the original trial and which would appear to show that the accused might be guilty of the offences of which they were previously acquitted. The High Court considers the Lord Advocate's application and decides whether an acquittal should be set aside and permission for a new prosecution granted. At present, the new evidence exception can be sought only in cases that were originally prosecuted in the High Court, but in recognition of the serious offences that will be heard in the SOC, including rape and murder, I consider it important that the new evidence exception apply to that court, too.

As well as allowing cases heard in the SOC to be reprosecuted under the new evidence exception, amendment 218 will allow such cases to be retried in the new SOC to ensure that complainers can also benefit from the specialist, trauma-informed approaches that it will introduce.

Amendment 218 will also require that, where an accused who is being prosecuted in the SOC makes a plea to the judge against prosecution on the basis that the indictment relates to offences for which they have previously been acquitted, the plea be remitted to the High Court for consideration. That will ensure that the High Court retains sole authority to grant the right to bring a retrial under the new evidence exception.

The remaining amendments in this group are technical in nature, their primary purpose being to ensure that the SOC has appropriate jurisdiction and will function as intended. Amendments 180 and 181 make it clear that the SOC will have jurisdiction over non-sexual offences that appear on an indictment alongside a qualifying sexual offence from the point at which the indictment is served on the accused. They put beyond doubt that the SOC will be able to take action in relation to non-sexual offences, such as accepting guilty pleas, before a case reaches trial.

09:30

Amendments 198 and 199 adjust the provisions that relate to the timeframe for the prosecution to submit applications to transfer cases into and out of the SOC on cause shown. The amendments move the timeframe for applying to transfer cases into and out of the SOC from the day before the commencement of the trial to the day before commencement of the trial diet. As the trial can commence on any day within the period of the trial diet, moving to a deadline that is linked to the commencement of the trial diet, which is set at the preliminary hearing, gives parties greater certainty on the deadline for submitting applications.

Amendments 183 and 216 provide the SOC with the powers that it needs to deal with cases where an individual is charged with

"aiding, abetting, counselling, procuring and inciting"

sexual offences, and amendment 182 makes the offence of conspiring to commit a sexual offence, as defined in section 39 and schedule 3 of the bill, a qualifying offence for the purpose of defining the SOC's jurisdiction.

I urge the committee to support the amendments in my name and to oppose the others in the group.

The Convener: If no other member wishes to speak, I invite Pauline McNeill to wind up and to press or withdraw amendment 157.

Pauline McNeill: It is hard to know how to respond when there has not been a full debate on my amendments. First, I made an error when I spoke to amendment 157. I do not fully understand why my amendments on the separation of the High Court and the sheriff court have been separated in the groupings. I should have said that, as the committee knows, I fully agree with the cabinet secretary about the importance of sexual offences courts being trauma informed, so that we can change the nature of how such offences are dealt with. At the previous committee meeting, I argued that those matters should be decided by a division of the High Court and a division of the sheriff court. I apologise—I do not know why that is not being addressed in this group of amendments; I will deal with it when I speak to amendment 270.

On amendment 69, we all agree that trauma-informed practice is a fundamental basis of the proposal for a new sexual offences court and, in fact, should be afforded to any victims who are brought before the courts. Solicitors and judges will be trained in trauma-informed practice, so I do not understand why the same judges could not try those cases in the High Court. I take the cabinet secretary's point that, if the Lord Advocate uses the discretion that the bill would afford her, she could indict murder in the sexual offences court, if there was a sexual element to the crime. Judges who are trauma informed could sit in the High Court—for example, the Glasgow High Court could hold a sitting of the sexual offences court, so in other words, the sexual offences court could look exactly the same as the High Court. I do not think that the argument against the amendment is solid.

One of the criticisms that Katy Clark and I have is that what is proposed could just look the same as what already exists. I do not see why there is a substantive argument that murder could be indicted in the sexual offences court, when we could do it the other way around and ensure that judges and practitioners, some of whom would be practising in the sexual offences court, could take such cases in the High Court. The substantive argument made by the senators of the College of Justice, which is clear enough, is that what the policy memorandum says about why the change is required is "anecdotal".

When we are presiding over such a fundamental change to our criminal justice system, we have to make the changes that we think are right, but we also have to protect the integrity of what is, by and large, a good criminal justice system, with all its faults.

Liam Kerr (North East Scotland) (Con): I am listening to the debate and genuinely trying to work out what to do for the best. I think that I completely understand Pauline McNeill's intention.

To reflect back, I think that the cabinet secretary's point was that, if your amendments 157 and 69 were agreed to, that could prevent rape from being tried in the sexual offences court. I think that that was the point that was made. If that is your intention, how do you respond to that point?

Pauline McNeill: You may remember that, in relation to a previous set of my amendments, I said that the same approach could be achieved by having a sexual offences division of the High Court and a sexual offences division of the sheriff court, rather than creating a new court. Rape, for

example, would therefore be tried in the sexual offences division, if you like. There would still be fundamental change, but a new court would not be created. My fear is that there will be a lot of cost and bureaucracy in creating something that we could do without and which could be created without legislation, as was done with the drugs courts and the domestic offences courts.

Amendment 69 relates to a separate point. At the moment, murder—being a plea of the Crown—can be tried only in the High Court. I wish that to remain the case for the reasons that I outlined. I am arguing that, if there is to be trauma-informed practice, which I presume would involve training for judges and practitioners in the sexual offences court, the same people could also sit in the High Court. A High Court judge sitting in the sexual offences court would have to be trauma informed, as would the practitioners; however, the same people could sit or practise in the High Court. Therefore, the trauma-informed argument is not really solid. Do you follow me?

Liam Kerr: Yes.

Pauline McNeill: You can achieve the same thing. A High Court judge—Lord Bracadale, for example—who sits in the High Court could sit in a newly created sexual offences court and preside over a sexual offence case or a rape case. They would have to be trauma informed to do so, but they would not stop dealing with cases in the High Court that are not sexual offences cases. A High Court trial for rape could be tried with the same people, who have been trained to be trauma informed.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I understand what you are saying, and I totally agree with that. I am now a bit confused about whether you approve of the setting up of a sexual offences court and whether you recognise that it is to be set up because of the very specialist nature of the crime and the huge increase in such crime.

I understand your argument about the same judges being in different courts but, even for representation reasons, do you not agree that setting up a specialist court is our way of saying that something must be done about this? I am now unclear about whether you want the court.

Pauline McNeill: I will rehearse the same argument as I rehearsed last week. I do believe that there should be a specialist element but, as I have argued from the beginning, it can be done in a different way. The bill will create a sexual offences court for all solemn sexual offence cases, which is quite a big change. My position is that specialist divisions of both the High Court and the sheriff court could be created to achieve the same thing. The judges and practitioners would still be required to be trauma informed.

Separately, on the question whether murder with a sexual element should be indicted in the new sexual offences court, I am arguing that all the people involved in the sexual offences court will also be able to practise in the High Court, so they would still be trauma informed if they dealt with such a case in the High Court.

That is just a different way of going about it. It is not that I fundamentally disagree with your perspective; I just think that it is an awful lot of change and an awful lot of money to spend, and we do not know whether anything different would be achieved at the end. I suppose that that is a difference of opinion on how to go about it. Does that make sense?

Rona Mackay: I will repeat what I said last week. I understand your argument, but I do not think that anything different will happen unless the new court is set up, because it has not happened so far. Previously, the need to set up a specialist court for sexual offences was not recognised, but now we have an opportunity to do it. It would be a wasted opportunity if we do not do it—I do not think that there will be a change in how courts operate unless the new one is set up. However, as you said, perhaps that is a difference of opinion.

Pauline McNeill: It is clearly a difference of opinion about how to achieve the same end. I feel as though I am arguing something that was part of last week's debate—what I am trying to get at in this group of amendments is that the High Court's integrity should be protected. This is not just about creating something new—and, by the way, I am absolutely sure that, if there were a new division, there would be a fundamental change. If a new division were to be created in the High Court or the sheriff court for sexual offences, the situation would be different. In the same way, we created the drugs court and now the practice is different. It operates differently.

Convener, I apologise for taking up too much time. I need to make sure that my arguments are understood, albeit that people may disagree with them.

Liam Kerr: I do not think that you are taking up too much time. This is really interesting, and it is clear that your colleagues are trying to get to the bottom of what to do.

Am I right that amendment 157 hinges on amendment 155, which we talked about last week and which was not moved? If I am right about that, amendment 157 is consequential, and because amendment 155 did not go through, we ought not to move forward with amendment 157 today. However, amendment 69 is completely separate—it relates to a separate issue. Therefore,

colleagues can come to different views on amendments 157 and 69.

Pauline McNeill: Yes—that is exactly right.

Liam Kerr: Great—thank you.

Katy Clark (West Scotland) (Lab): Will the member take an intervention?

Pauline McNeill: Yes.

Katy Clark: The cabinet secretary spoke about hierarchy as a negative—she said that we should not have a hierarchy. As Pauline McNeill knows, at the moment, the people with experience of hearing rape and sexual assault cases are High Court judges, and one concern is that we are moving towards a situation in which sheriffs would hear rape or serious sexual assault cases. That may be a good idea or a bad idea, but it is not a concept that we have scrutinised.

Angela Constance: Will the member give way?

Katy Clark: I am actually making an intervention on Pauline McNeill. I will hand back to her.

Pauline McNeill: I am happy to give way to the cabinet secretary.

Angela Constance: I reiterate the point that sheriffs and sheriffs principal sit as temporary judges, so they currently preside over rape cases in the High Court.

Katy Clark: They are sitting as temporary judges and they have been certified for that purpose. Our understanding is that the proposed sexual offences court would have a panel of judges who deal with a wide range of cases, some of which are currently dealt with in the sheriff courts and some of which are currently dealt with in the High Court—indeed, some may even be dealt with in the justice of the peace court.

As I said in my intervention on Pauline McNeill, the presumption is that any judge on the panel could deal with any case. That is our understanding on the basis of what we have been informed about. Does the member agree?

Pauline McNeill: I agree. On the question of hierarchy versus practicalities, it is possible to get both. As I have said, the specialist nature of a sexual offences court can be achieved in a different way. However, fundamentally, I think that we should hang on to some kind of hierarchy—we have a High Court; the hierarchy exists.

As I said to the cabinet secretary, and as Rona Mackay was right to say, the trajectory of sexual offences cases heard in the High Court is such that they make up 70 per cent of those cases. Are we saying that the judges hearing those cases do not have a specialism—seriously? Two thirds of the cases that they hear are about sexual offences. They may not be trauma informed, but that can be resolved.

I seek to withdraw amendment 157, but I will move amendment 69 when it is time to do so.

Amendment 157, by agreement, withdrawn.

09:45

Amendments 180 and 181 moved—[Angela Constance]—and agreed to.

Amendment 69 moved—[Pauline McNeill].

The Convener: The question is, that amendment 69 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Clark, Katy (West Scotland) (Lab)
Dowey, Sharon (South Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
McNeill, Pauline (Glasgow) (Lab)

Against

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)

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

As convener, I use my casting vote to vote against the amendment.

Amendment 69 disagreed to.

Amendments 182 and 183 moved—[Angela Constance]—and agreed to.

Amendment 28 not moved.

Section 39, as amended, agreed to.

Schedule 3—Sexual offences

Amendment 29 not moved.

Schedule 3 agreed to.

Before section 40

The Convener: The next group is entitled “Sexual Offences Court: Judges”. Amendment 184, in the name of the cabinet secretary, is grouped with amendments 185 to 197, 270 and 229 to 232.

Angela Constance: It is my firm belief that the success of the sexual offences court depends, perhaps more than any other single aspect of the model that is set out in the bill, on the judges who are appointed to preside over cases that call in the SOC. Judges play a hugely important role in any

court, but that role will be particularly pronounced in the SOC. Judges will set the tone and culture of the SOC and will be responsible for embedding the specialist trauma-informed practices and procedures that will be central to improving our approach to the treatment of sexual offences cases and the complainers involved.

Given that important role, it is imperative that we maximise the court's ability to take full advantage of the pool of experienced and trauma-informed judges who have the commitment and specialism to make the SOC a success. Of course, the judges must be allowed to exercise the full powers of their office without fear or favour.

We must have processes for appointing and removing judges of the sexual offences court that strike the correct balance between rigour and proportionality. By that, I mean that appropriate safeguards must be in place to ensure that a sufficient number of judges are appointed and that those judges are, and continue to be, the right people to preside over cases in the sexual offences court.

Provisions in the bill at introduction gave the Lord Justice General a broad power to remove judges of the sexual offences court, provided that the Lord Justice General had consulted with the Lord Justice Clerk and the president of the sexual offences court in advance. During stage 1, it was suggested that that power could undermine the security of tenure of judges, which could ultimately impact on the independence of judicial decision making. That resulted in a stage 1 recommendation from the committee that amendments be lodged at stage 2 to adjust the process for removing judges of the sexual offences court. In my response to the stage 1 report, I committed to doing that, and I indicated my intention to review the process for appointing judges to ensure that there is an appropriate balance.

Before setting out the substance of the amendments, I want to be clear with the committee on what they do not change about the appointments process. It will remain the case that judges of the sexual offences court can be appointed only from among those who hold substantive judicial office as a High Court or temporary judge, sheriff principal or sheriff, and that their role as judge in the SOC will continue to be contingent on their holding that substantive office. Additionally, my amendments will not change the requirement that only those who have completed a course of approved training in trauma-informed practice in sexual offences cases can be appointed to sit in the SOC.

I turn to the amendments. Taking up the committee's recommendation, the amendments remove the power of appointment from the Lord Justice General and establish distinct processes for appointing those who currently have rights to preside over High Court cases and those who currently have rights to preside over sheriff court cases. Amendments 184 and 195 will mean that all those who hold judicial office as a High Court or temporary judge are automatically appointed to the role of judge of the sexual offences court, provided that they have completed the necessary training in trauma-informed practice.

That approach recognises that those judges already preside over cases that involve the most serious offences that are heard in our courts, including rape and murder, and that they have the necessary associated sentencing powers when they do so. Putting it beyond doubt that those judges will be able to sit in the SOC underscores the status of the SOC and the seriousness and gravity of the crimes that it will consider.

The process for appointing sheriffs and sheriffs principal, as modified by amendments 185 to 193 and 196, is closely modelled on the process for appointing temporary judges under the Judiciary and Courts (Scotland) Act 2008. The Scottish ministers will be responsible for appointing sheriffs and sheriffs principal to the role of judge of the sexual offences court, based on the recommendation of the Lord Justice General.

Individuals will be appointed to sit in the court for a period of five years and will be automatically reappointed unless specific exceptions apply. Individuals can be appointed only if they have completed a necessary course of training in trauma-informed practice in sexual offence cases and the Lord Justice General considers that they have the skills and experience to hold office as a judge of the sexual offences court.

The temporary judge appointment process has been an effective and proportionate mechanism for giving sheriffs the additional responsibilities and sentencing powers that are associated with that office. We continue to engage with partners to ensure that the appointments process strikes the right balance between rigour and proportionality that I spoke about earlier, so that the approach will prove effective at ensuring that the SOC can access and take advantage of the talent and commitment in the Scottish judiciary.

Amendments 229 to 232 respond directly to the concerns that the committee raised regarding the process for removing judges of the sexual offences court. The amendments remove provisions in the bill that give the Lord Justice General the power to remove judges of the sexual offences court and, instead, tie that process to removal from the judges' substantive office.

Under existing legislation, High Court and temporary judges, sheriffs principal and sheriffs

can be removed from office only by the First Minister, following the recommendation of a Fitness for Judicial Office Tribunal. That provides an established safeguard against unfair dismissal and provides security of tenure for judges.

As provisions require that a judge of the sexual offences court holds that position only by virtue of their substantive office, it is therefore unnecessary to have provisions in the bill that create specific powers to remove judges of the sexual offences court from that office. Instead, the approach adopted through the amendments is to rely on the existing, long-standing and fair Fitness for Judicial Office Tribunal process related to their substantive post, so that if they are removed from that office, they also cease to be a judge of the sexual offences court.

Amendments 230 and 232 also make it clear that the conduct of an individual while sitting as a judge of the sexual offences court can be taken into account in a Fitness for Judicial Office Tribunal for their substantive post and can, in fact, trigger commencement of a tribunal.

Amendment 197 gives the Scottish Courts and Tribunals Service the power to pay expenses to judges of the sexual offences court in connection with expenses incurred in fulfilling that office. The amendment also enables the Scottish ministers to make bespoke arrangements for paying judges of the sexual offences court.

That is an enabling power, similar to that provided for in the legislation relating to temporary judges. I consider that it is important for the Scottish ministers to have that power and the flexibility that it provides to ensure that the SOC works as it should and that the framework that establishes it is future proofed to account for changing circumstances.

We will, of course, hear directly from Pauline McNeill on her amendment 270. Following our discussions, I believe that it is designed to address her concerns that moving rape cases to the sexual offences court somehow constitutes a downgrading of rape. However, I have profound concerns about the amendment, which would, in effect, not enable the sexual offences court to function as intended.

In considering the amendment, I encourage members to reflect on the evidence at stage 1. The victims and survivors who spoke to you were not concerned about the status of the SOC nor about the title of the judge appointed to preside over their case. Victims and survivors told us that what they care about is how their case is managed by the court system and that they are treated in a way that recognises and responds to the trauma that they have experienced.

Although senators may be the most senior cohort of judges, sheriffs sitting as temporary judges already preside over rape cases in the High Court, where, as Lady Dorrian told us,

"they do a very good job indeed".—[*Official Report*, *Criminal Justice Committee*, 10 January; c 13.]

There are a great number of sheriffs with many years of experience presiding over sexual offences cases. The positive impact of that expertise and experience would be substantially diminished if sheriffs and temporary judges were to be prohibited from presiding over rape cases in the SOC.

By placing restrictions on which judges can preside over certain offences, amendment 270 impinges on the capacity of the Lord Justice General to deploy the most suitable and effective judges to preside over the cases that are indicted to the SOC. In doing so, it prioritises adherence to existing hierarchies over and above good practice in the management of rape cases. In my view, that would not be to the benefit of victims. In addition, amendment 270 would present significant operational challenges for the SOC.

Prohibiting temporary judges from presiding over rape cases would fatally undermine the ability of the SOC to deal with the cases that will be indicted to it, let alone provide a sustainable model for the management of those cases moving forward. Temporary judges play a crucial role in managing the business of the High Court, including the many rape cases that are indicted to it. By excluding those who hold office as a temporary judge from presiding over rape cases in the sexual offences court, amendment 270 would lead to a substantial reduction in the judicial resource available to manage the current volume of rape cases. There would simply not be enough judges to deal with the SOC's case load.

I ask the committee to support my amendments.

I move amendment 184.

Liam Kerr: I will take you back to your amendment 185, cabinet secretary, which you talked about at the start of your speech, because I want to clarify something in my own mind. I was waiting to see whether you would address the point.

Amendment 185 removes the Lord Justice General as the person to appoint judges and inserts the Scottish ministers. My concern is that that could look like a power grab by the Scottish ministers. The approach would be in marked contrast with the position in England and Wales, where the independent Judicial Appointments Commission appoints judges. Forgive me if this is what you were doing earlier, but can you walk me through why it is necessary to give ministers that

power and to take it away from the Lord Justice General?

10:00

Angela Constance: I will rewind the committee back to an earlier point in this journey. There was a high level of criticism of the initial approach in the bill. Indeed, the committee heard evidence on the issue, which I recall also came from the senators of the College of Justice. There was a fair amount of media commentary, too, particularly on the insecurity of tenure, and other legal issues were raised on the airwaves.

The Government has opted to follow the committee's recommendation. In this instance—I hope that I am correct in saying this, but I am sure that there is a submission from the senators on this point as well—we would be better advised to follow the existing process.

I understand Mr Kerr's point about perception, but we are copying an existing process for the appointment of temporary judges, so there is absolutely no power grab by ministers.

Pauline McNeill: I welcome the amendments that the Government has lodged in this group and whole-heartedly support them.

I will address my amendment 270. Rape is among the most serious of crimes and if we are potentially making a fundamental change to who hears rape cases in our criminal justice system, that should be examined thoroughly and properly.

What I am hearing is that you will be able to appoint more judges, which might reduce delays. That is fair enough; it is a compromise. I accept the argument; I can see that it is a good one. However, before we have closure on the issue, it is important to flush out the other side of the argument. Rape cases are heard in the highest courts by High Court judges. My understanding is that they might not be heard in the sexual offences court, because there is nothing to prevent a sheriff presiding over a case, albeit one that is trauma informed and everything else.

First, I will address the question of temporary judges. I have to say that the committee has not really had the benefit of drilling down into the detail on that. We have not had the benefit of full and frank discussions with the judiciary on the issue—which is often the case. I will admit that I do not have as much knowledge of the issue as I would like, but I would still like to test the argument.

Temporary judges go through a process before they sit in the High Court. One wonders what is temporary about temporary judges, given that the post has a five-year fixed term and automatically gets renewed, unless they have done something. I just wonder why there are temporary judges in the first place.

That aside, there is a separate issue. Temporary judges will be able to sit in the sexual offences court as they can in the High Court. Sheriffs will also be able to sit in the sexual offences court. I am a bit concerned. It is important in our criminal justice system that the serious crime of rape is seen by the criminal justice system as being a serious matter. I am not sure that I want to leave that to chance. People did not like the idea of the creation of a sexual offences court in the long run. I am open-minded in a way. I have heard the arguments, but I hope that the cabinet secretary will at least accept that it is important to have this discussion, because there is no doubt in my mind that, although the cabinet secretary might get lots of benefits, she will lose something in all of this. Many practitioners who I have spoken to about the issue think that something will be lost in the creation of a sexual offences court because of its nature, even if we can achieve a reduction in delays.

Angela Constance: I am at the committee's mercy, and I respect the fact that there should be debate and scrutiny on all matters—every member of the Parliament has the freedom to roam in that regard. What we have all wrestled with, perhaps at different points in the process, is that any change from what has ayewis been comes with challenges. We all want to make changes for the better, and we all come to this with different degrees of what we want to give up from what has ayewis been. I am not saying that with any judgment.

I will not rehearse the arguments about why I fundamentally believe in the establishment of a sexual offences court, because I suspect that that would incur the wrath of the convener, but that is the underlying bedrock to the changes that have been made or are proposed in the previous group of amendments, this group and, indeed, in subsequent groups. This group of amendments is about the pragmatics. I want a pool of experienced judges. I am of the view that, ultimately, it is for the Lord Justice General to decide which judges are allocated to which cases.

Pauline McNeill: Just for clarification, it would be helpful if I could check that I have understood this correctly. Am I correct in thinking that, in the new sexual offences court, there could be High Court judges, temporary judges and sheriffs, and that either type of High Court judge can sit on any sexual offences case?

Angela Constance: Yes.

Pauline McNeill: So there are three categories of people—High Court judges, temporary High

Court judges and sheriffs—who can preside over rape or any other sexual offences case.

Angela Constance: Yes.

Pauline McNeill: Thank you very much.

Angela Constance: As I said, there is the role of the Lord Justice General in allocating individuals in specific circumstances.

My final word is that we have an existing process to appoint temporary judges, and it is tried and tested. Having listened to the full range of views, we propose to replicate that process for the appointment of others, whether they are sheriffs principal or sheriffs, to the sexual offences court.

I have one more point. Rape is serious not because it is prosecuted in the High Court but because it is one of the worst crimes that we know of. It usually—not always, but usually—involves the most appalling assault on a woman's agency, which is why it will continue to be seen as one of the most serious crimes in our canon. I will leave it there, convener.

Amendment 184 agreed to.

Section 40—Appointment of Judges of the Sexual Offences Court

Amendments 185 to 196 moved—[Angela Constance]—and agreed to.

Amendment 30 not moved.

Section 40, as amended, agreed to.

After section 40

Amendment 197 moved—[Angela Constance]—and agreed to.

Section 41—President and Vice President of the Sexual Offences Court

Amendment 31 not moved.

Section 41 agreed to.

Section 42—President and Vice President: incapacity and suspension

Amendment 32 not moved.

Section 42 agreed to.

Section 43—President's responsibility for efficient disposal of business

The Convener: Amendment 270 was already debated with amendment 184. I call Pauline McNeill to move or not move amendment 270.

Pauline McNeill: I wish to return to the issue at stage 3, but I will not move amendment 270.

Amendment 270 not moved.

Amendment 33 not moved.

Section 43 agreed to.

Section 44—Sittings of the Sexual Offences Court

Amendment 34 not moved.

Section 44 agreed to.

Section 45—Transfer of cases to the Sexual Offences Court

Amendment 198 moved—[Angela Constance]—and agreed to.

Amendment 35 not moved.

Section 45, as amended, agreed to.

Section 46—Transfer of cases from the Sexual Offences Court

Amendment 199 moved—[Angela Constance]—and agreed to.

Amendment 36 not moved.

Section 46, as amended, agreed to.

Section 47—Rights of audience: solicitors

The Convener: The next group is entitled "Sexual Offences Court: rights of audience". Amendment 200, in the name of the cabinet secretary, is grouped with amendments 70, 71, 201 to 203 and 228.

I point out that, if amendment 200 is agreed to, I cannot call amendments 70 and 71, due to pre-emption.

Angela Constance: Although the overriding purpose of the sexual offences court is to improve the experience of victims and survivors in their interaction with the courts system, it is, of course, imperative that we do so without losing sight of how the reforms will impact the accused.

I therefore welcome the detailed scrutiny that the committee gave at stage 1 to the issue of legal representation for accused in the SOC and the subsequent recommendation that stage 2 amendments should be lodged that embed the principle that cases that are currently prosecuted in the High Court should attract the same level of legal representation when heard in the new SOC. I share that view and, in response to the committee's stage 1 report, I undertook to explore mechanisms that would hardwire that principle into the model of the SOC for stage 2.

10:15

I am pleased to say that my amendments 200 to 203 and amendment 228 deliver against that

commitment by developing a mechanism that maintains that principle. My amendments embed an approach that achieves broadly the same balance of accused represented by counsel and those represented by a solicitor.

My amendments mean that accused persons in the type of cases that are currently prosecuted in the High Court will retain access to representation by counsel in the SOC, and the accused in the type of cases that are currently prosecuted in the sheriff courts, with representation by a solicitor, will continue to be represented by a solicitor in the SOC.

I have previously spoken to the committee about the risks of adopting an approach that would lead to a significant redistribution of cases to one part of the legal profession and about the potential for that to result in significant delays in cases reaching trial, which is an outcome that we must avoid.

My amendments in this group provide the accused with three routes to counsel where they have been indicted to the SOC. The first of those routes is provided by extending the list of offences in respect of which only advocates and solicitor advocates have a right of audience in the SOC. Amendments 200 and 201 extend that list beyond rape or murder to encompass a number of additional offences that, based on data provided by the Crown Office and Procurator Fiscal Service, are always or almost always indicted to the High Court. Those offences are attempted rape and attempted murder; offences under section 1 of the Domestic Abuse (Scotland) Act 2018 that libel conduct that amounts to rape; offences that attract a minimum custodial sentence of five years; and offences that are brought forward under the new evidence exception to the double jeopardy rule. The change in respect of the last category is linked to my amendment 218, which was debated in group 23 and extends provisions in the legislation that governs double jeopardy to the SOC.

Amendments 200 and 201 require that accused prosecuted in the SOC for any of those offences must be represented by counsel. Our estimates indicate that those revised rights of audience will capture two thirds of accused who are prosecuted for sexual offences in the SOC who would otherwise be indicted to the High Court. To ensure that we can remain responsive to changing practices, amendment 202 introduces a power that allows Scottish ministers to make regulations that would vary the list of offences for which rights of audience are restricted in the SOC.

The second route to counsel is introduced through amendment 228, which extends legal aid funding for counsel to the accused where the Scottish Legal Aid Board considers that there is a reasonable expectation that, if found guilty, the accused would receive

"a custodial sentence in excess of 5 years",

or the courts would impose a risk assessment order, which is a necessary prerequisite to considering an order for lifelong restriction. The decision to grant the accused an entitlement to representation by counsel where those criteria apply recognises that only the High Court has the power to impose custodial sentences in excess of five years and to make orders for lifelong restriction.

The third route to counsel is provided through the existing mechanism whereby the Scottish Legal Aid Board may grant sanction for counsel where it considers it appropriate in any case, notwithstanding that that case does not include an offence caught by the first two routes that I have already set out.

We anticipate that the comprehensive process that is introduced by the amendments, which is the product of close collaboration with a range of justice partners, including the Crown Office, the Scottish Legal Aid Board and defence practitioners, will extend access to counsel for the accused in the overwhelming majority of cases that would otherwise be indicted to the High Court.

To ensure that the process created by the amendments is operating as intended and to provide additional assurances to Parliament, amendment 203 will place a requirement on Scottish ministers to conduct a review of legal representation in the sexual offences court. That will allow us to assess whether the approach has met our ambition of delivering access to counsel for the accused in cases that would otherwise be prosecuted in the High Court and to consider what, if any, adjustments to the approach might be required.

Pauline McNeill's amendments 70 and 71 would remove provisions that give solicitor advocates rights of audience in the sexual offences court in cases that include an offence of murder. The amendments are linked to amendment 69, which was debated earlier and which sought to remove the jurisdiction of the SOC to hear cases that involve an offence of murder. The committee has already voted to retain murder within the jurisdiction of the SOC. Solicitor advocates can represent the accused in cases that involve an offence of murder in the High Court, so it follows that they should also be able to appear in those cases in the sexual offences court. I therefore ask Ms McNeill not to move amendments 70 and 71 and the committee to oppose them if she does.

I move amendment 200.

Pauline McNeill: I start by saying that the Government's amendments are the most significant and important changes to the creation of the sexual offences court and I put on the record my thanks to the cabinet secretary and her officials, who I know have worked hard to achieve that.

One of the reasons why I moved my earlier amendments on the structure of the sexual offences court was that rights of audience would remain the same if we went for the formula that I proposed last week. In the event that the Parliament passes the formulation that we are talking about today, I will be pleased that we have resolved the issue.

For clarity, I presume that it is pretty obvious that rape cases would attract a senior prosecutor and rights of audience for either counsel or a solicitor advocate. The position is less clear for non-rape cases. The amendments identify crimes that might attract sentences of more than five years and, as has to happen at the moment, those cases would previously have been indicted to the High Court. That protects the rights of audience, so that accused persons will be represented in the same way as they were previously. That is really good.

I have something for discussion at stage 3. Forgive me if I do not explain this properly, but it is also important to look in the round at what would have happened in the High Court in relation to the prosecution of cases, which would have been either by a procurator fiscal with experience appointed by the Lord Advocate or by an advocate depute with a three-year term. I am not sure, because it has not been discussed at any stage, whether there would be a corresponding expectation in cases that would attract those sentences, and whether anything needs to be said about who prosecutes those cases. For completeness, I thought that it would be worth mentioning that and having a discussion about it before stage 3.

I will not move my amendments. There is no need to do so because they relate to a previous formula. I welcome the cabinet secretary's amendments.

Angela Constance: I appreciate that we have all been able to work together on this, and I thank Ms McNeill for her comments. I will quickly say that the allocation of prosecutors is a matter for the Lord Advocate and those who act for her, so the proposal would get us into legal competency issues. I would be happy to discuss that further or to provide further information for Ms McNeill's consideration prior to stage 3. At the moment, it is my clear understanding that that is not an area in which I could lodge amendments, because of legal competency issues.

The Convener: I remind members that, if amendment 200 is agreed to, I will not be able to call amendments 70 and 71.

Amendment 200 agreed to.

Amendments 201 and 202 moved—[Angela Constance]—and agreed to.

Amendment 37 not moved.

Section 47, as amended, agreed to.

Section 48—Rights of audience: advocates

Amendment 38 not moved.

Section 48 agreed to.

Section 49—Statement of training requirement for prosecutors

Amendment 39 not moved.

Section 49 agreed to.

After section 49

Amendment 203 moved—[Angela Constance]—and agreed to.

Section 50—Clerk of the Sexual Offences Court

Amendment 40 not moved.

Section 50 agreed to.

Section 51—Deputy Clerks of the Sexual Offences Court

Amendment 41 not moved.

Section 51 agreed to.

Section 52—Clerk and Deputy Clerks: further provisions

Amendment 42 not moved.

Section 52 agreed to.

Section 53—Sexual Offences Court records

Amendment 43 not moved.

Section 53 agreed to.

Section 54—Sexual Offences Court records: authentication and electronic form

The Convener: The next group is entitled, "Sexual Offences Court: procedure and records". Amendment 204, in the name of the cabinet secretary, is grouped with amendments 205 and 206.

Angela Constance: Amendment 206 responds to a recommendation of the Delegated Powers

and Law Reform Committee, while amendments 204 and 205 are technical amendments.

Amendment 204 amends the bill to clarify that the reference to "the High Court" in section 54(5) is to the High Court of Justiciary. Amendment 205 amends section 54(5) to clarify that the reference to "the Keeper" is to the keeper of the records of Scotland.

Amendment 206 adjusts the provision in section 55(2) that gives the Scottish ministers the power to make regulations that make further provision for the procedure that applies in the sexual offences court. In line with the recommendation of the Lady Dorrian review, the bill provides that High Court procedure will apply in the sexual offences court. Section 55 provides for the wholesale adoption of High Court procedure in the SOC, except where the bill makes specific provision to the contrary.

High Court procedure will form the foundations of the process and practice that will be followed in the sexual offences court, with the bill introducing some variations to the way in which current High Court procedure will apply to the sexual offences court, such as in relation to the pre-recording of a complainer's evidence ahead of a trial.

10:30

However, the wholesale adoption of High Court procedure comes with the risk that certain aspects of that procedure will not operate in the sexual offences court as intended and may result in unexpected inconsistencies or inefficiencies that we will need to respond to. Therefore, the aim of the power in section 55(2) is to ensure that Scottish ministers are able to make regulations that would enable any issues that may arise from the adoption of High Court procedure in the SOC to be addressed swiftly and without the need for new primary legislation.

Amendment 206 responds to the issues that were raised by the DPLRC and limits the power of Scottish ministers to make regulations to those

"for the purpose of ensuring the proper functioning of the Court".

It will restrict that power to circumstances in which issues are identified that are fundamentally problematic to the operation of the SOC.

I hope that the committee will support the amendments in the group. I move amendment 204.

Amendment 204 agreed to.

Amendment 205 moved—[Angela Constance]—and agreed to.

Amendment 44 not moved.

Section 54, as amended, agreed to.

Section 55—Sexual Offences Court procedure

Amendment 206 moved—[Angela Constance]—and agreed to.

Amendment 45 not moved.

Section 55, as amended, agreed to.

Section 56—Prohibition on personal conduct of defence

Amendment 46 not moved.

Section 56 agreed to.

Section 57—Vulnerable witnesses

Amendment 47 moved—[Sharon Dowey]—and agreed to.

Section 57, as amended, agreed to.

Section 58—Ground rules hearings

Amendment 48 not moved.

Section 58 agreed to.

Section 59—Pre-recording of evidence

The Convener: We will have a comfort break after this group of amendments, which is titled, "Sexual Offences Court: vulnerable complainers." Amendment 207, in the name of the cabinet secretary, is grouped with amendments 208 to 214.

Angela Constance: The amendments in this group largely relate to provisions in the bill on the presumption in favour of pre-recorded evidence as it applies to the sexual offences court. They are intended to ensure that that presumption works as effectively as possible in the SOC.

Together, amendments 207, 209, 211 and 214 amend the bill to include provisions that will allow the SOC to admit evidence that was previously recorded by a vulnerable witness in another case. As members might recall, the committee discussed and agreed to a very similar amendment—amendment 216—during the debate on group 11. The key difference is that amendment 216 introduced provisions that will enable the reuse of pre-recorded evidence specifically in the High Court and sheriff courts.

Together, amendments 207, 209, 211 and 214 will allow for previously recorded evidence to be reused at a future, separate criminal trial. The previously recorded evidence can be used as all, or part of, the witness's evidence, so that the witness does not necessarily have to be cross-examined again, unless there is a specific need for them to be.

As I said when I spoke to amendment 216 in group 11, at the moment, certain witnesses can pre-record their evidence ahead of the trial, but that evidence can be used only as a witness's evidence in chief, not for their cross-examination or re-examination. That leaves witnesses open to the risk of being recalled to court to be cross-examined on their evidence again, which could be retraumatising.

The provisions allow for further questioning to be permitted by the court if there are relevant questions that were not put to the witness when the evidence was originally taken or if not asking those questions would risk the fairness of the trial. If the court considers that additional cross-examination of a witness is required, amendment 214 requires that that must take place at an evidence-by-commissioner hearing, unless a specific exception applies. Taken together, the provisions will ensure that the accused's right to a fair trial is protected, while minimising the risk of the witness being retraumatised.

Amendment 212 will enable applications for a victim's evidence to be pre-recorded to be submitted to the SOC before the case is indicted. That will ensure that there are no legislative barriers to a complainer doing that, if it is appropriate to do so. The amendment will bring procedure in the SOC in line with provisions established by the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, which ensure that all child witnesses and adult witnesses who are deemed to be vulnerable can, when appropriate, have the opportunity to pre-record their evidence ahead of their case being indicted. It is considered that such applications are likely to be rare, as only at the point at which an indictment is served will it become clear what requires to be proven in a particular case. However, removing the legislative barrier and aligning procedure in the SOC with the 2019 act will provide flexibility and allow what I have set out to take place, if it is considered to be appropriate in a particular case.

Amendment 208 relates specifically to the presumption in favour of pre-recorded evidence as it applies in the SOC, and its effect is twofold. First, it removes provisions in section 59 that give the SOC the ability to apply a best interests test when an adult complainer of a sexual offence expresses a preference to give evidence at the trial, instead of pre-recording their evidence in accordance with the presumption. The amendment requires the witness to have had access to such information, as prescribed by acts of adjournal, to support them in making a decision about how they wish to give their evidence.

The provision responds to a recommendation in the committee's stage 1 report; it will ensure that complainers have greater agency in how they wish to give their evidence and that they have access to information to support them in making an informed choice. Setting out the information that is to be provided to the complainer by way of court rules will provide flexibility to ensure that the information that is available to complainers remains relevant. The information might include, for example, timescales for commission hearings, which often allow witnesses to give their evidence many months in advance of the trial date.

Secondly, amendment 208 amends the provision in section 59 to permit the courts to grant an exception to the presumption in favour of pre-recorded evidence for children under the age of 12 when the children have expressed a wish to give evidence at trial and it is in their best interest to do so. As currently drafted, the provisions in the bill only permit such an exception for adults and for children between the ages of 12 and 18. The purpose of the amendment is to ensure that provisions that apply the presumption in favour of pre-recorded evidence in the SOC take account of article 12 of the United Nations Convention on the Rights of the Child. Amendment 217 made similar provisions in relation to cases in the High Court and the sheriff courts.

Amendments 210 and 211 are more technical. Amendment 210 restricts the presumption in favour of pre-recorded evidence as it applies in the SOC to complainers of sexual offences only. That will help to align procedure in the SOC with our planned roll-out of the presumption in favour of pre-recorded evidence in other courts, which will ensure that the criminal justice system is able to meet the increased demand.

Finally, amendment 213 amends the bill to align timescales for submitting section 275 applications in the SOC with those in place for the High Court.

I move amendment 207.

Liam Kerr: I have a brief question about amendment 210, which the cabinet secretary just talked about and which would pull out the reference to a complainer who

"otherwise falls to be treated as a vulnerable witness".

As I understand it, the intention is to deal with that through other legislation, such as through the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 or something like that. Can you confirm that that is the case and are you able to give us any timescales for when it might happen?

Angela Constance: The short answer is yes. If I recall correctly, we submitted a written note to the committee on the timescales last year. I do not have that at hand—either I submitted a note or I have answered a parliamentary question, possibly

from Liam McArthur—but there is information that I can forward to members. There is a timetable.

Liam Kerr: Thank you.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I will be brief. I wholeheartedly welcome and support amendments 207 to 214. It is a very important group of amendments. The bill runs the risk of being pushed through quickly because of the other debates that we have had in other areas, all of which are very important. It strikes me that the group is very important as it addresses a lot of practical asks that have been made to us by victims and witnesses during their quite harrowing evidence—as committee members will remember. Those practical asks are, in the main, incorporated as much as they can be in this group of amendments—which, I reiterate, is a very important group.

I will not pick out all the amendments, as the cabinet secretary has already outlined them. The best interests test in amendment 208 strikes me as a very important change. We heard from victims and witnesses that we can never assume how they might want to give their evidence. Some victims and witnesses told us that they wanted to give their evidence in person; others told us that they did not. Amendment 208 is an important change and will bring real comfort and empowerment to victims and witnesses who are going through such a process.

It is clear that the Government and the cabinet secretary have listened not only to the committee at stage 1 but to the many victims and witnesses who have spoken to us and to the cabinet secretary. The Government has tabled these important amendments; I fully support them and I am sure that other members will, too.

Amendment 207 agreed to.

Amendment 208 to 211 moved—[Angela Constance]—and agreed to.

Amendment 49 not moved.

Section 59, as amended, agreed to.

10:45

Section 60—Taking of evidence by a commissioner

Amendments 212 and 213 moved—[Angela Constance]—and agreed to.

Amendment 50 not moved.

Section 60, as amended, agreed to.

After section 60

Amendment 214 moved—[Angela Constance]—and agreed to.

Section 61—Giving evidence in the form of a prior statement

Amendment 51 not moved.

Section 61 agreed to.

After section 61

Amendment 215 moved—[Angela Constance]—and agreed to.

Section 62—Sentencing power of the Sexual Offences Court

Amendment 52 not moved.

Section 62 agreed to.

After section 62

Amendments 218, 216 and 217 moved—[Angela Constance]—and agreed to.

The Convener: Before we move to the next group of amendments, we will take a five minute comfort break.

10:47

Meeting suspended.

10:56

On resuming—

Section 63—Sexual offences cases: anonymity and restriction on publications

The Convener: Our next group is on anonymity for victims in sexual offences cases. Amendment 129, in the name of Liam Kerr, is grouped with amendments 158, 130, 159 to 161, 131, 162, 132, 163, 133 and 164 to 168.

Liam Kerr: I have five amendments in this group. Amendments 129 and 131 are related, so I shall deal with them together. Amendments 130, 132 and 133 are separate but related to each other.

I will deal with amendments 130 to 133 first. Members might wish to know that those amendments were suggested to me by the BBC. They fall in section 63 of part 6.

Section 63 concerns the anonymity of a victim or complainer in a sexual offence listed in proposed new section 106C(5) of the Criminal Justice (Scotland) Act 2016. Under proposed new section 106C, no publication, which is a defined term, could publish certain information if to do so would be likely to lead to identification of the victim.

Members will note that the offences that are listed—the ones that prevent publication—all

involve a sexual element, which makes sense, given that the whole section is about the reporting of sexual offences cases. However, one of them does not explicitly relate to sexual offences cases—the one in section 106C(5)(e) is the offence of human trafficking or slavery under the Human Trafficking and Exploitation (Scotland) Act 2015. In order for consistency with the rest of the offences that are listed in subsection (5)—and, indeed, with the purpose of the section—my amendment 130 would add the clarifier:

"where the offence"—

that is, of human trafficking or slavery—

"involved a sexual element".

Amendments 132 and 133 would tighten the provisions further. I do not know whether they will be contentious. They would simply add provisions to proposed new section 106F of the 2016 act, which sets out the punishment for the offence of publishing information that would not be allowed to be published. It not only says what would happen to someone if they did that but, rightly, sets out the defence to the charge. Section 106F(3) states that one defence is when

"the person to whom the relevant information relates"—

the victim—has

"given written consent"

to its being published and has not, before the publication happens, withdrawn the consent by

"written notice".

11:00

All that my amendment 132 would do is to clarify that the consent that would be needed up front from the victim to say that the information can be published could be written or other recorded consent. Amendment 133 provides that the notice to withdraw consent—the victim saying, "Actually, I don't want you publishing this. Here's my written notice"—could also be written or other recorded consent. I am trying to give the person who has the ability to give or withdraw consent an increased opportunity to protect themselves if they wish to do so and to remove any ambiguity.

With amendments 129 and 131, we stay in section 63, which members will remember is about anonymity for victims and restricting publication in sexual offences cases. Under that section, no one can publish information that identifies victims of sexual offences. Under proposed new section 106C(3), at the top of page 40, the restriction on publishing a victim's information stops when that victim dies. Therefore, as soon as the victim died, the restriction on publication would go away under the section as drafted. If committee members agree to my amendment 129, that position would change such that the restriction on publishing information identifying the victim would continue after the victim died. The restriction would not go away just because they had died.

Amendment 131 would protect the position in so far as it is always important that absolute positions can be challenged. In proposed new section 106D of the 2016 act, which is on page 41 of the bill, the Government has rightly ensured that, when there is a child victim and someone other than that child wishes to publish information relating to that child, that someone can apply for a court order and a sheriff can grant it. A sheriff can reconsider the restriction on publishing in relation to a child victim and, if it is the right thing to do, lift it. My amendment 131 would simply add a new and pretty much identical section below proposed new section 106D so that there would be a pretty much identical power for a court to remove the restriction on publishing when someone had died.

Remember that, with amendment 129, I would change the position such that the restriction on publishing would carry on after someone had died, but, in amendment 131, I would give the court the power to take that away if necessary. I have added a further safeguard to amendment 131 such that family members of the deceased would have the opportunity to make representations before a decision was made.

Amendments 129 and 131 would extend the right of anonymity for complainers or victims of the listed offences so that it would continue after they had died and would ensure that there was the possibility of applying to the court to take away the restriction after the victim's death. Colleagues will be keen to know that the two amendments have the support of the Law Society of Scotland—for transparency, I remind colleagues that I am a member of the Law Society—and that Victim Support Scotland supports amendment 129. For full transparency, it is important to note that Victim Support Scotland does not support my amendment 131.

I move amendment 129.

Angela Constance: This is a sensitive subject, so I will lay out in detail my position on Liam Kerr's amendments. Although they are well intentioned, I cannot support them as they raise significant policy issues.

As members have heard from Mr Kerr, amendment 129 would fundamentally alter the anonymity reforms in the bill by extending the legal right to anonymity so that it would continue to apply after the death of a victim. Amendment 131 would create an application process to the sheriff for dispensing with a deceased victim's right to anonymity.

As members will be aware, the Scottish Government carried out a consultation on approaches to reduce the trauma that media reporting of child homicide cases can cause. After careful consideration, I concluded that legislation would not be an effective approach to dealing with the complexities of media reporting on those cases. The consultation responses raised issues that made it clear that there would be serious difficulties with developing legislation that could strike an appropriate balance between privacy rights and freedom of expression, and that there would be difficulties with the practical enforcement of such legislation, particularly as media and social media cross borders.

Instead, I announced that the Scottish Government will work on non-legislative measures that could improve the experiences of families who are affected by reporting on child homicide cases. Sensitive reporting in respect of victims of sexual offences is a critical aspect of responsible journalism, and dialogue with the industry about how we move forward has already begun.

The policy of anonymity in the bill is focused on the individual victim, who, in almost all cases, will be alive after the committal of the offence that has given rise to their anonymity protections. That is different from child homicide anonymity, when the suggestion of anonymity is, of course, for the benefit of surviving family members.

When developing the bill, we looked carefully at the experience of other countries that have sought to provide anonymity for victims beyond their death. It is significant that jurisdictions that have extended the right to anonymity beyond a victim's natural life, which include Ireland and individual states in Australia, have subsequently amended their legislation due to the unintended and damaging consequences for bereaved family members. One of the reasons why laws were reversed was that there was a risk of criminalising or silencing bereaved friends and family who, with entirely understandable intentions, wished to comment on the victim's death, their memories of them and their legacy. Other reasons included the curtailment of freedom of expression and the difficulty of enforcement in relation to social media.

Members will recall Dr Tickell's evidence at stage 1. Reflecting on the lessons that have been learned from international practice and experience, he said:

"well-intentioned legislative reform has caused people significant problems." —[*Official Report*, *Criminal Justice Committee*, 31 January 2025; c 49.]

More practically, in relation to the operation of the right to anonymity, United Kingdom Government legislation will be needed to ensure that the restrictions apply to publications elsewhere in the UK if they are accessible in Scotland. In England and Wales, the right to anonymity automatically expires on the death of the victim.

Mr Kerr's amendment 131 would provide a mechanism for the court to consider applications to relax the right to anonymity without being clear about how the court would decide. It proposes that the court use a test of whether there is "no good reason" not to grant an order to disapply the right to anonymity. It is hard to see how the court could make that judgment if individual bereaved family members had different views on anonymity. That was one of the key concerns that was raised in the consultation on deceased child anonymity.

Liam Kerr's amendment 130 would reduce the scope of the anonymity protections for victims. It would mean that victims of the offences of human trafficking and modern slavery would qualify for anonymity only when there had been a sexual element to the offending behaviour. Under the bill, victims of each of the offences of criminal exploitation, as well as some other offences of limited scope, would gain an automatic right to anonymity, regardless of whether there was a sexual component to the behaviour. Those offences are included because those victims suffer from the same privacy and dignity concerns as victims of sexual offences. The position in England, Wales and Northern Ireland is the same, as victims of human trafficking have a right to anonymity with no requirement for there to have been a sexual element to the offences.

Although I cannot support amendments 132 and 133 in their current form, I offer to work with Mr Kerr to consider whether new amendments relating to adult victims could be developed for stage 3. A fundamental principle of the anonymity framework is that a victim controls their own anonymity—they have full and complete agency. Under the bill, an adult victim can waive their right to anonymity by publishing their own information or publishing through a third party, without the involvement of a court.

Waiver through a third party is established through a defence to the new criminal offence of breaching anonymity. The adult waiver defence provides that a person who publishes identifying information about an adult victim with the written consent of the victim does not commit an offence as long as the victim is at least 18 years old and their consent was not withdrawn in writing before publication. That is the same as the approach in England, Wales and Northern Ireland.

I can see that Mr Kerr's amendments 132 and 133 are well intentioned in seeking to add a new method by which consent could be provided. However, I have concerns that, as drafted, they have the potential to weaken the procedural safeguards that are being put in place for victims

and third-party publishers. I say that because there is no specification as to what some "other recorded" form of consent means or the acceptable parameters of that alternative method. That could create the risk of a publisher going public with the identity of a victim of a sexual offence under the mistaken belief that they had permission to do so, when the victim did not provide unambiguous written consent—for example, two people might have different understandings of a verbal conversation that has been recorded.

My concern is heightened, given that we are considering the operation of a new criminal offence, under which any ambiguity or uncertainty could have significant implications for individual publishers. We all want to ensure that there are sufficient and accessible ways in which an adult victim can make clear to a publisher their consent. However, I am not convinced that the bill, as it stands, is insufficient in taking the simple approach of written consent, which may be a short email or letter that confirms consent for publication.

For those reasons, I ask the committee to oppose Liam Kerr's amendments in this group, but I commit to discussing amendments 132 and 133 with him ahead of stage 3.

I will now speak to my amendments in the group. Amendment 158 is a relatively minor amendment that adds the offences of forced marriage and forced civil partnership to the list of offences that will gain an automatic right to anonymity. The policy rationale for that is the same as applies to the current extension of anonymity protections beyond sexual offences to certain other offences that share similar underlying concerns regarding preserving a victim's privacy. It is worth noting that the equivalent offence in England and Wales of forced marriage and forced civil partnership also has victim anonymity protections in place.

Amendments 159, 162 and 167 are minor clarifying amendments on the scope of the core anonymity protections in the bill and the operation of the new offence of breaching anonymity.

Amendment 168 provides for the right to anonymity for child victims of sexual offences and the other listed offences in the bill to take precedence over the existing more general provisions in section 47 of the Criminal Procedure (Scotland) Act 1995, which contain reporting restrictions relating to any offence of which a child is a victim. Amendment 168 will ensure that child victims of sexual offences and the other listed offences that qualify for an automatic right to anonymity benefit from the bespoke protections in the bill. That will ensure, for example, that child victims of sexual offences gain automatic lifelong anonymity, rather than protections ending when they attain adulthood or even earlier under the general provisions in the 1995 act.

Amendment 160 is a technical clarifying amendment to address a recommendation by the committee in its stage 1 report that there should be certainty that the protections that are available to victims will not be impacted by an acquittal verdict in a criminal case. It is not the policy intention that a victim would cease to have the right to anonymity if criminal proceedings were raised that resulted in an acquittal verdict. Amendment 160 puts that beyond doubt.

11:15

Amendments 164 and 165 are minor clarifying amendments that reflect points in the committee's stage 1 report on the operation of the public domain defence. They make minor changes to the wording of the public domain defence to make it clear that it will not protect people who share publicly a child victim's identifying information, even when a child has self-published their own story. That reflects the policy that extra safeguards be in place for children before a third party can lawfully publish identifying information about a child victim of a sexual or other relevant offence through the requirement of judicial oversight.

Finally, amendments 161, 163 and 166 are minor technical amendments to adjust the wording of the definition of "child" and references to age within the anonymity framework, so that there is internal consistency in the bill.

The Convener: Would any other member like to come in at this point? If not, I invite Liam Kerr to wind up and to press or withdraw amendment 129.

Liam Kerr: I am grateful to the cabinet secretary for her remarks. I will deal with all my amendments in the order in which I proposed them.

I am grateful to the cabinet secretary for dealing with amendment 130, and I will keep this short. The cabinet secretary makes a very persuasive case, and, having listened to her, I will not move that amendment.

I absolutely believe in what I am trying to do with amendments 132 and 133. However, again, having listened to the cabinet secretary, I think that there is a force of argument behind what she says. It would never be anyone's intention to weaken the safeguards for victims. The cabinet secretary knows that I get very worked up about specifics and imprecise drafting, and her point was well made about how those particular amendments could be misunderstood. I will not move amendments 132 and 133 at this stage, but I would be very grateful if the cabinet secretary

would work with me. I get the sense that the cabinet secretary agrees that there is something there, but we have to get it right if we are going to do it.

I am very grateful for the cabinet secretary's comments on amendments 129 and 131. It concerns me when the cabinet secretary, for whom I have a great deal of respect, argues against my amendments. That always gives me pause for thought. The cabinet secretary also mentioned Dr Tickell, for whom I have the greatest respect. When Dr Tickell tells me that this might be challenging, that concerns me greatly. However, the cabinet secretary would expect me to argue back, and my brief arguments against her proposals start with a remark that she made about amendment 131 specifying that there is "no good reason" to refuse. My straight point on that is that all that I have done there is to mirror the existing drafting of section 106D(4)(b) of the 2016 act, which includes the phrase "no good reason".

I hear the concern about extending anonymity beyond life, but my view is that that should be the default position for victims and complainers. Victim Support Scotland, in its submission, said that the bill is about greater protections for victims of sexual offences and that that protection should surely not lapse automatically on their death. An example that troubles me, which I had in mind, is when a victim of a sexual offence obtains lifelong anonymity but, a week later, is unfortunately dead. If my amendment 129 is not agreed to, all the details in such a case would become publishable straight away, which feels wrong. That cannot be right if we are to protect victims and their close family.

I remind the committee of evidence that we received during our stage 1 consideration from a victim of sexual assault, who said—as is set out anonymously in the submission—that they wanted anonymity to continue after their death because of the impact that removal would have on their family. They made quite a powerful statement:

"There should be no end point for anonymity for the complainer. Should be anonymous from the start and no end point, for the person's dignity. Even if I was to die, or another complainer to die, the family would have to deal with it".

I feel that that is quite a powerful argument that should give us pause for thought.

I am glad that the cabinet secretary raised the consultation on media reporting on child homicide victims, which is a very concerning issue; however, I think that we can distinguish the situations. First, the consultation focused on child victims of homicides, and the list of offences contained in section 106C(5) does not limit anonymity to such cases. Furthermore, the consultation does not show consensus on how the waiver of the right to anonymity of child victims of homicide should operate. Respondents highlighted that some families might have different views on whether details of the child victims should be published. Indeed, the analysis of the responses indicates that, for some respondents, ensuring the

"child homicide victim's anonymity would help provide space for families to grieve in private and process information at their own pace."

In any event, we cannot get away from the fact that provisions in the Victims, Witnesses, and Justice Reform (Scotland) Bill cover a wider spectrum of sexual offences cases.

The cabinet secretary made a persuasive argument about the situations in different jurisdictions, particularly Ireland and the state of Victoria in Australia. That gives me pause for thought, but other comparable jurisdictions have extended the right to anonymity beyond the victim's death. I take as my authority the criminal justice division of the Scottish Government, which has produced a very helpful paper that I can easily distribute later if members have not seen it. The paper considers the example of Victoria and what happened there, as well as the examples of Ireland and Northern Ireland. The Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022 extends the anonymity of all victims of sexual offences for 25 years after their death. I find that particularly interesting, not least because it follows recommendations made by Sir John Gillen, who indicated in his report that ceasing anonymity on the victim's death might have a negative impact on victims who are suffering from a terminal illness and on the families of victims who have died.

Another example is Canada, where young people cannot be identified as a victim or a witness of an offence. That protection is automatic and indefinite. The paper also mentions New South Wales, where there is an automatic extension of anonymity for child victims beyond death, although next of kin have the right to waive that anonymity.

In summary, I am conflicted on the issue, as I think that my amendments 129 and 131 have merit. I hear the challenges from the cabinet secretary and Dr Tickell, but, on balance, I feel that I can meet those challenges and that the amendments are the right way to go.

Given that I can distinguish the Victims, Witnesses, and Justice Reform (Scotland) Bill from the points cited, I will press amendment 129.

The Convener: The question is, that amendment 129 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Clark, Katy (West Scotland) (Lab)
Dowey, Sharon (South Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
McNeill, Pauline (Glasgow) (Lab)

Against

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)

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

I will use my casting vote against the amendment.

Amendment 129 disagreed to.

Amendment 158 moved—[Angela Constance]—and agreed to.

Amendment 130 not moved.

Amendments 159, 160 and 161 moved—[Angela Constance]—and agreed to.

Amendment 131 moved—[Liam Kerr].

The Convener: The question is, that amendment 131 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Clark, Katy (West Scotland) (Lab)
Dowey, Sharon (South Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
McNeill, Pauline (Glasgow) (Lab)

Against

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)

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

I will use my casting vote against the amendment.

Amendment 131 disagreed to.

Amendment 162 moved—[Angela Constance]—and agreed to.

Amendment 132 not moved.

Amendment 163 moved—[Angela Constance]—and agreed to.

Amendment 133 not moved.

Amendments 164 to 168 moved—[Angela Constance]—and agreed to.

Section 63, as amended, agreed to.

Section 64—Applications to admit certain evidence relating to sexual offences: rights of complainers

The Convener: The next group is on independent legal representation. Amendment 219, in the name of the cabinet secretary, is grouped with amendments 220 to 227.

Angela Constance: I have paid careful attention to views on independent legal representation during and following stage 1. My amendments in this group reflect that and the close working that has been carried out by the Crown Office and Procurator Fiscal Service and the Scottish Courts and Tribunals Service to ensure that the amendments clarify roles and responsibilities and will streamline operational processes.

11:30

Amendments 222, 223 and 225 will create notification duties that the complainer's independent legal representative—ILR—should have by amending the proposed new section 275ZA of the Criminal Procedure (Scotland) Act 1995, which is being added by section 64 of the bill. The amendments would ensure that the complainer's ILR has a statutory duty to notify the prosecutor and the court "in writing" and

"as soon as reasonably practicable"

that they have been instructed by the complainer. Similarly, and by virtue of amendment 225, the ILR would have to make the prosecutor and court aware if they were no longer instructed. As well as ensuring procedural parity with the defence, amendments 222, 223 and 225 will facilitate the efficient flow of relevant information between all parties.

Amendments 219, 220, 224 and 226 relate to the new disclosure of evidence provisions, with amendment 226 setting out a new, improved process. Key changes include the onus being placed on the complainer's ILR to write to the Crown, outlining whether they wish to receive copies of any evidence based on what is set out in the section 275 application. If the complainer's ILR requests evidence, the Crown must notify the defence, which can give consent to that evidence being disclosed; alternatively, they have up to seven days in which to object. In cases of objection, the defence must specify what items they object to and the reasons why. Crucially, the court would be involved only when there was an objection. The Crown would be able to disclose any evidence to the complainer's representative that was not objected to without the need to involve the court.

The new process removes the obligation that would otherwise be placed on the Crown to sift all evidence and decide what should be made available to a complainer's ILR. Instead, the complainer's ILR will determine what evidence they may, or may not, require to fulfil their role. It also aims to reduce the need for court determination, as that would be required only in cases in which there is an objection. Furthermore, the objection period acts as a safeguard, ensuring that evidence that is shared is either agreed upon or determined by the court. Linked to that, amendment 226 also ensures that the complainer's ILR and the complainer are subject to a duty of confidentiality in relation to any evidence that is disclosed.

Although the restrictions in section 274 apply to deceased complainers, amendment 221 puts beyond doubt the fact that the right to independent legal representation does not apply to deceased complainers, as it would, of course, not be possible for a deceased complainer to provide their views on the accuracy or relevance of the evidence sought to be led. That said, the Crown would retain its common-law obligation to consider and contest applications that did not meet the statutory tests. As I said earlier, the rape shield protections would still be engaged.

I am aware that, during stage 1, committee members met with individuals who had lost a close family member because of a serious crime. They argued that independent legal representation should be made available to them and could have a role in providing legal advice when they are called as witnesses. It should be noted that that is a very different ask from the provision of independent legal representation to deceased complainers and, as such, requires its own separate consideration and scrutiny. The complainer's ILR is appointed for a very specific purpose in relation to a section 275 application, not to provide general advice on criminal justice proceedings.

I have considered carefully whether the family of deceased complainers should have access to independent legal representation. We need to remember that a section 275 application is, by its very nature, often related to intimate behaviour. Therefore, if independent legal representation were allowed in those circumstances, in what way might family members be able to challenge with any degree of authority or evidence the veracity of the evidence that the section 275 seeks authorisation to lead? Also, how would we define the family in those circumstances? Would it be possible to arrive at consensus among the relatives, noting that, if family members who had already suffered greatly were involved, it would expose them to highly traumatic and intimate evidence? Perhaps most significantly, there is also the question of the complainers' dignity and privacy and, of course, their consent, which they would be unable to provide.

It is a very emotive and sensitive issue, but I have arrived at the conclusion that the risk of trauma outweighs any benefit that could be derived by a family member and that it far exceeds any impact or the ability to affect the outcome of the application. I hope that my reasoning assures members that I have considered the issue extensively and have given due consideration to the impact of trauma versus outcomes.

Finally, amendment 227 is a technical amendment that ensures that a complainer who is to give their evidence before a commissioner is afforded the same period of 21 days as any other complainer to instruct a solicitor and receive advice prior to the determination of any such application.

I move amendment 219.

The Convener: No members wish to add anything. Cabinet secretary, do you wish to wind up?

Angela Constance: I have nothing further to add.

Amendment 219 agreed to.

Amendments 220 to 227 moved—[Angela Constance]—and agreed to.

Section 64, as amended, agreed to.

After section 64

The Convener: The next group is on other support for complainers. Amendment 68, in the name of Katy Clark, is grouped with amendments 265 to 267, 64, 77 and 264.

Katy Clark: I have two amendments in this group, amendments 68 and 64, both of which aim to reduce trauma by empowering victims to ensure that they have information and are in a position to make representations. At the moment, victims often do not have information about the legal process around their case and communication is regularly poor. Indeed, complainers often describe the criminal justice system as retraumatising. My amendments aim to empower victims within the process.

Amendment 68 would require the Scottish Government to set up an independent legal representation pilot for rape victims to give them information and advice. There is significant scope in Scotland to give victims far more advice and support in the justice system. As we know, complainers often say that they find the challenge of retelling and sometimes reliving their stories retraumatising. The experience of the criminal

justice system for complainers is also often felt to be retraumatising, intimidating and disempowering. My amendment 68 calls for a pilot for complainers that is similar to systems that exist in many other jurisdictions, including California, most European countries, Australia, Colombia, Ireland and many other countries across the world. Many of those systems have brought in representation for victims in recent decades—that representation was not initially in place. Scotland needs to look at such systems in more detail.

The amendment states that

"The Scottish Ministers must, by regulations, provide that any person who is or appears to be a victim of rape or attempted rape and meets any other specified criteria is ... to be entitled to independent legal representation".

Maggie Chapman (North East Scotland) (Green): Can you give a little bit of an explanation about your rationale for limiting the amendment only to rape? Do you not think that there would be value in including other sexual offences?

Katy Clark: Yes, I think that there would be value in that. I am focusing on rape and attempted rape because the amendment proposes a pilot. Also, I would not expect the service to be available across Scotland, as the nature of a pilot means that it would be limited, controlled and evaluated with a view to seeing what was a success and what was not. I agree with the principle of what Maggie Chapman suggests, as there is probably a wide range of offences in which such representation would be appropriate, but the proposal in my amendment is for a pilot. Rather than going ahead with a full scheme, we would look at what works and build on that. Proper evaluation should be part of the pilot process.

As Maggie Chapman will note, the representation that I propose in the pilot is limited and restricted from the point at which the allegation is made until the end of the criminal investigation or proceedings. It may well be the case that there should be advice and representation beyond the very restricted proposal that is made for the pilot. The pilot is the start of what I imagine may be a longer process, but we would have to evaluate it to see how it works.

Other countries and jurisdictions have started off with a relatively restricted process of representation that has expanded over many decades. That might happen here, but it is not what is proposed today. What is proposed today is representation and advice in the early part of the process—before the court door, if you like.

Amendment 68 would require the Scottish Government to consult persons providing victim support services and any other persons that ministers consider appropriate before making the relevant regulations. There would be scope to build views and representations into the pilot, but the amendment says that the regulations

"must be made within 1 year of this section coming into force."

Therefore, there are time constraints and pressure on the Scottish Government to act.

These are relatively modest proposals, but, as I indicated, they represent the current direction of travel. The amendment aims to empower victims in the process, and it seeks to enable them to have information about and understand the process so that they can engage with it and, where appropriate, make representations.

Amendment 64 also relates to empowering the victim—the complainer. It relates to having a single point of contact for victims. In drafting the amendment, we looked at other legislation that has been passed by the Parliament where there has been a single point of contact.

Amendment 68 also states that

"the Scottish ministers must—

(a) review the operation of the regulations,

(b) publish a report on their findings and

(c) lay the report before the Scottish Parliament."

The report

"must include the views and feedback of—

(a) complainers,

(b) the Lord Justice General,

(c) the Lord Advocate,

(d) the Faculty of Advocates,

(e) the Law Society of Scotland

(f) the Scottish Courts and Tribunals Service,"

and other stakeholders.

Amendment 68 retains the definition of rape under the Sexual Offences (Scotland) Act 2003, so it works within the existing legal definitions. Victim support services are also defined in the amendment.

Victims of sexual trauma have told us about inconsistent access to support and specialist guidance. My proposal would build on existing schemes, and the intention would be to take a trauma-informed approach.

11:45

Amendment 64 calls on ministers to assign a single point of contact, which would enable the victim to obtain relevant information on the progress that has been made in an investigation, as well as any related court proceedings. The amendment is informed by the views of complainers and their experiences, as they often

find it difficult to get information and feel that they are passed from pillar to post.

I believe that my amendments 68 and 64 should be considered with a view to changing the balance in the criminal justice system in order to empower victims and address some of the significant concerns that they have raised repeatedly with the committee for many years.

I move amendment 68.

Maggie Chapman: I refer members to my entry in the register of members' interests, which shows that, before I was elected, I worked for a rape crisis centre.

My amendments in the group all deal with different forms of support that I and others believe that survivors need. If it is okay with the committee, I will take a bit of time to speak about each of them. First, amendment 266 on independent legal representation makes provision through regulations for ILR for complainers throughout criminal proceedings. In the paper "Without Fear or Favour: A Voice for Rape Survivors in the Criminal Justice System", which she published 14 years ago, Professor Fiona Raitt from the University of Dundee said:

"With the exception of Scotland and England and Wales, every country in Europe gives complainers in rape cases some form of entitlement"

to ILR. She went on to say:

"The accused's right to fair trial is paramount in our legal process. The prosecutor is bound by that principle. Because the Crown has to take account of the accused's right to a fair trial, then when his interests are place[d] in competition with the woman's interests, hers will always be trumped. An independent representative is not constrained in this way. Her sole consideration is the interests of her client."

This is about justice and the right to participation in a genuinely just justice process, as well as the right to privacy.

I believe that the provisions in the bill are welcome, but they are not sufficient. COPFS is doing much more, which is also welcome, but it represents the wider public interest, which is not always that of the complainant. It is clear that things that happen before a trial begins can dramatically affect how that trial proceeds. For instance, relevant decisions are made at pre-trial hearings, so the complainer needs representation then, not just at the trial itself.

Overall, the patriarchal and misogynistic biases that are still embedded in our society, which are only too obvious in our justice system, especially when dealing with crimes of power such as sexual offences, are structural injustices, so they need structural solutions.

The committee heard that there was strong support for ILR, as indicated in the stage 1 report. As Lise Gotell from the University of Alberta said when discussing the Canadian experience, ILR can protect an array of rights and interests, guard against distortions that are caused by discriminatory biases and

"help to prevent 'second rape' where complainants' privacy interests and dignity are sacrificed at the altar of a narrow conception of fair trial rights."

I ask members to support my amendment 266, which would enable ILR to be provided.

My amendment 267 calls for the provision of legal advice from the point at which a complainer first gets in touch about an offence with the police, victim support services or any other people, as indicated in the amendment, and for a year after the conclusion of any criminal proceedings. Rape Crisis Scotland has specifically called for that. It said that independent legal advice

"should be extended to include legal advice for complainers of sexual offences in the lead up to the trial, to assist them to better understand the process and feel better prepared for giving evidence. This is a proposal that is supported by both Rape Crisis Scotland and the Faculty of Advocates."

That proposal would help complainers to feel supported throughout and to feel a part of the criminal justice process. As the committee heard at stage 1, survivors would very much value that support.

To add to what I said on amendment 266, it is clear that independent legal advice works. It has been available in Northern Ireland for some time, and has been extended in recognition of its success. It is surely only right that complainers are supported to understand the process and be properly prepared for any trial and that it is important to continue that advice after a case is dismissed or abandoned.

Katy Clark: I understand that, in other countries, advice extends beyond a year—for example, it could be until the conclusion of compensation. Is there any particular reason why the timeframe of a year has been chosen? Is there any evidence that that is right? We can imagine situations in which, a number of years later, there are live issues.

Maggie Chapman: That is a good question. We ummed and ahhed about the cut-off point, but we thought that there needed to be some point at which the right to free independent legal advice ends. However, if there is scope for extending that, I would be up for a discussion on that between now and stage 3.

Finally on independent legal advice, Rape Crisis Scotland and the Faculty of Advocates have together developed a model for that, so I hope that

it will not be contentious, neither here nor in the world out there.

Amendment 264 is on the provision of independent advocacy support to complainers during criminal investigations and proceedings. That was a clear recommendation by Lady Dorrian and is supported by Rape Crisis Scotland. Where such advocacy support exists, survivors find it essential and life changing, but it is not available to all survivors across Scotland.

The Scottish Centre for Crime and Justice Research made positive evaluations of the national advocacy service, which unfortunately is not national, and recommended that it be routine provision that is nationally funded. The centre's evaluation report stated:

"Victims-survivors were overwhelmingly positive about the advocacy support that they had received, describing it as invaluable and life-changing".

Indeed, survivors themselves said things such as

"to me it's turned my life around, like, completely",

"I found it just invaluable"

and

"This has been invaluable, it's changed my life, it's been fantastic".

The service clearly fills a gap in the justice system. Victim survivors described perceived imbalances in the criminal justice system, reflecting its adversarial nature, and the perception that it protects the interests of the accused before those of the victim. Advocacy support was therefore understood to improve victim survivors' experiences by providing someone who is independent of any investigative or prosecutorial process and whose sole remit is to protect and represent the interests of the victim survivor.

Finally, amendment 265 calls for a report on what provision of ILR to complainers might be possible. In some ways, that is a fallback position in case there is no movement on the other amendments in the group—either Katy Clark's or mine. However, it would still be useful to gather that information as preparation for the drafting of regulations or the preparation of a pilot.

Katy Clark: As Maggie Chapman will be well aware, one of the issues is what happens in the court. That is complicated, because different interests and individuals are involved in that process. As the cabinet secretary will be well aware, any proposal on representation in court involves an awful lot of detailed work with the different parts of the court process, and that work has been happening in relation to the very limited form of independent legal representation that is proposed in the bill. Does Maggie Chapman agree that the report that she proposes could scope out some of that and look at where there might be further representation?

Maggie Chapman: Absolutely—yes. The report could gather useful information in advance of the pilot scheme. That would inform the pilot scheme, which would then provide additional information for a wider roll-out. Alternatively, if we went straight for ILR, as my amendment 266 asks for, it would provide that foundational information. The report would have value regardless of what else happens with other amendments in the group, but it could be a useful starting point for Katy Clark's amendments or my amendments.

Turning briefly to the other amendments in the group, I broadly support the intentions behind them, and I am interested in hearing the cabinet secretary's remarks as to how we can progress with the support.

Finally, I stress that it is important that we understand that there is a distinction between advocacy, advice and legal representation. There might be overlaps, but those three things are different and each of them needs to be addressed.

Pauline McNeill: Amendment 77 would insert a duty to provide information to complainers in sexual offence cases. It states that the

"Advocate Depute must ... meet with the complainer"

before

"the first hearing"

and

"provide the complainer with relevant information on the progress of the case over the course of proceedings."

Tony Lenehan KC said:

"It is important that I am allowed to say to them beforehand that the trial can be conducted as slowly as they need it to be, that they can think about the questions and, if they do not understand the questions, that they can tell me that. We can build that into the process so that, when they come into the court, they know me a bit."—[*Official Report, Criminal Justice Committee,* 24 January 2024; c 43.]

He has also highlighted that a current practice note indicates that the advocate depute should meet the complainer in advance of their giving evidence when evidence is taken by commission.

My amendment falls within the broad scope of issues that are raised in relation to independent legal representation and a single point of contact. The overwhelming experience of the vast majority of victims from whom we have heard was that they felt that they had no agency in their own case. In many cases, nothing was explained to them and they felt that they had no stake in what was happening in the case in which they were the victim. It is clear to me that we cannot go back to what we had before.

The Lord Advocate is to be commended for the way that she has, from what we have seen, promoted among advocate deputies the necessity of seeing victims. We have heard from at least one victim who expressed on the record that her experience was completely different from the experiences of all the other victims from whom we heard in that evidence session, who did not feel, in any way, that they had a part in the whole process.

The important thing is that the advocate who is dealing with the case will have read the papers and will have some understanding of the intricacies of how the trial might be expected to go. It is a really important aspect of making a difference to complainers.

I imagine that Governments are never happy to put this type of thing into statute, so I will listen to find out whether there is another way to do that. You will note that Tony Lenehan said that it is already covered in a practice note. However, I want to ensure that the right for a complainer to sit down with a person who is, after all, going to be prosecuting their case, is made permanent and does not slip when a new Lord Advocate comes into post.

I see that Liam Kerr is about to intervene, so I will take his intervention.

Liam Kerr: My starting point is that I feel that that is the right thing to do. My concern, however, on which I would be keen for you to allay my fears, is about the new duty that amendment 77 sets out. The amendment would impose a duty to

"provide the complainer with relevant information",

and it goes on—rightly—to define "relevant information" as various things. The proposed new subsection 5(d) of the Criminal Justice (Scotland) Act 2003 includes, as "relevant information",

"information requested by the complainer".

That makes sense, but it seems very broad. In theory, surely the complainer could ask for anything under that provision. Are you able to explain to me why you choose to make it such a wide right in law, and have you considered the practical impact of including that particular subsection?

12:00

Pauline McNeill: That is a fair point. The intention behind the amendment is to allow the complainer to get an insight into how the case will be argued and into any other factors that might have arisen. We have heard the case for independent advocacy at the preliminary trial and in relation to a section 275 application, but then there is the trial itself. How the case looks at the outset will differ from how the case looks later on. As is often the case with provisions that are drafted by back benchers, there is room for improvement.

I will hear what the cabinet secretary has to say about it, but I am sure in my mind that I want the measure to be permanent. It is worth having a discussion, because there is a lot of commonality in the principles of providing legal advice and legal support and changing the fundamentals of how a victim is involved in understanding the case throughout. I feel more strongly about this stuff than I do about the change in structure that was debated in an earlier group, which the Government feels strongly about. I want to support measures that would change fundamentally the experience of victims, because I believe that victims can give their best evidence when they have the fullest understanding.

Katy Clark's approach to piloting independent legal representation is important. It is right that we evaluate something that is not tried and tested.

I am sympathetic to Maggie Chapman's amendment 264, because that is something that Lady Dorrian asked for, and that is quite persuasive. Again, I do not know whether there is a crossover between independent advocacy support and what I am trying to achieve. It probably needs to be further fleshed out, but I am clear about the principle that something permanent needs to happen to change the experience of victims before and during the trial, and some of the amendments would make that change happen.

The Convener: If no other member would like to come in, I call the cabinet secretary.

Angela Constance: Over the past few weeks, we have debated many amendments to the bill that aim to improve the experience of victims in the criminal justice system. I hope that members can acknowledge that, in the course of those debates, I have sought as much as possible to accept amendments from members or to commit to work with members to see whether amendments can be developed for stage 3 that are workable and deliver for victims.

The amendments in this group are, of course, similarly well intentioned. However, I am sorry to say that I am concerned that, rather than enhancing existing support, the amendments risk creating confusion and duplication as to how victims exercise their rights to receive information and advice.

Although I very much appreciate the aim of amendment 64, in the name of Katy Clark, which is to assist victims in obtaining information from a single point of contact, events have moved on significantly since the amendment was lodged last summer. It is to Ms Clark's credit that she lodged

very early amendments. What has changed in particular is that the victim-centred approach project reported in November last year. It recommended a universal approach across all crime types, consisting of an online portal and designated contacts in victim support organisations and the criminal justice agencies. The model applies to all cases and it builds on existing knowledge and expertise. Work is under way to make that a reality and is the result of detailed consideration by a broad range of partners.

Amendment 64 does not reflect that model, which would add further complexity. The amendment lacks clarity on how the single point of contact would operate and does not take into account individual choice. It is also unclear how digital services or the need to include personnel from victim support organisations and criminal justice agencies would be accommodated in the references to a single person. I therefore ask members not to support amendment 64.

Katy Clark: The principle behind the amendment is that it should be clear to a complainer where to go and that there should be a named person or persons from whom they would be able to get information. Does the cabinet secretary believe that that principle is incorporated in the work that she advises is on-going?

Angela Constance: I believe that that principle is incorporated in that work. The work of the victim-centred approach workstream is part of the victims task force, which brings together key victim support organisations as well as criminal justice agencies. The work has been done in that forum, and it has been led by victims. I respectfully suggest that the victims task force is a good forum to work through the recommendations and how to implement them. It is fair to say that the work is still at an early stage, but I am confident that it has been built on solid foundations, which has at its heart consideration of the needs of victims.

There are several challenges in Pauline McNeill's amendment 77, which means that I am unable to support it. The amendment does not recognise that most relevant cases will be prosecuted in the sheriff courts and typically presented by a procurator fiscal depute rather than an advocate depute. Requiring a meeting to occur ahead of the first hearing would also mean—

Katy Clark: Will the cabinet secretary take an intervention?

Angela Constance: I will finish talking about Pauline McNeill's amendments and then come back to you, otherwise none of this will make any sense.

Requiring a meeting to take place ahead of the first hearing would also mean that there would be little to engage with the complainer on at that early stage before all the evidence has been submitted and considered and charges finalised.

Significant challenges would also arise from requiring advocate deputes to share any information that is requested by the complainer that is relevant to their case. There might be good reasons for withholding certain information from a complainer, and which information prosecutors can and should share should be left to their discretion.

Katy Clark: I appreciate the cabinet secretary's points about drafting, but the principle is about communication from the prosecution and the Crown, whether that is the advocate depute or procurator fiscal. Does she support that principle? It is very much being introduced now, as she will be aware.

Angela Constance: If Ms Clark's question is solely in relation to Ms McNeill's amendment 77, I am just about to get on to the fact that we are, unfortunately, going to have some legislative competence issues. I know that that is not what folk want to hear, but bear with me, please.

As Ms McNeill mentioned, her amendment replicates existing practices in High Court sexual offence cases, where it is established convention that advocate deputes meet with complainers. The Crown Office and Procurator Fiscal Service is improving its guidance on that point for High Court and sheriff court sexual offence cases. It is vital that the process is led by the complainer, who can decide whether they want a meeting and, if so, what time in the process is right for them.

In contrast, by seeking to impose statutory obligations, amendment 77 assumes that all victims want to meet an advocate depute as soon as the case has first been called in court. It is the quality and content of discussions with the prosecutor that have the greatest impact on the experience of a complainer, and that qualitative aspect could not be set out in legislation in any meaningful way.

Pauline McNeill: I can see that there are some drafting issues, so I admit that. You said that the practice has been established by convention, but that convention is very short lived. The current Lord Advocate, having headed up the sexual offences unit, is very passionate about sexual offences. This is not to talk down other Lord Advocates, but she strikes me as someone who is very passionate about the issue. When we have another Lord Advocate, the convention could fall away—that is what I want to discuss. I expected you to say what you said, which is fine. Perhaps these things are better not done by legislation but by practice notes, but will the Government

consider ensuring that the practice cannot be dropped by a future Lord Advocate?

Angela Constance: I understand, appreciate and endorse the comments that Ms McNeill makes with reference to the Lord Advocate—she is an absolute champion of these matters as well as others. From a Government perspective, ultimately, I must emphasise that the amendment is likely to fall outside the legislative competence of the Scottish Parliament, as it would interfere with the Lord Advocate's determination of prosecution policy, and that is where I am stuck.

Although I very much understand Pauline McNeill's intention, amendment 77 seeks to make provision for a process that, I think, requires more nuance and flexibility than legislation permits, and it is for that reason that I urge members to reject it.

I also do not support Katy Clark's amendment 60 and Maggie Chapman's amendments 265 and 266, which are concerned with independent legal representation for complainers at all stages of criminal proceedings. I very much understand the desire to improve how sexual offence complainers are supported throughout criminal proceedings. We all want to see improvements. However, the independent legal representation provision in the bill as it stands is very firmly focused on what is a deeply intrusive aspect of sexual offence cases in terms of sexual history evidence. The change that the bill will bring is already significant in breaking new ground for complainers, with the introduction of a third party into proceedings.

Providing for independent legal representation throughout a sexual offence case presents complex challenges and could create many unintended consequences that go well beyond the impact of independent legal representation for section 275 applications. At stage 1, Lady Dorrian cautioned that anything beyond independent legal representation at the section 275 application stage would derail trials and cause delays. Lord Matthews also explained that a third party would not be able to cross-examine witnesses or the accused, stressing the role of the Crown as public prosecutor.

I note the committee's conclusion at stage 1 that the immediate focus should be on properly resourcing ILR in respect of section 275 applications.

Maggie Chapman: I hear what the cabinet secretary says, but there is a difference between what Katy Clark and I think about the issue and what she does. Could a report gathering information on extending ILR beyond the very specific scope that is currently in the bill help us to better understand what could be done beyond the very narrow and intrusive part of a trial that you indicate?

Angela Constance: I believe that I have been consistent on the issue and, I hope, respectful of people's desires and ambitions to go further and faster. My starting point in all this is that I think that we all instinctively want to go further and faster, bearing in mind that members of the committee, quite rightly, challenge me on a regular basis about financial investment and the financial underpinnings of legislation. They also challenge me about unimplemented legislation. I am clear that, as ILR is significant new ground, certainly for Scotland, I want it to be embedded and funded properly.

12:15

The measure will need to be evaluated, which should inform what comes next. At this point, I am very reticent to go further than the original intentions of the bill. I am also anxious about the idea of creating legislation now for what might be the case in the future. We need to bear down on what we can deliver in the short-to-medium term.

Regarding Ms Chapman's amendment 267, on legal advice for complainers, I am pleased to advise the committee that I intend to support the proposal that has been submitted to me by Rape Crisis Scotland and the Faculty of Advocates to deliver a pilot for free independent legal advice. Although it is complementary to the objectives of the bill, the pilot does not require legislative underpinning.

The pilot will provide specialist independent legal advice from dedicated solicitors for complainers in rape and attempted rape cases, utilising the expert Emma Ritch law clinic. Where desired, the pilot will provide access to an independent and experienced court practitioner to assist complainers in feeling more prepared to give evidence as well as ensuring that complainers know their rights, helping to make those rights more accessible. An advisory group chaired by the Scottish Government and including Rape Crisis Scotland, the Crown Office and Police Scotland will inform the development of the pilot.

Katy Clark: Will the cabinet secretary outline how the pilot will differ from the proposal in amendment 68? I appreciate that the pilot would not have a statutory footing, but would all the principles that are outlined in amendment 68—including the evaluation and the approach—be incorporated in the pilot?

Angela Constance: The pilot will provide choice and agency, which I hope will align with Ms Clark's ambitions. It will provide advice that will be available throughout the criminal justice process—end to end and beyond, if that is needed. That would go further than what is envisaged in Ms Chapman's amendment 267, where the advice

would stop 12 months after the criminal investigation or proceedings are concluded. I hope that Ms Chapman will welcome that, and I ask her not to move her amendment.

On how the pilot compares to amendment 68, I understand that the amendment aligns with Katy Clark's consistent calls for independent legal representation but, in that sense, there are difficulties. Perhaps we could compare and contrast the approaches at another time, because there are some points with respect to advocacy that are certainly important.

Katy Clark: I look forward to considering that in more detail before stage 3.

Has the cabinet secretary looked at the likely costs of the pilot? Will she be able to provide that detail today or, if she cannot do so, after this meeting, so that we have a better understanding of the pilot's scope and whether it will be available to women throughout Scotland to opt into or will be only in, say, the Glasgow area?

Angela Constance: We have looked at the costs of the pilot, and that information could readily be made available to members. With respect, I will turn the tables a wee bit and reciprocate by asking whether members have looked at the costs of their amendments. We can always compare and contrast our approaches.

There is a range of preparatory work to establish the pilot and total costs. That includes the recruitment of staff and ensuring that all necessary arrangements for its smooth running are in place, including awareness raising regarding how complainers can access it. We have some ballpark figures for that; they might not be narrowed down specifically in terms of pounds, shillings and pence, but we have worked hard with those proposing the pilot to reduce the cost. I will be able to provide further information on that.

Maggie Chapman: I welcome the pilot, but I have a couple of questions about it. The first is on timescales. First, when do you hope that the pilot could be under way? Secondly, before Katy Clark's intervention, you mentioned the importance of advocacy; however, in this context, we are talking not about advocacy but about advice. It is important that we retain the distinction between advocacy and advice, because they are two distinct and important services.

Angela Constance: I agree with that—we must not confuse representation with advice or advocacy. Ms Chapman has made that point consistently throughout the debate on the subject. Regarding the pilot that I have outlined today, it certainly is my hope that that will start by next year—I would want it to have commenced by then. That may not be without its challenges, but I assure Ms Chapman that my focus is on 2026.

To pick up the point regarding advocacy, that is complementary to independent legal representation, independent legal advice and wider support for victims. As we have discussed, there can often be confusion around those areas, but nonetheless they are interlinked; Ms Chapman and I have discussed that when we have met.

Ms Chapman's amendment 264 is broad, and my concern is that it is not clear who would provide such support. I put on record that support is currently provided that does not require to be rooted in legislation. My overriding point is that some of the discussions that we are having, in particular with regard to budget and funding, are, in my view, negotiations that are more suited to the budget negotiation process, rather than some of the more nuanced negotiations that we need to have on legislation. Nonetheless, I appreciate that there are different views on that round the table, particularly at different times.

For the record, I note that independent advocacy support is currently provided free of charge by Rape Crisis Scotland's advocacy programmes, and I note the comments that Ms Chapman made earlier on that. It is a national service that receives £2 million annually from the Scottish Government. In principle, it aims to provide support to victims in a flexible way, from before a statement is made and beyond the resolution of proceedings.

There is also the victim-centred approach fund, which has provided more than £18 million to Victim Support Scotland over the past three years to offer free information and support to victims of crime. The fund forms part of our fairer funding pilot, which means that recipients continue to receive awards over the next two financial years.

I do not support amendment 264, as I do not think that it is the best way to proceed.

Maggie Chapman: Will the cabinet secretary give way?

Angela Constance: I am just about to finish—

Maggie Chapman: It is just on that point, if I may.

Angela Constance: Of course.

Maggie Chapman: You said that a service already exists. I am familiar with an advocacy service that exists at the moment, but the problem is that it is not national—not all survivors have access to it. On the point about whether it is a matter for a budget discussion rather than something to be put into legislation, part of the problem is that, because of budgetary constraints, some complainers never get support. Putting the provision on a statutory footing would make it much more likely that more survivors would get the advocacy support that they need. How does

the cabinet secretary answer the recommendation of Lady Dorrian, given that what currently exists is not sufficient?

Angela Constance: I do not think that anybody is disputing the importance of independent advice or advocacy. I am sure that people will continue to discuss and debate this but, with the best will in the world, legislation is not always the best place to address funding and operational matters.

I draw my remarks to a close there.

Katy Clark: I will not press amendment 68. I have listened carefully to what the cabinet secretary said, particularly about the pilot that has been proposed. I would like to hear more about that before stage 3. That sounds like a positive development, so I will not press amendment 68 or move amendment 64, but I may bring them back at stage 3.

Amendment 68, by agreement, withdrawn.

Amendment 265 moved—[Maggie Chapman].

The Convener: The question is, that amendment 265 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)

Against

Clark, Katy (West Scotland) (Lab)
Dowey, Sharon (South Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
McNeill, Pauline (Glasgow) (Lab)

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

As convener, I will use my casting vote to vote against the amendment.

Amendment 265 disagreed to.

Amendment 266 moved—[Maggie Chapman].

The Convener: The question is, that amendment 266 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

Against

Dowey, Sharon (South Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)

Abstentions

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

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

Amendment 266 disagreed to.

Amendments 267, 64 and 77 not moved.

Amendment 264 moved—[Maggie Chapman].

The Convener: The question is, that amendment 264 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

Dowey, Sharon (South Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)

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

Amendment 264 disagreed to.

Section 65—Pilot of single judge rape trials

12:30

The Convener: The next group is on the rape trials pilot. Amendment 65, in the name of Katy Clark, is grouped with amendments 66, 53, 54 and 59.

Katy Clark: I believe that my amendments have been overtaken by events. On the basis that the cabinet secretary is proceeding with her amendments, I do not intend to proceed with mine. For the purpose of the debate, I move amendment 65, which I will then seek to withdraw.

The Convener: I call Russell Findlay to speak to amendment 53 and the other amendments in the group.

Russell Findlay (West Scotland) (Con): I have three amendments in this group, 53, 54 and 59, with amendments 54 and 59 being consequential to amendment 53, which is the most significant one and is my focus.

Amendment 53 would remove from the bill the proposal by the Scottish Government to remove juries from rape trials. In the committee's stage 1 report, Scottish National Party members supported the proposal for juryless trials but, having listened to the evidence, my party took a different view,

which we set out in detail in that report. In summary, we opposed the fundamental departure from the long-established right of an accused person to be tried by a jury of their peers and we stated that the proposal

"would amount to an experiment with people's lives"

and would risk creating

"a two-tier justice system".

It was clear from the evidence that ministers had not taken into account recent developments to address rape myths and that they had no answer to the very real prospect of lawyers boycotting juryless trials. In addition, some of the most compelling evidence came from rape survivors who said that they supported trial by jury. It is therefore welcome that the Government, and presumably the SNP committee members, now agree with us and with all those who warned that that was a bad idea. The Scottish Solicitors Bar Association described that as a "humiliating U-turn" and said:

"Our opposition was a principled campaign based on a simple premise: either all of us matter or none of us matter. Once you start taking away some people's rights, it never ends there."

They, and many others, will be glad that the cabinet secretary has now seen sense. It is a victory for common sense.

I have some brief further observations to make before hearing from the cabinet secretary. Fighting to remove juries has taken a monumental amount of Government, Parliament and committee time. The bill was published almost two years ago yet, throughout the process, the Government has failed to provide basic evidence to justify that radical experiment, to explain the intent behind it or to address the consequences and concerns that have been raised by so many people. My concern is that that has been an example of this Government's cavalier approach to legislation.

Rona Mackay: Would the member acknowledge that Rape Crisis Scotland and women's organisations were in favour of such trials and would he also acknowledge that this is an example of the Scottish Government listening to voices from across the board and, far from being a humiliating U-turn, shows the Government working with members?

Russell Findlay: There was some evidence in support of the proposal, but the majority of evidence, as was set out in detail in the stage 1 report, was opposed to it, for good reasons. I am glad that you, as a member, and the cabinet secretary now agree with our position.

It is extremely frustrating to have lost two years to arguing about something. It is welcome that the Government is now doing the right thing, but I think that the cabinet secretary has a duty to explain why it has taken two years to finally reach this position and do the right thing.

The Convener: Do any other members wish to speak?

Fulton MacGregor: I support Russell Findlay's amendments, which are supported by the cabinet secretary, but I think that he does a huge injustice to our stage 1 deliberations when he refers simply to SNP members being for the proposal and he and his party being against it. Mr Findlay was a very collegiate member, I have to say, and I think that the committee has worked very well together. However, his summary of events plays down the amount of time that we spent debating the issue in committee with witnesses and in the preparation of our report, and the complex nature of the proposals in front of us. As Rona Mackay rightly said, many organisations were in favour and others were not. We took all that into account, and the convener will remember, as will the clerks and other members of the committee, that we spent hours on the issue.

Russell Findlay: I think that we are in full agreement. My speech was a very brief summary of two years' worth of work and evidence, but the stage 1 report is in black and white. The SNP members supported the proposal, in spite of all the evidence that we heard explaining why it was a bad idea. The stage 1 report also sets out in great detail why we believed that it was a mistake. We are where we are, and that should be welcomed.

Fulton MacGregor: I am not disputing that—I was going to come on to say that. You are right to say that you had only a brief period in which to describe the committee's work, but the manner in which you have chosen to describe it has prompted me to come back and say, as Rona Mackay has already said, that that is an example of the Government listening.

Russell Findlay: Would the member take an intervention?

Fulton MacGregor: I am developing a point, and I will come back to you. It is an example of the Government listening to the concerns that have been raised and being willing to change its mind, which is to be commended.

I support your proposal, and the cabinet secretary supports it, but I want to reflect for the record that it is not as simple as saying that so many members were for it and so many members were against it. I am happy to put that on the record. If you still want to come in, that is fine.

Russell Findlay: I apologise for my manner, but I provided a factual summary of events. Indeed, it is a matter of fact that some members were for it and some were against it, as the stage 1 report

says. I look forward to hearing from the cabinet secretary.

Fulton MacGregor: I feel that I have also provided a factual record of events.

Pauline McNeill: I will make a short contribution. As Katy Clark said, we have had the debate and accepted that the Government has had a change of heart. The committee spent a lot of time considering this particular proposal. The huge number of legal concepts and detailed changes to criminal justice in one bill has exercised me from the beginning. I will continue to make that point, and I will certainly make it at stage 3.

We have come to the right conclusion, but it has taken a considerable amount of the committee's time to examine the proposal, and rightly so. I appeal to future Governments to think twice before they give any future committee such fundamental change all in one bill. I do not need to say for everyone here that it has been a difficult week, what with trying to cope with this big bill and the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill that we debated in the chamber yesterday.

As I have said before, I do not think that it is ideal in the long run to scrutinise a bill as large as this in one statutory document.

Angela Constance: Our stage 2 proceedings had been very constructive until we reached group 31. We had managed, until Mr Findlay's appearance, to have robust and respectful exchanges, including in and around the previous group on independent legal representation. I acknowledge Ms McNeill's point that the bill is large and complex. However, I think that it is somewhat puerile and childish to say that I am the reason why it has taken two years; that shows a lack of awareness of parliamentary process and proceedings—

Russell Findlay: Will the cabinet secretary take an intervention?

Angela Constance: I will absolutely not take any interventions, Mr Findlay, because I really do not want to waste any more of your time, to which you have objected so profoundly—

Russell Findlay: I was just going to say that you misunderstood the point that I made—

Angela Constance: No, sorry; I said no.

I start with a point around substance. I still believe that it is vital that we do not lose sight of the substantial evidence that the current approach to decision making in rape trials is denying women justice. Data from the Scottish Government that was published last April show that, in rape and attempted rape cases, where there is a single complainer and a single charge, the five-year average conviction rate for cases that reach court is just 24 per cent. That is sobering, and I do not hear many comprehensive answers as to why that is.

That is why it is crucial that we understand more about the barriers to justice for rape victims. One way that we can do that is through research that looks into the content of jury deliberations, in order to help us to better understand whether, and how, rape myths affect verdicts and what measures could effectively address them. I am pleased that the committee supported my amendments to the Contempt of Court Act 1981 in the previous group, which will help to pave the way for that.

It is also important that we continue to challenge rape myths, not just with jurors but in society as a whole. I have confirmed that we will set up a working group to look at that in more detail, and I hope that members across the committee will support that.

As you know, convener, I have always recognised that views on the proposed pilot of juryless trials are mixed. During stage 1, some stakeholders and members spoke compellingly in support of a pilot, while others expressed their concerns. I have listened carefully to all those views and reached the conclusion that there is not enough parliamentary support for a pilot of juryless trials at this time.

When I wrote to the committee in October, I made it clear that I would remove the pilot from the bill. In the interests of building as much consensus as possible, and as amendments were already lodged that would remove the relevant sections of the bill, which meant that I could not lodge my own amendments, I have lent my support to amendments 53, 54 and 59. Consequently, I note Ms Clark's remarks on her amendments.

The Convener: I ask Katy Clark to wind up and to press or withdraw amendment 65.

Katy Clark: I intend to withdraw my—

Russell Findlay: Will Katy Clark take an intervention?

Katy Clark: Yes, I will.

Russell Findlay: Thank you. My apologies for the unconventional approach, but the cabinet secretary was unwilling to take an intervention. If I understand her contribution correctly, she seemed to think that I was accusing her of being the cause of the two-year process, which I absolutely was not. I do not think that there was anything that was not respectful about my contribution. I am disappointed that the cabinet secretary did not take an intervention. It is good that we have now reached this position. In the future, however, much

greater preparation in respect of legislation would be better.

Katy Clark: I thank the member for his intervention. As I was saying, I intend to withdraw amendment 65 and not move my other amendments in this group, given that the Scottish Government has decided not to proceed with its very controversial proposals, which, I would argue, were not evidence based. I was surprised by some of what the cabinet secretary said, in that my understanding is that we were not presented with evidence that judge-only trials led to different outcomes. It is a very wide debate and we have to put the interests of victims at the centre of the process. I am pleased that the Scottish Government has not proceeded with the proposals, given their controversial nature. I therefore do not intend to proceed with my amendments.

12:45

Amendment 65, by agreement, withdrawn.

Amendment 66 not moved.

Amendment 53 moved—[Russell Findlay]—and agreed to.

Section 66—Report on section 65 pilot

Amendment 54 moved—[Russell Findlay]—and agreed to.

Before section 67

The Convener: Members will be pleased to hear that we have come to the final group, on the review of the act. Amendment 169, in the name of the cabinet secretary, is the only amendment in the group.

Angela Constance: Thank you, convener. I recognise the importance of assessing the impact of legislation. Amendment 169 provides for just that by placing a duty on the Scottish ministers to review the operation of the act and submit two reports to the Parliament.

A key aspect of the bill is the cumulative impact of its reforms, in terms of both improving the experiences of victims, witnesses and vulnerable parties and modernising the system and its processes. A whole-bill reporting requirement, as created by amendment 169, will ensure that the full package of reforms can be properly considered. Instead of there being different reporting requirements for different parts of the bill, which would mean that each topic is looked at in isolation, the amendment will allow us to consider both individual policies and the package of reforms as a whole.

The timing of the two review points reflects the likelihood that elements of the bill will be commenced at different times. The initial reporting point of five years after royal assent will mean that ministers are required to account for what progress has been made by that time. The second review point, a further five years later, will ensure that the act can be considered in its entirety when all of its provisions have commenced and that the effect of the different elements can be effectively reviewed.

It is absolutely vital that those whose experiences the bill aims to improve are included in any review. Therefore, the list of persons whom ministers should consult in respect of delivering the reporting requirements includes victim support services, persons representing the views of victims and witnesses in criminal proceedings and of vulnerable parties and witnesses in civil proceedings, and representatives of the judiciary, justice agencies and the legal profession. All those groups will be impacted by the bill and all can provide data, evidence and views that can be used to assess its impact. That list of those who should be consulted is non-exhaustive, so others can be engaged with as needed.

On data collection for the reports, the Scottish Government will work with those who are listed to develop the operational policy approach on what data would be helpful for assessing the legislation's effect as part of the bill's implementation.

At last week's committee meeting, I undertook to work with Pauline McNeill ahead of stage 3 to ensure that any review of the operation of the bill includes appropriate consideration of developments relating to corroboration. That demonstrates my willingness to work collaboratively to ensure that the Parliament can continue to scrutinise the matters that we have been debating in recent months, while also making sure that the bill works as intended.

I move amendment 169, and I ask members to support it.

Pauline McNeill: Cabinet secretary, what you have outlined makes sense—not to chop up the act into bits but to review it in one comprehensive report. My only concern is that, if some aspects of the bill are not enacted within the five years following royal assent, or are enacted at the tail-end of the five years, there is only a very short period of that aspect to review—you said that the plan is to draw down in stages. Could you give consideration to that? You might say that it is unlikely that something is not drawn down, but it could happen, so could we take account of that? If that happened, it would be another five years before that aspect was reviewed.

Angela Constance: The draft timescales are not entirely bolted down, but we would be looking at an overall implementation period of three to four calendar years. All of the bill should then be in place, albeit that it will be phased in.

Amendment 169 agreed to.

Section 67—Regulations

Amendment 55 not moved.

Section 67 agreed to.

Section 68 agreed to.

Section 69—Interpretation

Amendment 93 not moved.

Amendments 170 and 171 moved—[Angela Constance]—and agreed to.

Section 69, as amended, agreed to

Section 70 agreed to.

Schedule 4—Minor and consequential modifications

Amendment 56 not moved.

Amendments 228 to 232 moved—[Angela Constance]—and agreed to.

Schedule 4, as amended, agreed to

Section 71—Commencement

Amendment 271 not moved.

Section 71 agreed to.

Section 72 agreed to

Long Title

Amendment 57, 134 and 58 not moved.

Amendment 59 moved—[Sharon Dowey]—and agreed to.

Long title, as amended, agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank everybody for the constructive way in which they have engaged with the debate and in our collective endeavours. I also thank the cabinet secretary, the minister and the officials for their contributions.

I close the meeting and wish everybody a happy Easter when it comes.

Meeting closed at 12:55.

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