OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 15 December 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 15 December 2020

CONTENTS

JUSTICE COMMITTEE
33rd Meeting 2020, Session 5

CONVENER

*Adam Tomkins (Glasgow) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Annabelle Ewing (Cowdenbeath) (SNP)
*John Finnie (Highlands and Islands) (Green)
*Rhoda Grant (Highlands and Islands) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Anne Cook (Scottish Government)
Patrick Down (Scottish Government)
Douglas Kerr (Scottish Government)
Katherine McGarvey (Scottish Government)
Rachel Nicholson (Scottish Government)
Graeme Waugh (Scottish Government)
Humza Yousaf (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Committee

Tuesday 15 December 2020

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Adam Tomkins): Good morning. Welcome to the 33rd meeting of the Justice Committee in 2020. We have no apologies this morning.

Agenda item 1 is to decide whether to take item 8 in private. If members agree, could they please indicate accordingly? No member disagrees, so that is agreed.

Domestic Abuse (Protection) (Scotland) Bill: Stage 1

10:00

The Convener: Item 2 is to begin our stage 1 consideration of the Domestic Abuse (Protection) (Scotland) Bill. I refer members to the relevant papers in our pack.

This morning, we will take evidence from the Scottish Government's bill team. To that end, I welcome our first panel of witnesses, who are all attending remotely. We have with us Patrick Down, criminal law and practice team leader; Anne Cook, head of social housing services; and, from the legal directorate, solicitors Katherine McGarvey and Rachel Nicholson. Welcome to all of you.

I intend to allow up to an hour for questions. If witnesses wish to respond to a question, they should press R in the BlueJeans chat box, and we will come to them.

Patrick Down, do you want to make an opening statement or should we launch straight into questions?

Patrick Down (Scottish Government): I thought that it would be useful to give a quick overview of what the bill does.

As I am sure that members will be aware, the bill contains two distinct topics. It provides for a new system of protective orders for people at risk of domestic abuse, and it provides landlords in the social rented sector with new powers to apply to a court to reassign a tenancy that is in the name of a perpetrator of domestic abuse to the victim of abuse.

I turn first to the protective orders scheme. The bill provides for a power for the police to make an emergency domestic abuse protection notice—DAPN—in cases where such a notice is necessary. The police can make a notice if they have "reasonable grounds for believing" that the suspected perpetrator has engaged in behaviour that is abusive of the person at risk, and that it is necessary to make a domestic abuse protected order—DAPO—for "the purpose of protecting" the person at risk from abusive behaviour by the suspected perpetrator. There is a requirement that it is necessary to make the DAPN to protect a person at risk before the sheriff can make an interim or full DAPO. Where that last test is not met, police can decide to apply to the court for a DAPO without having first made the DAPN, and there will be the option for the sheriff to make an interim DAPO, pending determination of that application.

The bill provides an exhaustive list of conditions that could be included in a DAPN, which could be used to remove a suspected perpetrator from a home that they share with the person at risk and prohibit them from contacting or approaching them. Where the police make the DAPN, they must apply to the court for a DAPO on

"the first court day after the day on which"

the DAPN is given. The sheriff must then

"hold a hearing in relation to the application not later than the first court day after the day on which the application is made".

There is a requirement for that hearing to be concluded

"on the day on which it begins",

but that does not preclude the sheriff from assigning further hearings in the proceedings. It is simply a means of ensuring that there is a clear point at which the DAPN ceases to have effect.

It might be helpful for me to briefly outline the options that are open to the sheriff at the hearing. They can grant the protective order, refuse the application, grant an interim order and set a date for a further hearing, or make no interim order but still set a date for a further hearing. The sheriff can make the DAPO if they are satisfied that the person against whom the order is sought has engaged in behaviour that is abusive of the person at risk and that it is necessary to make the order for the purpose of protecting that person from future abuse. The sheriff can impose any "requirements or prohibitions" that are necessary for the purpose of protecting the person at risk. The order can run for a maximum of two months, which is capable of being extended on application to the court for one further month. That is in contrast with longer-term civil orders such as non-harassment orders and exclusion orders and reflects the fact that DAPOs are intended to be a short-term, emergency measure. Breach of a DAPO is a criminal offence, punishable on conviction on indictment with a sentence of up to five years' imprisonment and a fine.

Briefly, part 2 of the bill creates a new ground on which a landlord can apply to the court to end the tenancy of a perpetrator of domestic abuse, with a view to transferring it to the victim of that abuse. It applies in cases in which the perpetrator is a Scottish secure tenant and the victim is married to, in a civil partnership with or cohabiting with the tenant, and it will make it easier for a local authority or registered social landlord to transfer a tenancy to a victim of domestic abuse. Those provisions will help to improve immediate and longer-term housing outcomes for domestic abuse victims who are living in shared social housing and who wish to continue living in that family home, and they will help to avoid homelessness.

We will be happy to take questions from committee members. It might be helpful to add that Katherine McGarvey and I lead on the domestic abuse protection orders provisions, and Anne Cook and Rachel Nicholson lead on the social rented tenancy provisions.

The Convener: That is very helpful—especially your last comments, which enable committee members to know to whom they should direct their questions.

My first question is for you and is about domestic abuse protection notices. The committee has received a range of written evidence about that aspect of the bill. A range of organisations are supportive of what is outlined, but some quite serious reservations have been expressed by the Sheriffs Association, the Summary Sheriffs Association and the Law Society of Scotland, which have raised concerns about the concept of the domestic abuse protection notice and, in particular, about the test that must be met under the relevant section of the bill before a notice can be imposed. As I understand it, that is simply that a senior police officer has "reasonable grounds" for suspicion.

What sort of level of evidence must be available to the police before they can issue such a notice, and can you assure the committee that the operation of the test will be compatible with relevant rights under the European convention on human rights?

Patrick Down: First, I must clarify that the test is that the police officer who makes the notice must have "reasonable grounds for believing" that the suspected perpetrator has engaged in behaviour that is abusive of the person at risk and that it is necessary to make the order. I make that distinction because we think that "reasonable grounds for believing" is a slightly stricter test than that of having reasonable grounds to suspect. Obviously, the police, like all public authorities, are obliged to act in compliance with the European convention on human rights.

I would not like to try to give an exhaustive set of examples of what would or would not constitute "reasonable grounds for believing" in any given case. The test of having reasonable grounds to suspect is, I think, the one that the police would use in deciding whether they can arrest somebody on suspicion of committing an offence. We are talking about similar sorts of circumstances in that, for example, they might have received a report about abuse, there might be eyewitnesses, or the person who is reporting the abuse might have complained of abuse on other occasions.

I invite my colleague Katherine McGarvey to add to that answer.

Katherine McGarvey (Scottish Government): I agree with what Patrick Down has said about "reasonable grounds for believing". Belief is a slightly higher threshold than suspicion. It is essentially a matter of degree, but the test of "reasonable grounds for believing" is slightly higher than that of having reasonable grounds for suspecting.

In essence, there are two elements to the test. The senior constable who is making the decision has to hold a genuine belief; and there must be reasonable grounds for that belief. The "reasonable grounds" part of it imports an element of objectivity into the test. That is important because it means that the officer who is imposing the notice cannot act simply on their subjective belief; they have to have grounds that can essentially hold up to scrutiny.

You asked about ensuring that domestic abuse protection notices are compliant with convention rights. We acknowledge that article 6 of the European convention on human rights is engaged with here. In making a decision to impose a notice, an officer is not acting as a court of law. Convention jurisprudence recognises that, in some exceptional circumstances where the object of any given measure requires efficient and quick decision making, not all the protections in article 6 can be afforded in the timeframe if the objective might be undermined. In this case, the objective is to provide immediate and enforceable protection for the person who is at risk, hence the ability of the police to impose a domestic abuse protection notice.

However, I echo Patrick Down's point that "reasonable grounds for believing" is a test that would be commonly employed by the police. As I mentioned earlier, it contains an objective element, which is important.

The Convener: Thank you for clarifying that we are talking about "reasonable grounds for believing", rather than reasonable grounds for suspicion. That is helpful.

What should a police officer do in the event that they believe that allegations have been made maliciously? How would a police officer know whether the allegations on the basis of which it is necessary to serve a domestic abuse protection notice have been made in good faith or maliciously?

Patrick Down: My observation is that the police inevitably encounter that scenario at the moment when they receive reports of allegations of domestic abuse. When the police attend a domestic abuse incident, they have to consider whether there is sufficient evidence that a criminal offence may have been committed. There will be occasions when, for whatever reason, they are not persuaded of that. I do not think that the option to make a domestic abuse protection notice changes that.

At the moment, the police will go to domestic abuse incidents where they will receive allegations and counter-allegations. Two individuals may both claim to have been the victim, rather than the perpetrator, of a domestic abuse criminal offence. That will continue to be the case under the new scheme. The police have to decide whether there are reasonable grounds to believe that either of those individuals has been subjected to abusive behaviour and whether it would be necessary to make a domestic abuse protection notice to protect the individuals from domestic abuse.

John Finnie (Highlands and Islands) (Green): I am interested in this line of questioning. I want to know, not least as a former police officer, how would that work in practice? I should declare at the outset that I am a member of the cross-party group on men's violence against women and children and I am involved with the white ribbon campaign.

I am trying to imagine a situation in which officers are called to a location in a landward part of the extensive region that I represent, the Highlands and Islands. You have touched on the issue of counter-allegations. What will happen in such a situation? If a police officer has reasonable grounds to believe that someone is at risk, and an individual is arrested, what will be different from what happens at the moment?

10:15

Patrick Down: It will be another option that the police have. I am aware that the police's written evidence outlines the various means by which provision can be put in place to protect a person who is at risk where someone has been charged with a criminal offence. If, in any given case, the police suspect that a criminal offence might have been committed but are not persuaded that there is sufficient evidence to charge the person with an offence, the police will have the option of making a protection notice. The same will apply in a case where the police initially charge someone and report to the Crown Office, and later in the process the Crown decides to mark the case for no further proceedings. If the police believe that a person is still at risk and that there are reasonable grounds to suspect that the suspected perpetrator has committed domestic abuse against that person, the police will have the option of making a protection notice to ensure that protection is put in place for the person who is at risk.

John Finnie: That suggests a civil degree of proof rather than a criminal degree of proof, which

would follow on from someone being arrested. Is that correct?

Patrick Down: Yes. That is our understanding of the test. I will give Katie McGarvey an opportunity to come in.

Katherine McGarvey: Yes, that is correct. The orders are civil orders and will use the civil standard of proof, which is the balance of probabilities.

John Finnie: Thank you for that, but I am still trying to understand what will happen on the ground when officers attend the scene. The suggestion is that the provision is an additional string to the bow in dealing with domestic violence, which everyone would applaud on one level. In an instance where there are reasonable grounds to believe that an accusation and indeed a counter-accusation have some credibility, what is the timeframe for all that decision making, bearing in mind that it is unlikely that an inspector will be in attendance? It is all very well for us to see how it looks on paper, but I am interested in how it will work in practice. What timeframe are we talking about?

Patrick Down: That will inevitably depend on exactly how Police Scotland chooses to make use of the powers and on the mechanism that it puts in place for officers on the ground who suspect that domestic abuse has occurred and believe that a protection notice and order would be appropriate. It will depend on the mechanisms that Police Scotland has for clearing the decision with an inspector, as that is the level at which the decision will be required to be made.

Similar powers have existed in England and Wales for about six years, where there are domestic violence protection notices and orders, which are made in considerable numbers each year. The bill provides a certain degree of flexibility as to the exact mechanism that the police put in place for decision making on the measures, provided that the decision is made by somebody at inspector level or above.

John Finnie: Thank you. I still have questions about that, as I think that there will be operational challenges connected with it.

The Convener: Thank you, John. That was a helpful line of questioning that we will want to take up with later witnesses.

Before I move on to Fulton MacGregor, I have a question for Patrick Down and Katie McGarvey. What will happen if someone who is made the subject of a domestic abuse protection notice is on home detention release or is wearing an electronic tag that requires them to remain at home? Does the DAPN have the authority to release the individual from the requirements of wearing an electronic tag or being in a certain place at a certain time? How do the provisions interact with other elements of the criminal justice system that we already have in place?

Patrick Down: I have to admit that we will have to come back to the committee on that in writing, unless Katie McGarvey wants to come in. Of course, the police would be able to consider that matter in deciding whether to make a DAPN.

Katherine McGarvey: That is probably something that it would be worth coming back to the committee on in writing. I agree with Patrick Down that it is likely to be something that the police would take into consideration when deciding whether to impose a notice. Given that the person would be required to stay in their home, it might not be appropriate to impose a notice. It is an issue on which it would be worth us writing to the committee.

The Convener: The committee is taking evidence on the bill from a range of stakeholders a week today. We would like to have your written submissions on the issues before then, so that we can put those points to stakeholders. I think that that will be our last opportunity to do so, because of the timetable that we are working to in order to meet the Government's legislative ambitions. We would be very grateful if you would turn that around as soon as possible.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning. My line of questioning is similar to John Finnie's, on decision making. Police Scotland has suggested to the committee that enabling the police to issue a domestic abuse protection notice without the usual multi-agency involvement in decision making might not be a positive feature of the bill. What does the Government think of that concern? Is it valid, and what proposals are in place to address it?

Patrick Down: The bill does not specify the decision-making process that the police must follow. If the police are of the view that, in a given case, the most appropriate mechanism for deciding whether to make a DAPN is to go through a multi-agency process and to take account of the views of third sector support groups or the local authority social work department, for example, the bill will not prevent them from doing that.

However, the bill gives the police the flexibility to make a protection notice in an emergency, without first having to go through a multi-agency decision-making process, if they consider that the need to make a decision at speed outweighs the need for a multi-agency process. There will be cases in which, for example, the suspected perpetrator and the person who is at risk will be well known to the police and other agencies, and the police might

also be called to incidents in which they consider that a person is at serious risk of abuse, so the need to put measures in place instantly outweighs the need to take the views of agency partners.

I do not think that there is anything in the bill that seeks to undermine the idea that the police would work on a multi-agency basis in domestic abuse cases.

Fulton MacGregor: I understand the need for flexibility. The situations that you described allude to that well, but the police are saying that the matter causes a wee bit of concern, so are you not concerned that it would be the police who would decide whether to deal with the notice themselves or take a multi-agency approach? Could not something be done that would still allow flexibility? Guidance could be put in place about when that would be a police decision and when it needs to be a multi-agency decision. It strikes me that if the police are concerned about that aspect of the bill, it is definitely worth looking at.

Patrick Down: That is an operational matter that you might want to consider in detail when the bill is passed and is being implemented, by working closely with the police and other relevant parties to agree a full process for how the protection notices and orders in the bill will be used in practice.

You might want to put the question to the cabinet secretary when he gives evidence. However, it would not necessarily be helpful to specify that in great detail in the bill—not least because doing so would risk losing flexibility and would offer less scope to adjust processes, reflect on lessons learned and improve processes in the light of experience, once the protection notice and protection order scheme is effected.

Fulton MacGregor: That was really helpful. Thank you.

The Convener: Rona Mackay has a supplementary question, after which Shona Robison will ask questions.

Rona Mackay (Strathkelvin and Bearsden) (SNP): If the police decided not to apply for a protection order and there was then a subsequent abuse incident, would the victim have any recourse? What would the outcome be?

Patrick Down: Clearly, as is the case at the moment, the police will be able to attend an incident that is reported to them and decide whether to arrest the suspected perpetrator on the basis of the evidence that is available to them. If a decision is made not to arrest, a subsequent report might be made, at which point the police might decide to arrest.

The same will be true under the bill's provisions. If, after an incident for which the police had decided not to make a protection notice or to apply to the court for a protection order, a further incident were to occur, they might wish to revisit that decision.

Shona Robison (Dundee City East) (SNP): In the process that is set out in the bill, a DAPN can, as you know, last for as few as two days, depending on where the weekend or a public holiday falls. A DAPN must also last until the court reaches a decision on imposition of a DAPO or an interim DAPO.

You will be aware of the arguments around that issue. One argument is that two days is not long enough to prepare a case for a court order. Conversely, if DAPNs in practice typically last much longer because of the pressure of court business, for example, there is an argument that appeal rights against such notices might, for the benefit of suspected perpetrators, need to be built into the process. I would like to hear your comments on those views, and whether you think that there is merit in the concerns that are being raised on both sides. Patrick Down would probably be the best person to respond to that.

Patrick Down: I accept all those arguments. There is inevitably a trade-off to be made. There is a balance to be struck between, on one hand, ensuring that such a decision by a police officer—to bar from their own home a person who has not necessarily been charged with a criminal offence—is subject to review by a court within a reasonable time and, on the other hand, the need to build into the process enough time for a case to be prepared by the police for a decision by the court.

The bill's approach, in an attempt to strike that balance, is explicitly to provide power for the court to make an interim order in a case in which it is decided that further evidence or investigation is required before a decision is made on a full order. An interim order could run for up to three weeks. The result of that is that there will be early oversight by the court of the police's initial decision and, in cases in which it is necessary, scope for the sheriff to allow more time for further evidence to be prepared before a final decision is made on whether to grant the order.

Shona Robison: On that basis, obviously you consider the balance to be about right, but do you think that, for that reason, there will, in practice, be a high level of use of interim orders?

10:30

Patrick Down: That is certainly possible. When we were preparing the bill, I spoke to colleagues in police forces in England and Wales, who said that, there, a decision on the final order is usually made at the first hearing. A different approach might be

taken here; the sheriff courts might prefer to rely more on interim orders.

The Convener: I will go back to Rona Mackay to pick up questions on protection orders.

Rona Mackay: Thanks, convener. I will follow up on Shona Robison's line of questioning. What is your response to organisations that say that the proposed maximum three months for a DAPO is too short?

Patrick Down: I feel that I am repeating myself, but that is yet another issue on which it is fair to say a balance must be struck. In this case it is between protecting the rights of a suspected perpetrator, who might have been barred from their own home, and providing the person who is at risk with sufficient time to address their longer-term safety.

It is worth noting that where the person who is at risk wants to take out an interdict, a non-harassment order or an exclusion order, although there might be cases in which a final decision—particularly on an exclusion order—might not be made within two or three months, the courts have the power to make an interim order. For the majority of cases, I expect that two to three months will be sufficient for the person at risk to have taken steps to address their longer-term situation and safety.

Rona Mackay: Given that it is a relatively short-term measure, the other system of civil protective orders and complex measures to which people have recourse will remain. Will that mean that reform of the wider system of civil protective orders for domestic abuse might have to be considered in the next parliamentary session? Would the bill extend to allegations of stalking—could a victim apply for a protection order in such circumstances?

Patrick Down: I will answer the second question first. The bill is restricted to cases in which the suspected perpetrator and the person at risk are either partners or ex-partners, so it would cover stalking only when it is being carried out by—I presume—an ex-partner, because I do not think that it is meaningful to talk about stalking by a current partner. However, it is there; the bill would cover that—

Rona Mackay: I want to clarify that. Would the bill cover that?

Patrick Down: Yes—it would cover stalking by an ex-partner, because it is a form of abuse.

Rona Mackay: What about the case of an abuser who is living in the home and leaves temporarily? If a protection order is taken out against that person and he stalks the person at risk, would that be enough to create an offence?

Patrick Down: Yes. If a suspected perpetrator is ordered to leave the home and then stalks the person at risk, such as by sending unwanted or abusive communications or by telephoning them, the bill contains a power to make provision prohibiting their doing that. Breach of a provision in a domestic abuse protection order is a criminal offence. Therefore, the answer is yes.

To come back to your question about the wider system of civil protective orders, I have some notes on that, because civil law colleagues have provided me with information.

I will find them in a moment—this is the downside of doing everything from home, using small print. I am sorry, I cannot find the information—

Rona Mackay: You can get back to us in writing on that.

Patrick Down: I know that the Scottish Law Commission is undertaking a wider review of civil protective orders, so that could well form part of the work that is done in the next session of Parliament. I have already committed to getting back to the committee on one point, so we can certainly add more information on civil protective orders.

Rona Mackay: I would like to move on to consent of the victim. In our call for evidence, 28 per cent of respondents thought that consent should be required and 46 per cent thought that that is not necessary. Scottish Women's Aid feels strongly that the victim should be asked to consent. That relates to the victim not having control if they are not asked to consent. What is your view on consent?

Patrick Down: I think that it is fair to say that, in the vast majority of instances, protective notices and orders are far more likely to be effective if the person at risk supports them and consents to their being made. Clearly, if they impose conditions on a suspected perpetrator, that is likely to be effective only if the person at risk feels comfortable reporting a breach to the police and wishes to do so.

However, there could be exceptional cases in which the police believe either that the person at risk wants an order to be made but does not want to be seen to be consenting, because of fear of how the suspected perpetrator might react to that, or that the degree of coercive control that is being exerted is so great that the person at risk might not appreciate the level of danger that they are in. We think, therefore, that there is a case for not making it an absolute requirement that there be consent in all cases.

However, I accept—particularly with regard to protection orders, as opposed to protection

notices—that this is a finely balanced issue, and that an argument can be made either way.

Liam Kerr (North East Scotland) (Con): Good morning. I have a question on a similar line. The majority of respondents to the consultation thought that, when a notice or an order is made, the person at risk should be referred to support services. However, the Scottish Government has not taken that forward. Why not?

Patrick Down: That is about whether the matter should be placed in legislation as a statutory duty, or left as an operational matter for the police to decide on in each individual case. When the police respond to a domestic abuse incident, they routinely provide the complainer with information on how to seek help from appropriate third sector support bodies. I expect that they would do exactly the same thing in making a domestic abuse protection notice or applying for a domestic abuse protection order.

The question, therefore, is whether it is appropriate to place on the police a statutory duty to provide that information in every case. We must bear it in mind that there could be exceptional cases in which the person at risk does not want to be referred. There are also, potentially, data protection issues involved in passing information to a third party without the agreement of the person at risk. Therefore, we think that that is best left as an operational matter for the police to decide on, in individual cases.

We have seen no evidence that the police are failing to make complainers in criminal domestic abuse cases aware of the support that is available to them; I think that that approach will continue to apply in cases in which they make protective notices or orders.

The Convener: Liam McArthur has a supplementary on that, then Annabelle Ewing will be next.

Liam McArthur (Orkney Islands) (LD): Good morning. I will follow up Liam Kerr's line of questioning. I understand the reticence about putting in the bill a statutory provision on referral of victims to support services, particularly given there is not a great deal of evidence that the police do not make people aware of support. However, I wonder whether there might be a case for some form of presumption whereby if a referral is not made, there would, at least, be a requirement to explain the rationale for that. That would provide a check, notwithstanding the reassurances that Patrick Down has provided about there not being a great deal of evidence that the police do not make people aware of support.

Patrick Down: In relation to amending the bill in that way, that might be a question that you could put to the cabinet secretary when he gives evidence in January.

The Convener: I am sure that he will be grateful for that. Thank you. Annabelle Ewing will pick up on that line of questioning, then Rhoda Grant will be next.

Annabelle Ewing (Cowdenbeath) (SNP): Looking at the bill's scope as far as the notices are concerned and particularly the issue of who can be the perpetrator in terms of the relationship with the victim, the bill as drafted deals with intimate relationships and not wider intrafamilial relationships. Can Patrick Down provide clarity as to the rationale for that approach?

Patrick Down: Yes. It is broadly in line with the approach that we took in the Domestic Abuse (Scotland) Act 2018 and recognises that intimate relationships can involve particular imbalances of power. We think that the forms of coercive and controlling behaviour by an intimate partner can be of a particular kind that merits taking a separate approach for domestic abuse.

In the longer term, there might be a case for considering whether other situations—for example, those involving intrafamilial abuse, stalking by acquaintances or strangers, or abuse by people sharing a house in multiple occupation—could be dealt with in future legislation. However, the definition of abuse in the bill, which is closely modelled on the definition of domestic abuse in the 2018 act, is specifically designed around the kind of abuse that can occur in intimate personal relationships. We found that it would not necessarily be a good idea to divert the understanding of what domestic abuse is by providing a general power that would apply in domestic abuse cases and other cases where somebody could be experiencing harassment or abuse by family members, friends or acquaintances.

Annabelle Ewing: Thank you for that clarification. I have a supplementary on that question and then a separate question. Notwithstanding what Patrick Down said would be the policy rationale, in his view would there be any technical problems from a legal or drafting perspective in trying to widen the approach beyond the broad one of the 2018 act?

Patrick Down: If that is ultimately a question about whether amendments to the bill would be within scope, I am not sure that I am qualified to comment on that. It is a sort of legal parliamentary question. I do not know whether my colleague Katie McGarvey wants to comment on that or whether it is for the Parliament to decide what it thinks the scope of the bill is.

Katherine McGarvey: I cannot give a definitive statement on that, I am afraid. I think that it would

be for the Parliament to decide whether that was within the scope of the bill. I cannot say definitively at this stage whether it would be.

Annabelle Ewing: The point about the bill's scope is interesting, but I was also thinking about the operational efficiency of what it proposes. Having heard the debate that we have already had this morning, it seems to me that the bill is justified in trying to deal with certain issues. If we were to seek to widen its scope too much, we might lose some justification for what it seeks to do. However, I guess that we will return to that issue.

The other area that I want to consider concerns the age thresholds. Whereas a perpetrator must be aged 18 or over for an order to be issued, the victim requires to be aged only 16. Could Patrick Down or Katie McGarvey indicate why that approach was adopted?

10:45

Patrick Down: The reason for having slightly different thresholds is that we did not think that it would be appropriate for the power to be used to require the removal of someone who is legally a child from their home. We have therefore set the age limit for the suspected perpetrator at 18. However, we recognise that a small number of 16 or 17-year-olds might live with abusive older partners. In such cases, we think it appropriate that the power should exist to provide protection for them. I expect that that would come into play in only a small number of cases. If we were to be asked why the limit had been set at 16, we would say that that is the minimum age for marriage. It is unlikely that someone aged under 16 would be living with a partner or ex-partner, but in such cases other child protection measures might be more appropriate—for example, the power to refer cases to the children's reporter.

Annabelle Ewing: Just for clarity, would the child protection angle deal with a perpetrator who was aged between 16 and 18?

Patrick Down: Potentially, yes—but I add the caveat that the number of 16 and 17-year-olds living together independently as partners is probably vanishingly small.

Rhoda Grant (Highlands and Islands) (Lab): The protection notice will give protection to children, but it will not take in other people such as other family members. Why was that decision taken? As we know, family members can be on the receiving end of domestic abuse if the abuser cannot access the person whom they would normally target.

Patrick Down: It is important to remember that the protection notice is a short-term one that is not subject to any oversight by the court. It puts in place a minimum set of conditions that we think are necessary to protect a person who is at risk, in the short term, before a court can consider whether to make a full or an interim domestic abuse protection order. At that point it would be open to the court to impose any condition that it considered necessary to protect the person at risk from abuse. In appropriate cases, where it considered it both necessary and proportionate, the court could include, for example, a condition not to approach or contact other members of the family of the person at risk or their friends or acquaintances. The court might do so in a case in which it was known that the suspected perpetrator might otherwise pursue such a course of action.

Rhoda Grant: It is widely understood that the most dangerous point in a domestic abuse situation is when the relationship breaks up. If a notice were to be put in place then, I fear that that could be at a time when the whole situation is volatile. Is thought being given to that, and is there an opportunity to change it to involve other family members, given that we are talking about a very short time?

Patrick Down: If the committee were to recommend an amendment to widen the powers in section 5(1), which sets out the conditions that can be imposed by a domestic abuse protection notice, I am sure that the cabinet secretary and the Scottish ministers would be interested in considering that.

Rhoda Grant: Would the notice and the order take precedence over other court orders that might be in place, such as for shared custody of children or access to children? We all know of cases in which abusive partners have access to children and, indeed, use them to perpetrate abuse. Would a victim of domestic abuse still have to hand over children to an abuser when a protection notice or order was in place?

Patrick Down: It is our understanding that the conditions imposed in any domestic abuse protection notice or protection order would override any pre-existing court order. Clearly, it would be in the interests of the person against whom the order is made, if they want to maintain child contact, to make the court aware of the existence of that order at the point when the application for a DAPO is being considered by the court. It would be for the court to decide whether it was proportionate to include conditions prohibiting the suspected perpetrator from contacting the children.

Rhoda Grant: Would that be the case with the notice, given that the matter would not have gone to court and that it would be a short-term intervention? Would that take precedence over custody or access arrangements that a court had

put in place? Could the police override a court decision in the short term with a notice?

Patrick Down: I will give my colleague Katie McGarvey a chance to come in to contradict me if she thinks otherwise, but I think that the police domestic abuse protection notice would override any pre-existing court order for the relatively short period of time for which it is in effect.

Rhoda Grant: I am just waiting to see whether Katie McGarvey will contradict you.

Katherine McGarvey: Yes, I would like to come in—not to contradict Patrick Down, but just to add a point of clarification. It is not so much that we are saying that a police protection notice or a domestic abuse protection order would overturn another court decision; it is simply a fact that the effect of a notice or order will be such that they place prohibitions on person A, who is subject to a criminal offence if in breach of those prohibitions. In effect, there is nothing to prevent the police or courts from imposing prohibitions on contacting a particular child, even if there is some form of contact order in place, and the effect of that is that, if a person breaches a notice or order, they will be subject to a criminal offence.

That is the rationale behind our saying that, in effect, the notices and orders take precedence. In essence, person A would not be able to have that contact while a notice or order was in place. However, as Patrick mentioned, it would be open to parties to draw to the court's attention any outstanding orders that they wanted the court to take into consideration before imposing a protection order.

Rhoda Grant: Given that the orders are time limited, would there be time to allow a victim of domestic abuse to go back to the courts to change custody arrangements? It would obviously allow time for harassment orders and the like to be taken out, but would the family courts be able to react in time to changes to custody if an order was in place?

Patrick Down: We may have to come back to you in writing on that point.

Rhoda Grant: That would be useful.

I have a final question. Given that both the notice and the order will have regard to the risk to children, will there be an opportunity for a child to have a notice or an order taken out in their own right?

Patrick Down: No. The bill is specifically limited to partners and ex-partners. A domestic abuse protection notice can, for the purpose of protecting a person who is at risk, prohibit contact with children. Likewise, a domestic abuse protection order can do that, but it is made to protect a partner or ex-partner from the risk of abuse. A separate domestic abuse protection order would not be taken out to protect a child. Does that make sense?

Rhoda Grant: It makes sense, but it does not recognise the damage that domestic abuse can cause to a child. However, I think that that is a policy issue rather than an issue of fact.

The Convener: Liam Kerr has questions on the criminal offences.

Liam Kerr: As the convener says, I would like to ask about the criminal offences when a notice or an order is breached. I am looking specifically at sections 7 and 16. A breach of a notice or an order without a "reasonable excuse" would be a criminal offence. What is a "reasonable excuse"?

Patrick Down: That would inevitably depend on the facts and circumstances of the particular case, but one of the conditions that may be imposed in a domestic abuse protection notice is that the perpetrator must not contact or approach the person at risk. In any given case, there could be exceptional circumstances where it might be necessary for the perpetrator to contact the person at risk. I would not like to speculate as to what they might be but if, for example, there were children in the custody of the suspected perpetrator for whatever reason—I dare say that that would be unusual—and there was an emergency, it is possible that there could be reasons why it would be necessary for the suspected perpetrator to contact the person at risk.

Likewise, on the bar on approaching, there could be exceptional circumstances, perhaps where the people happened to be in the same place at the same time even though they did not expect to be. It would be a matter for a court to decide in any given case whether there was a reasonable excuse for breach of the conditions. I would not like to try to exhaustively list the possible or hypothetical cases where that could come up.

Liam Kerr: That feels rather subjective. It is unlike the answer that you gave the convener at the start of your evidence when you said that "reasonable grounds" are objective. That is particularly important when the criminal penalty is potentially severe. It also begs another question. I understand that the breach of an order or a notice is not a criminal offence in England and Wales. Why are we proposing a different course of action in Scotland?

Patrick Down: It might be helpful if I clarify that, in England and Wales, breach of a notice is not a criminal offence, but breach of an order is a criminal offence. They, too, have a condition that it is an offence if it is done without a "reasonable excuse". I think that there is actually very similar

provision in the equivalent law on breach of non-harassment orders and the conditions in them—it is a fairly standard approach.

On the reason why we have made breach of a domestic abuse protection notice a criminal offence, I note that the alternative approach that has been taken in England and Wales is, in effect, to provide the police with a power to arrest the perpetrator and hold them until a hearing can be held on an order. However, the view of the consultation respondents was that that was a much less effective deterrent than making the breach of a domestic abuse protection notice in itself a criminal offence.

11:00

Liam Kerr: My final question is on a slightly different topic. It is about section 8, under which the police, but not other organisations or individuals, can apply for an order. Responses to the consultation suggested that it might be appropriate to widen that provision. I believe that in England and Wales it is proposed that a wider category of people can apply. Why did the Scottish Government not agree?

Patrick Down: It comes down to the fact that the police, in so far as they are responsible for criminal investigations into domestic abuse, often have the most substantive evidence that abuse has taken place. In the case of criminal offences, they will be well used to tests relating to the thresholds around what are potentially sufficient grounds to take a criminal prosecution. They will also be aware of whether any criminal prosecution is on-going; therefore, there is not the same risk that any application for a protection order could override or conflict with a criminal investigation in any way. That is not to say that there is absolutely no case for potentially extending the provision to other organisations; however, on balance, we think that the best approach is to encourage the police to work with the other organisations, such as social work or third sector domestic abuse support organisations, to agree a protocol by which the organisations can report any concerns to the police, such that the police act as a central point in deciding whether to make an application for a domestic abuse protection order.

The Convener: John Finnie will ask questions about that aspect of the bill and the powers in relation to social landlords. Mr Finnie, you might like to ask those questions of different witnesses, but it is over to you.

John Finnie: I will direct my first question to Mr Down. There are existing protective powers, and the policy memorandum talks about the intention for the bill to "complement rather than replace" those powers. The existing non-harassment order can only keep a perpetrator away from a home that they have already left; it cannot remove them from a home that they have a legal right to occupy. Under section 8, a civil court, but not a criminal court, can grant a DAPO. Why does the Scottish Government propose to restrict the power to grant an order to a civil court? Would that not be a useful addition to criminal courts' powers?

Patrick Down: We sought views on that matter in the consultation, and it is fair to say that there were mixed views on whether it would be helpful to allow the courts to impose a DAPO on conviction. However, the organisations that work most closely with victims of domestic abuse, particularly Scottish Women's Aid, were of the view that it would not be helpful, due to the long-established precedent that, in criminal cases, non-harassment orders are widely used to keep a perpetrator away from a home.

I suspect that, in practice, that is because in a criminal domestic abuse case the perpetrator will probably have already left the home. The organisations' view was that, because there is a time limit on domestic abuse protection orders, it might reduce the use of non-harassment orders; in the context of a perpetrator having been convicted and left the home, their view was that non-harassment orders, for which there is not the same time limit, are the more effective route. For that reason, we have not provided a power for criminal courts to impose DAPOs.

John Finnie: Would there be an opportunity in the circumstances in which someone appears from custody? The relationship between the civil and criminal courts and the levels of protection that are provided to victims vary. However, if someone were to appear from custody, surely that would be a worthwhile addition to the armoury of the sentencing judge in a criminal court.

Patrick Down: Are we talking about the point at which someone who is being held in custody is being sentenced or the point at which a decision is being made about whether to grant bail pending a criminal trial, for example?

John Finnie: I was thinking of circumstances in which someone has been arrested—I appreciate that that is perhaps less likely nowadays—kept in custody because of the likelihood of reoffending, and appears in court the next lawful day.

Patrick Down: Our view is that the powers that the police have to make a domestic abuse protection order at the point at which the court decided to release a person from custody would be more appropriate. However, in any case, it would be open to the court to impose bail conditions that would prohibit them from contacting or approaching the complainer in the criminal case. In those cases, the police and the

courts already have powers to prevent a suspected perpetrator from approaching a complainer in a criminal case pending the trial.

John Finnie: Okay. Thank you very much. Maybe we will probe that further with the minister.

I have questions about housing for Ms Cook or Ms Nicholson. My first question is perhaps for Ms Cook. If the perpetrator is the sole tenant in a property and the person at risk is another occupier, section 18 does not allow the court to authorise the transfer of the tenancy from the existing tenant to the person at risk as a new tenant. After the court order is obtained, the social landlord must take the further legal step of creating a new tenancy for the person that they wish to remain in the property. If the court had been able to order the transfer of the tenancy, would that not have allowed for a more seamless process for the person at risk?

Anne Cook (Scottish Government): [*Inaudible*.]

John Finnie: I am sorry, Ms Cook, but I cannot hear you.

Anne Cook: Sorry. Is that better?

John Finnie: Yes. Thank you.

Anne Cook: I am sorry—I am using an iPad.

The point is that the court cannot order a transfer of tenancy; it is the social housing landlord who would offer the resulting tenancy to the victim. The contract is between the landlord and the person to whom they offer the tenancy. That is why we kept the bill like that. The landlord would offer the tenancy after the perpetrator has been ejected and a court decree has been obtained.

I am not sure whether Rachel Nicholson has a view on that.

Rachel Nicholson (Scottish Government): Good morning, committee. I simply add that one of the grounds that must be met in order for the landlord to complete the process is that the victim or survivor wishes to continue to live in the property. I do not know whether that helps to clarify the position.

John Finnie: Was the rationale behind that not to disenfranchise the landlord in relation to their rights? The process would seem to be seamless if the court could simply do away with the resulting administration.

Anne Cook: Perhaps we could revisit that and come back to the committee on it. Our understanding is that it is the landlord who has to offer the tenancy, as there is a contract agreement between the landlord and the tenant through the Scottish secure tenancy agreement. I am not sure whether a court could set up such a contract.

John Finnie: Okay. We will maybe hear back from you on that and on the issue of reasonableness, if you can provide some clarity on that.

Section 18 covers only social landlords. What does the Government propose for a person who is at risk and who lives in a private home or some other form of dwelling that is not covered? I am thinking in particular about the Gypsy Traveller community and the significant challenges that are associated with accommodation for them.

Anne Cook: The provisions will not apply to the private sector or to Gypsy Traveller communities. They will apply only to tenants who have a Scottish secure tenancy—that is, a tenancy with a registered social landlord or local authority. The provision is all part of the work of the homelessness and rough sleeping action group and the work of the Chartered Institute of Housing and Scottish Women's Aid-led committee on improving housing outcomes for people who are subject to domestic abuse. That group's immediate work focused on the social housing sector.

There has been quite a campaign from the Chartered Institute of Housing and social landlords, who are keen to have the provisions in the bill so that they can be more proactive in supporting victims of domestic abuse who have tenancies with them. The group will now look at the opportunities and issues in the private rented sector. The group will give that issue due consideration and will consult on it to see what protections could be applied in that sector, where the scale of the issue is very different. There are 185 social landlords and approximately 245,000 private sector landlords, so that is a much more difficult issue. The decision was therefore taken that the bill would cover the social housing side, but that there would be on-going work on what similar protections could be applied in the private sector.

John Finnie: Of course, the vile thing that is domestic violence does not know any social boundaries and takes place in all social sectors. Is there any indication of a timeframe for that work? We certainly do not want to give the impression that the level of protection that someone has relates to the type of accommodation that they live in.

Anne Cook: Indeed. It is appreciated that domestic abuse happens across all sectors, including the owner-occupied sector. However, I understand that work on that is about to start shortly.

John Finnie: Could you write to the committee with any further information on timeframes and the scope of that work, particularly with regard to

those who are not covered in the private rented sector as well as the challenge of dealing with domestic violence in the Gypsy Traveller community?

Anne Cook: I will do that.

John Finnie: Thank you.

The Convener: Liam Kerr has a supplementary question, and so do I.

Liam Kerr: It is a brief question on something that has occurred to me. I believe that a notice or order will have legal effect only in Scotland. Therefore, if I was subject to an order, I could do something in England that was banned in Scotland, but that would not constitute an offence. My understanding is that, under the Domestic Abuse Bill in England and Wales, any notices or orders would have cross-border legal effect. If my premise is correct, will you explain why there is a difference?

Patrick Down: It might be helpful if I first give a bit more detail on the rules on jurisdiction. You are right that it would not be an offence for somebody to breach an order while in England and Wales or outside the UK. However, the rules on jurisdiction are such that, if somebody decided to travel across the border to England and start sending abusive messages or to repeatedly phone the person who is protected by the order from another location—it could be England or anywhere else—that would be considered to be within the jurisdiction of Scotland, based on where the person who is being protected by the order is at the time.

On whether it would be helpful as a matter of Scots law to provide that breach of a protective order in England and Wales is an offence under Scots law, that is open to question, although I understand that something similar is being done in the English bill. We are talking about short-term orders that apply for a maximum of three months and which are principally intended to protect the person who is at risk in their home and to remove a suspected perpetrator from their home.

11:15

My understanding of the English and Welsh bill is that it is intended not only to replace their existing domestic violence protection orders, but to act as a replacement for occupation orders and non-molestation orders, which are longer-term orders, in so far as they relate to domestic abuse cases in England and Wales. With those longer-term orders, there is perhaps a stronger case for having cross-UK jurisdiction, albeit that it is worth noting that, in order for the police to arrange for someone to be arrested for breach outside Scotland, they would have to get a warrant from a court. It could be quite difficult for the police to act immediately on the breach of a protection order that occurs outside Scotland, but that is an issue that we could consider.

The Convener: I have a final question, which I have been puzzling away at since the beginning of our conversation this morning. It goes back to the issue of the circumstances in which the police would want to make a domestic abuse protection notice. Given that, for a domestic abuse protection notice to be lawfully made, a senior constable must reasonably believe that a person has engaged in behaviour that is abusive—such behaviour is a criminal offence under the Domestic Abuse (Scotland) Act 2018—in what circumstances would the police want to make a domestic abuse protection notice rather than arrest somebody on suspicion of committing a criminal offence that the Parliament passed into law a couple of years ago? I do not know that I quite understand the relation between the notice-making provisions in the bill and the substantive criminal offences, which already exist.

Patrick Down: I will give a couple of examples. First, domestic abuse protection notices and orders are civil orders, so the test is the balance of probabilities. There could be cases in which the police reasonably believe that somebody has—to be blunt—committed an offence of domestic abuse, but in which they know from the outset that there is no corroborating evidence and no prospect of that, or that there is no realistic prospect of proving beyond reasonable doubt that such an offence has been committed, so they might decide that a domestic abuse protection notice is a more appropriate course of action.

Another example could be a case in which the police initially arrest and charge the suspected perpetrator with a criminal offence, they report it to the Crown Office for consideration of prosecution and the Crown Office decides that there should be no further proceedings. The Crown Office might decide that there is insufficient evidence to bring a criminal prosecution, but the police might nonetheless believe that the test under the bill—that there are reasonable grounds for believing that the suspected perpetrator has been abusive towards the person at risk and that the making of a protection notice or order is necessary to protect them from future abuse—has been met.

The Convener: It is interesting that, with the bill, we are talking about having reasonable grounds for belief but that, with criminal powers of arrest, we are talking about reasonable grounds for suspicion. With the bill, it is the balance of probabilities that applies whereas, with the criminal law, it must be beyond reasonable doubt. Therefore, where the overall burden or standard of

proof sits in relation to those two procedures is not straightforward, is it?

Patrick Down: At this point, I would like to bring in my colleague, Katie McGarvey.

Katherine McGarvey: Thank you, Patrick. I just wanted to clarify something in relation—*[Inaudible.]*—the orders in question and a distinction between the underlying behaviour that is required for a notice or an order to be imposed and the underlying behaviour that is required for a criminal offence to be constituted.

Of course, as Patrick Down has said, domestic abuse protection orders are civil orders, so when they get to the court, the civil standard of proof and the civil rules of evidence will apply. When the matter is with the police, it will be a case of having reasonable grounds for believing that someone has engaged in abusive behaviour. Over and above that, I point out that such orders are preventative measures that are designed to prevent further domestic abuse.

The definition of abusive behaviour—the behaviour that is required in order that a notice or an order can be imposed—can be met by a single incident. A single incident or a course of conduct can form the underlying behaviour. The courts and the police also have to consider whether it is necessary to impose a notice or order to prevent further abusive behaviour, but I would just draw out that distinction between the domestic abuse offence in the 2018 act, in which there is a requirement for a course of behaviour, and the underlying behaviour that can form part of a notice or order, which can be a single incident or a course of conduct.

The Convener: I thank you all for your evidence. You have said five or six times this morning that you will write to the committee with further details in response to our questions. I want to underscore the importance from the committee's perspective of you doing that very quickly. We will have only one opportunity to put those points to external stakeholders, and that opportunity will be one week today. In our first evidence session after the Christmas and new year break, we will hear from the cabinet secretary. I am afraid, therefore, that none of us has the luxury of time. If we could hear from you with those details before we have to put those points to external stakeholders next week, we would be very grateful.

With that, I suspend the meeting to enable a change in witnesses.

11:21

Meeting suspended.

11:24

On resuming—

Covert Human Intelligence Sources (Criminal Conduct) Bill

The Convener: Welcome back. Our next item of business is to take evidence from the Cabinet Secretary for Justice, Humza Yousaf, who joins us this morning, and his officials on the Covert Human Intelligence Sources (Criminal Conduct) Bill, which is a United Kingdom bill, in respect of which the Scottish Government has published a legislative consent memorandum.

The cabinet secretary is being joined remotely by Graeme Waugh and Douglas Kerr. As usual, cabinet secretary, we will direct questions at you but please feel free to bring in your officials when you want.

I will open by asking whether you have any opening statement and whether you could update the committee on where exactly we are with the bill and its passage through the UK Parliament. As I understand it, the bill has not quite reached the final amending stage, so it is still possible for it to be amended before the Scottish Parliament has to determine whether and—if it does—how it wants to give consent.

The Cabinet Secretary for Justice (Humza Yousaf): It is also possible for a supplementary LCM to be issued at a later date.

Thank you for the opportunity to update the committee and then take questions. The Covert Human Intelligence Sources (Criminal Conduct) Bill was introduced in the Westminster Parliament on 24 September. It aims to provide an express statutory power for certain public authorities to authorise a covert human intelligence source—CHIS—to participate in criminal conduct when it is necessary and proportionate to do so. A CHIS can, of course, be vital in gathering essential intelligence that might save lives or protect the public from serious harm, including organised crime and child sexual exploitation.

As it stands, the bill lacks sufficient safeguards. That could be mitigated if prior approval by a judicial commissioner at the Investigatory Powers Commissioner's Office was required before a criminal conduct authorisation, or CCA, was made. As the bill has progressed, it has become clear that there is cross-party concern about the sufficiency of the safeguards and potential implications for human rights. Additional safeguards that have been called for include but are not limited to setting out in the bill certain conduct that cannot be authorised, limitations on granting CCAs for a juvenile CHIS, and the need to ensure that legitimate trade union and party-

political activity is not the subject of any criminal conduct authorisations. I share those concerns, which have been articulated by a number of human rights organisations, including Reprieve and Amnesty International, and I believe that the committee has received written submissions from such organisations.

The bill amends the Regulation of Investigatory Powers Act 2000 and the Regulation of Investigatory Powers (Scotland) Act 2000. The amendments provide for a new CCA that makes conduct lawful for all purposes under that authorisation.

On the convener's question about legislative consent, the amendments to RIPSA cover operational activity in Scotland by Police Scotland and the Scottish Administration, which means, in practice, the Scottish Prison Service. Amendments to RIPA cover operational activity in Scotland by certain UK bodies, particularly the National Crime Agency and HM Revenue and Customs when they grant an authorisation for the purposes of detecting or preventing crime, or preventing disorder. The bill also amends the related provisions in the Investigatory Powers Act 2016.

I agree that it is sensible to put matters of criminal conduct by a CHIS beyond any doubt for it to be properly regulated and subject to strong safeguards. I would prefer a consistent four-nations approach to the area, but to legislate to allow someone to break the law is a serious matter and any measure must be accompanied by appropriate and stringent safeguards. My strong preference, which I should say is consistent with the views of the Lord Advocate and the chief constable, is for there to be prior approval by a judicial commissioner at IPCO before a CCA is made. That will provide an independent judicial assessment that the authorising officer has made a decision that is necessary and proportionate to what the authorisation aims to achieve.

I have been pressing the UK Government for stronger oversight than currently exists in the bill. I accept that, in the absence of prior judicial approval, it would be acceptable for an amendment to be made requiring notification to IPCO immediately after the CCA is made, but that would be subject to the other concerns that I have mentioned being addressed. That is why I agreed for RIPSA amendments to be included in the bill on introduction.

There has been a good level of engagement with the UK Government but, despite assurances, no such amendments have been tabled. I am aware that an amendment has been proposed in the Lords requiring notification to IPCO within seven days, but that amendment has not been accepted at the time of speaking and my view is that the seven-day period is too long.

I cannot therefore recommend that the Scottish Parliament should consent to the bill. As the bill has progressed, cross-party members have expressed significant and valid concerns in the House of Commons and the House of Lords, and those concerns are set out in the LCM. If the UK Government can make suitable amendments to the bill at the House of Lords report stage, the Government will reconsider its position and bring forward a supplementary LCM if necessary.

I have made it clear to the UK Government that the bill will need to be changed substantially, with greater independent oversight and additional safeguards in relation to the human rights concerns that have been articulated before the Scottish Government can reconsider its position and recommend that the Scottish Parliament consents to the bill.

11:30

The Convener: Thank you, cabinet secretary. I would just like to understand something about the nature of the use of covert human intelligence sources in Scotland now, so that I can understand the scope of the legislative consent that is being sought by the UK Government and which is within the responsibility of this Parliament to give or not. Most of the agencies that will be able to seek CCA under the bill are UK agencies that operate in reserved space rather than in devolved space. The striking exception to that is any police force—obviously, Police Scotland is devolved. In addition to Police Scotland, who uses covert human intelligence sources in Scotland for purposes that are within devolved competence? In our conversation about legislative consent, are we talking only about Police Scotland or are we talking about others?

Humza Yousaf: You are absolutely right that, with regard to devolved purposes, it is largely Police Scotland that would be affected by the bill, and the Scottish Prison Service would potentially be affected as well. The chief constable helpfully gave a briefing to some members of the committee, in which he went into some detail about what sort of criminal activity Police Scotland has looked to disrupt in this way. It ranged from drug trafficking to human trafficking and right the way through to child sexual exploitation. We are talking about extremely serious matters.

As I referenced in my comments, the bill would also impact UK-wide bodies that were also using a CHIS in Scotland for purposes of detecting crime. The National Crime Agency might do that, as well as HMRC, for issues to do with tax or tax fraud. However, you are right that the biggest implication would be for Police Scotland.

The Convener: The amendments to the bill that you indicated in your opening remarks you want to see made pertain principally—perhaps you can clarify whether they pertain principally or entirely—to authorisations.

As I understand it, in the House of Lords, where the matter has been quite extensively debated, significant concern has been voiced by, for example, David Anderson, who is the former independent reviewer of terrorism legislation, and his predecessor, Alex Carlile, about the extent to which IPCO should be involved in preauthorisation. The Scottish Government seems to be pushing for an amendment that previous independent reviewers of terrorism legislation say would be inappropriate and perhaps even dangerous. Will you explain that for me? You will know much more about that than I do.

Humza Yousaf: Sure. It is worth saying that I have a lot of time and respect for Lord Anderson in particular; I do not know Lord Carlile as well, but I have met him in a previous role. I have met Lord Anderson on a number of occasions, and I do not dismiss his view in the slightest.

However, I reiterate a point that I think I made in my opening remarks. Prior judicial approval, even if it is not IPCO approval, would still be the preference. It is not just my preference and that of the Government but the preference of the chief constable and the Lord Advocate. It is important that the views of the operational partners who deal with covert human intelligence sources and the authorisation of any criminal activity when it comes to Police Scotland are listened to in that regard.

I should also say that, notwithstanding the concerns of Lord Anderson and maybe Lord Carlile—forgive me, but I have not seen Lord Carlile's contribution on the matter—on the other side there are human rights organisations, some of which I have mentioned and some of which I think have written to the committee as well, that express a wish for a greater degree of oversight. My feeling is that, where the law is sanctioning criminal activity, which is what the bill aims to do, albeit within very narrow parameters, of course, additional oversight that is independent of the bodies that are the operational partners can only ever be a good thing.

We could have a debate about whether it should be IPCO or another body that provides important oversight, but I am convinced that there must be additional oversight, because of the gravity of what we are being asked to do in this regard. At the moment, that has not been provided for.

The Convener: Your point is that you are aware of the concerns that have been raised by Lord Anderson and others, and you are relatively open minded about the detail of what the oversight might look like but, nonetheless, there needs to be some form of oversight—preferably judicial and preferably provided by IPCO—in advance of CCAs being granted.

Humza Yousaf: Yes. I have spoken to a few human rights organisations—I should not throw them into one homogeneous category, as they are not homogeneous, of course—and found that some believe in prior judicial oversight but are not sure that IPCO is the right body to provide that. Reprieve might fall into that territory.

I have spoken to Sir Brian Leveson, who leads IPCO, and I am sure that he would not mind me mentioning—indeed, would want me to state on the record—that he is adamant that, although these are policy choices for the Government to make, if IPCO were asked to facilitate a prior approval scheme, it could do so. I asked whether IPCO could facilitate such a scheme if Scotland had a different regime from that of the rest of the UK, and he said that he is confident that it could. However, he is firm and adamant that it would be a policy decision for the Government and, ultimately, the Parliament to make.

The Convener: That is helpful. Annabelle Ewing will pick up the questioning from here.

Annabelle Ewing: The UK Government may well not accept any satisfactory changes to provide for the additional safeguards that the Scottish Government seeks. In those circumstances, what would be your plan? Would that require legislation to be introduced in Scotland? If so, what would be the timing for that, and what would happen next?

Humza Yousaf: Annabelle Ewing's questions are pertinent but, unfortunately, I will not be able to answer some of them. I will come to the reasons why in a second.

So much of what we choose to do will depend on the Court of Appeal's judgment. I will not rehearse the background, as the committee has a briefing on it and will have seen the LCM explanatory notes that I provided. It will be up to the court, of course, but our belief is that a judgment on the case will be made towards the end of January and, at the earliest, will be published in February. A lot of what we do next will come down to the judgment.

As the committee would expect, as a responsible Government taking a prudent approach, we will base our planning on what is reasonably likely to be the worst-case scenario, which could be that the judgment affects what we do in Scotland and has an impact on what is contained in RIPSA. The worst-case scenario could be a cliff edge, whereby unless there were express statutory underpinning for the authorisation of criminal activity by a CHIS, that

activity would be unlawful. For that scenario, we are preparing internally for emergency legislation. I mentioned that we have held briefings with a number of Opposition members about that.

Emergency legislation is not my preference, which would be for a matter of such complexity and sensitivity to be dealt with in normal time. However, for the worst-case scenario, which I deem to be unlikely—I can expand later on why that is, if anybody wishes—we are making preparations for emergency legislation. Any emergency legislation would have to have a sunset clause, so that we could introduce further legislation in normal time.

We want to prevent a scenario in which there is an impact on any police operation with a participating CHIS, which could be not just disrupting crime but saving lives. It is difficult to tell the committee exactly what the next steps will be, because a lot of that will depend on the Court of Appeal judgment.

Annabelle Ewing: I understand that. Thank you for your comprehensive answer.

The Convener: Is the Scottish Government a party in the case in the Court of Appeal?

Humza Yousaf: No. It is my understanding that we are not, but there is a concern that any judgment could have a read-across to RIPSA and potentially to what we do in Scotland. Any judgment could then make another challenge to the Scottish Government—the Scottish Administration, as it is technically known—more likely.

The Convener: Is there no current intention to join that litigation as a third party?

Humza Yousaf: No. Graeme Waugh is online and might give clarity on that point. I am clear that current cases are not targeted at the Scottish Government but are targeted at the security services and the UK Government. Is that right?

Graeme Waugh (Scottish Government): That is correct.

The Convener: Thank you for that clarification.

Liam Kerr: Earlier, you set out various amendments that you want to see made. You have obviously had dialogue with the UK Government. As far as you are aware, why has the UK Government declined to accept your amendments?

Humza Yousaf: I should say from the outset that I have had good engagement with the UK Government. The Minister for Security, James Brokenshire, has engaged frequently and in good spirit—I think that we are speaking again later this week. He has often listened to my concerns and I know that his officials have also spoken with the Lord Advocate.

I do not know why the UK Government has not accepted prior judicial oversight. There was no significant movement from the UK Government on the other concerns that members raised across the House of Commons, particularly around human rights, and I can only guess at the reasons for that, because I do not truthfully know. I suppose that the UK Government is in a different position from this Government, in that it has a majority and less incentive to accept amendments, but I really cannot answer for it.

The Convener: It has a majority in the House of Commons but not in the House of Lords, where the bill currently is.

Rhoda Grant: In your opening statement, you talked about the balance between community safety and civil liberties. Does the bill provide that balance, or are there concerns about legal organisations, such as trade unions? Do you also have those concerns?

Humza Yousaf: We do. I do not need to rehearse some of the concerns about previous undercover activity relating to peaceful and legitimate protest groups for example, because I know that Rhoda Grant knows that issue particularly well, as one of her colleagues has often commented on it.

The rebuttal from the UK Government would be that any authorisation would have to be "proportionate and necessary". The reason for my being so adamant on judicial oversight is that that "proportionate and necessary" judgment should be made by somebody who is not part of the organisation that is involved in the operation.

The answer, in short, is yes—I have those concerns, and I would like to examine that area further if we have to introduce separate Scottish legislation. I could not say 100 per cent at the moment whether it would be within scope for this Parliament to exempt trade union activity, for example, but I would be keen to have that discussion. I should say that we are exploring the matter internally in preparation for an emergency bill.

John Finnie: As in previous instances, I declare that I am a member of Amnesty International, which is one of the groups that have put in a collective briefing to us.

The LCM expresses a wish to have limits placed on what can and cannot be authorised in a CCA; the cabinet secretary is aware that most people would see it as reasonable to suggest that torture, murder and sexual violence be included in those limits. The submission from Amnesty International,

a group with which the cabinet secretary is familiar, says:

"Without express limits at the authorising stage, we worry that even improved oversight would leave too great a scope for abuses. Even if a requirement was introduced for Criminal Conduct Authorisations to be approved by a judge or a regulator, experience in the surveillance sector suggests that a warrantry system of this nature is wide open to abuse when conducted in secret. Notably, the Investigatory Powers Commissioner"

—whose remarks you quoted earlier—

"has himself conceded that MI5 systematically kept vital information from him to falsely justify surveillance warrants, and suggested that the agency is failing to reliably record the kinds of crime in which their agents become involved."

Regardless of how this pans out, what is your view of such activities? I think that everyone would want to see there being judicial oversight of them.

11:45

Humza Yousaf: Conduct that might be described as non-permitted requires careful attention. I spoke to Reprieve and a number of other human rights organisations about their concerns on the bill. They often make the point—and it might also be in the briefing to which you have referred—that references to non-permitted conduct can be found in legislation in America and other parts of the world, so the suggested provision is not unique.

The counter-argument to that, which I have heard being made by the UK Government in the House of Commons, is that the Human Rights Act 1998 would allow a safeguard against such conduct. I have a couple of concerns in that regard. The first is that the same Government has instructed a review of the 1998 act, so I would be concerned about the intentions behind its review and the strength of that safeguard. The second is that certain forms of conduct that the bill regards as non-permitted—for example, murder, torture and sexual violence—could be used by criminal organisations to test a CHIS to see whether they were an undercover informant.

We would therefore have to consider such issues carefully. However, if it can be done in other countries without particular issues arising there, I have to say that I am attracted to it and sympathise greatly with those who ask us to consider whether, in the event of our having separate Scottish legislation, it should cover non-permitted conduct.

John Finnie: Of course, the same UK Government is seeking to sanction crimes committed by the UK military abroad. Also, according to a parliamentary publication, it does not believe that the Human Rights Act 1998 applies to abuses committed by its agents.

One of the signatories to the briefing to which I have referred is the Pat Finucane Centre. As you will know, Mr Finucane was a human rights lawyer who was murdered by the UK state. The de Silva review confirmed that, and Prime Minister David Cameron graciously apologised for it. We know that there will not now be an inquiry into it, however. Members of the public still harbour grave concerns about the untimely deaths of others such as Hilda Murrell and William McRae. I would like to know from you, cabinet secretary, what is acceptable. You have alluded to previous instances and we know about actions such as taking the identity of a dead baby, the collusion associated with that, and what is sometimes referred to as state-sanctioned rape. How can we be assured that, for all the Scottish Government's understandable willingness to try to have co-operation on the issue, it will not inadvertently sanction any such matters?

Humza Yousaf: The fact that I have not recommended that consent be given to the LCM should provide assurance. I hope that it goes some way towards demonstrating that I have concerns about the issue, which, as I said, can be put into three broad categories. One is prior judicial oversight. The second category is the Lord Advocate's concerns on interference with his role as the independent head of the criminal prosecution system. The third category is precisely as Mr Finnie articulated—the human rights concerns, which themselves can probably be put into three brackets. The first of those concerns non-permitted conduct, which Mr Finnie mentioned. The second is about safeguards on juvenile CHIS. We must remember that, very rarely, young people can be used as CHIS, so there should be appropriate safeguards around that. The third covers legitimate political protest or trade union activity, which Rhoda Grant mentioned.

I give you an absolute assurance that the Government takes those human rights concerns very seriously. However, I should also say that the Scottish Government absolutely understands that there will be some instances where a CHIS will have to conduct criminal activity—that might be unavoidable. Police Scotland gave an example, which it was comfortable with me using, of a situation where an undercover operative infiltrated a paedophile network, which culminated in the arrest of a man who had planned to pay to rape a five-year-old boy and a six-year-old girl. When he was arrested, further evidence of his offending was identified from his computer. The male pleaded guilty and received an eight-year prison sentence. Without going into operational detail, in order for that undercover operative to infiltrate that paedophile network, they had to infiltrate networks that it would otherwise be criminal to infiltrate. We

all have to accept—as I am sure that John Finnie does, given his background and knowledge of policing—that there will be times when a CHIS has to carry out criminal activity. As a Government and a Parliament, we have to ensure that any state sanctioning of that is within the narrowest parameters and that the appropriate safeguards are in place.

John Finnie: Of course, we would accept such a situation, just as we would accept an undercover operative in pursuit of a drugs gang being in possession of illegal drugs.

On the potential for outsourcing and the question of rendition, airports such as Inverness and Wick in my region, as well as Prestwick, have been mentioned. Some people believe that it is appropriate to have some poor, unfortunate individual trussed up in the back of a plane, shackled to the floor and hooded, in the name of so-called national security. Has there been any progress on that? Can that be used as an example of something that we do not want? It is unfortunate that the UK Government has declined to assist the Lord Advocate in his inquiries into that.

Humza Yousaf: John Finnie knows the Scottish Government's and my position on that, which has not changed. Extraordinary rendition is absolutely unacceptable, and I share his frustration and disappointment that the UK Government has not approached the United States Administration to get the unredacted Senate report. There might be a willingness to do that now, given that there will be a new Administration in charge. I will pick that conversation back up with the UK Government. I should probably not say much more, because there continues to be a live investigation into these matters.

John Finnie: You mentioned Her Majesty's Revenue and Customs and the National Crime Agency. There is also the British Transport Police, over which there is no direct political oversight. Could it also be covered by the bill, as it works on a cross-border basis?

Humza Yousaf: Forgive me, but I would have to look at the bill documents to check all the organisations that are affected by it. My assumption is that the British Transport Police would be covered by the bill, but I will double-check that with my officials, who are online.

Graeme Waugh: I am afraid that I would also have to check the legislation, but I would be very surprised if BTP was not included.

The Convener: Cabinet secretary, I am a bit confused now about exactly what you are seeking from the UK Government by way of amendment to the bill. I will try to pin it down with more precision. If there were an amendment that imposed a requirement for prior judicial authorisation, would that meet the Scottish Government's concerns about giving legislative consent, or would you want further safeguards in the bill to address some of the issues that you have just explored with Mr Finnie?

Humza Yousaf: Forgive me if there is a lack of clarity, but we have three concerns, one of which is about judicial oversight. Yes, if the UK Government accepted a requirement for prior judicial oversight, that would go a long, long way towards addressing my concerns. Having that independence, prior to any authorisation being given, would go a long way to doing that, although I would have to discuss that with others, including Opposition members.

However, I am not the only one who has concerns about the matter. The Lord Advocate's concerns would also have to be addressed. He can speak for himself, but I spoke to him recently and heard that his concerns have not been addressed as yet. The third lot of concerns are about human rights. However, a lot of those concerns could be addressed if there is prior, additional judicial oversight.

The convener is right to allude to the fact that prior judicial oversight would be the most significant safeguard that could be introduced. If the Government is satisfied, a supplementary LCM could be lodged, as I mentioned in my opening remarks. However, at this stage, I cannot recommend that the Parliament gives consent.

The Convener: I understand that at this stage you are not recommending that the Parliament gives consent, but I am just trying to understand on the basis of paragraph 24 of the legislative consent memorandum what exactly you are asking for in order for that position to be changed. However, you have helped with the—

Humza Yousaf: Sorry to interject, but I should say that the UK Government is in no doubt about the amendments that the Scottish Government would like to see. The conversation has happened over a number of months and the view about prior judicial oversight has not changed. If significant amendments were to be made to address human rights concerns, we could potentially look at whether those would relate to prior judicial oversight or notification straight after a CCA is made. However, that would be dependent on other human rights concerns. There is a balance, which is why I am careful to say that having prior judicial oversight would go a long way to addressing my concerns, but we would have to look at the detail of any amendment.

The Convener: Your official, Douglas Kerr, has indicated that he wants to come in.

Douglas Kerr (Scottish Government): I confirm that BTP would be included. You would

need to compare the lists that are in the bill with the organisations that are listed in section 46(3) of the Regulation of Investigatory Powers Act 2000. That will clarify which bodies are in scope.

The Convener: Thank you.

Liam Kerr: I have a final question to help my understanding.

As I understand it, the concern is that the Court of Appeal ruling would leave a lacuna—a cliff edge—of no statutory underpinning for a CHIS. At its core, I presume that the UK bill seeks to plug that lacuna. You have concerns that that bill does not cover all the bases, but I presume that you concede that it covers some of them, and that with further safeguards, especially around judicial oversight, the bill might become okay.

Why would the Scottish Parliament not consent to the LCM and, ultimately, the bill to give a baseline statutory underpinning and then work to nuance the motion from there, rather than risking the cliff edge that you fear?

Humza Yousaf: If we recommended and accepted the LCM and the bill passed in Westminster, it would be extraordinarily difficult, if not nigh on impossible, to make changes to it. Therefore, the committee would be asking us to recommend to the Parliament to accept a bill that has—as I would describe them—some fairly fundamental flaws. I will not rehearse those flaws, as the committee understands my concerns, as well as those of trade unions, many members of the Opposition, human rights organisations and so on. However, if we get to the reasonable worst-case scenario of the cliff edge—which I hope is unlikely—we have a plan in place to deal with it that does not compromise some important human rights concerns. I think that that is the most sensible approach.

Liam Kerr is correct that if we accepted the LCM and the bill covered the whole of the UK, and a Court of Appeal judgment ruled that express statutory underpinning was needed, that would be there. However, the simple fact that the potential gap could be plugged in that hypothetical scenario does not mean that it is the right route to take because of the serious underlying human rights concerns.

The Convener: You said that the reasonable worst-case scenario is unlikely in your view. Why do you think that it is unlikely?

12:00

Humza Yousaf: We should never second-guess a court judgment but, from all the conversations that I have had, including with some of the claimants in the case and some of the organisations that have already been mentioned, I know that they also feel that it is unlikely. In the original judgment of the case in the investigatory powers tribunal, the decision was split 3:2, and the three judicial members found in favour of the UK Government. Again, we do not want to make a presumption about which way the Court of Appeal judgment would go.

The second point is that, without pre-empting anything, it is unlikely that members of the judiciary would create an operational cliff edge for operational partners, because they know the issues around and the importance of CHIS. I cannot say definitely and definitively that it will not happen—and, if it does, we have a plan in place—but I hope that it is unlikely. That is not just my view; it is the view of some of the claimants in the case, to whom I have spoken.

The Convener: Therefore, even if the appeal is successful, the appeal court might be crafting a judicial remedy that is capable of achieving the result without creating a cliff edge.

Humza Yousaf: Yes, and any Court of Appeal judgment might be so narrowly confined to the Security Service Act 1989 that it would not affect the legislative framework that we have under RIPSA. There are a lot of unknowns but, as I said, the hard cliff edge scenario is unlikely.

The Convener: Since no other member has indicated that they wish to ask you further questions on that, I thank you for your time and consideration of that matter.

Subordinate Legislation

Regulation of Investigatory Powers (Prescription of Offices, etc, and Specification of Public Authorities) (Scotland) Amendment Order 2020 (SSI 2020/361)

Management of Offenders etc (Scotland) Act 2005 (Specification of Persons) Amendment Order 2020 (SSI 2020/365)

12:01

The Convener: Agenda item 5 is consideration of two negative Scottish statutory instruments. I refer members to the relevant papers in our pack. Are members content not to make comments to the Parliament on the SSIs?

Members *indicated agreement.*

Justice Sub-Committee on Policing (Report Back)

12:02

The Convener: Our next item of business is a report back on the meeting of the Justice Sub-Committee on Policing, which took place on 7 December. Again, I refer members to the relevant paper in our pack and I invite John Finnie to supplement his written report, if he wishes to add anything further.

John Finnie: I am content with the paper and I am happy to answer questions from members.

The Convener: Do members have questions for John Finnie on the report?

No member has indicated that they want to ask anything at this point, so I thank John Finnie for the report.

Our next meeting will be a week today on Tuesday 22 December, when we will continue our consideration of the Domestic Abuse (Protection) (Scotland) Bill.

12:03

Meeting continued in private until 12:33.

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