OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 27 June 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 27 June 2017

CONTENTS

	Col.
DECISION ON TAKING BUSINESS IN PRIVATE	1
JUSTICE SUB-COMMITTEE ON POLICING (REPORT BACK)	2
SUBORDINATE LEGISLATION	4
Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017 [Draft]	4
DOMESTIC ABUSE (SCOTLAND) BILL: STAGE 1	8

JUSTICE COMMITTEE
24th Meeting 2017, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Mairi Evans (Angus North and Mearns) (SNP)
*Mary Fee (West Scotland) (Lab)
*John Finnie (Highlands and Islands) (Green)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
Liam McArthur (Orkney Islands) (LD)
*Oliver Mundell (Dumfriesshire) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Michael Matheson (Cabinet Secretary for Justice)
Denise Swanson (Scottish Government)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 27 June 2017

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning, everyone, and welcome to the Justice Committee's 24th meeting in 2017. We have received apologies from Liam McArthur. The committee's clerks have been notified that the Cabinet Secretary for Justice will be five minutes late so, with members' agreement, we will move to agenda item 5. Are we all agreed?

Members *indicated agreement.*

The Convener: Before we take agenda item 5, under agenda item 1, we must make a decision on whether to take agenda items 6 and 7 in private. Agenda item 6 is consideration of our approach to the scrutiny of the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill at stage 1. Agenda item 7 is consideration of our work programme. Are we agreed that those two items should be taken in private?

Members *indicated agreement.*

Justice Sub-Committee on Policing (Report Back)

10:01

The Convener: We move quickly on to agenda item 5, which is feedback from the Justice Sub-Committee on Policing on its meeting of 22 June 2017. Following the verbal report, there will be an opportunity for brief comments or questions. I refer members to paper 4, which is a note by the clerk, and invite Mary Fee to provide the sub-committee's feedback.

Mary Fee (West Scotland) (Lab): The Justice Sub-Committee on Policing met on 22 June 2017 and took evidence from Her Majesty's Chief Inspector of Constabulary in Scotland, Derek Penman, on his review of openness and transparency in the Scottish Police Authority.

The sub-committee heard that Her Majesty's Inspectorate of Constabulary in Scotland had made 11 recommendations, including on holding board and committee meetings in public and making papers publicly available in advance of meetings without any embargo.

Derek Penman highlighted, among other things, issues with the understanding of the chair, the chief executive and all board members of the "On Board" guidance, collective responsibility, supporting processes and relative roles.

Following the evidence session, Andrew Flanagan sent a response to the sub-committee and I want to address a couple of points that he raised.

Last week, Mr Penman told the sub-committee that staff associations think that the current level of engagement is not sufficient and are looking for better ways to engage. In his response, Mr Flanagan says that "stakeholder engagement" was

"championed and endorsed on the Policing 2026 work."

As the work on the policing 2026 strategy predates Mr Penman's report, it appears that the staff associations do not share Mr Flanagan's view. Proper engagement is vital.

The chief inspector's report concentrates on the roles, awareness and understanding of the chair, the chief executive and board members. While there were some recommendations for improving executive structures, the report does not criticise the hard-working staff in the wider organisation. The key findings are focused on the senior management team, who should focus on making necessary changes to improve the reputation of the SPA and, in turn, the morale of its staff.

The sub-committee will next meet on 14 September 2017.

I am happy to take questions from members.

The Convener: Do members have any questions or comments for Mary Fee? As there are none, I suspend the meeting briefly, to allow the cabinet secretary to settle into his position.

10:04

Meeting suspended.

10:04

On resuming—

Subordinate Legislation

Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017 [Draft]

The Convener: Our next item of business is consideration of an affirmative instrument.

I welcome the Cabinet Secretary for Justice and his Scottish Government officials: Denise Swanson, head of the access to justice unit; Kevin Philpott from the criminal justice division; and Greig Walker, solicitor, from the legal services directorate.

I refer members to paper 1, which is a note by the clerk, and ask the cabinet secretary to make a short opening statement.

The Cabinet Secretary for Justice (Michael Matheson): Thank you, convener, and I apologise for my slightly late arrival.

These regulations relate to the WF v the Scottish ministers judgment that was issued in February 2016. The case concerned a complainer's right to receive legal aid when seeking to oppose release of their medical records in connection with a criminal case, and it was an important judgment that has led to a significant change in approach in cases in which an application is made to recover sensitive information in criminal proceedings.

The judgment clarifies that any person whose rights under article 8 of the European convention on human rights, which relates to respect for private and family life, may be infringed by an order for recovery of medical records and other sensitive documents must have the application for recovery of those records intimated to them and be given the opportunity for their opposition to the application to be heard. On 1 March, following the judgment, I advised the committee when I was before it as part of its scrutiny of the Abusive Behaviour and Sexual Harm (Scotland) Bill that, with the courts having established the right to be heard, interim provisions had been put in place to make legal aid available to allow a client to be represented where they were seeking to oppose release of medical or other sensitive documents.

The regulations before the committee regularise those interim provisions by amending the relevant statutory legal aid framework to make equivalent provision. Specifically, they make provision for assistance by way of representation to be available to a client who seeks to oppose recovery of their medical records or other sensitive documents in connection with criminal

proceedings. As with the interim provisions, the assistance will be available without a means test being applied. The regulations also make incidental amendments to advice and assistance regulations to ensure that work is consistently carried out as assistance by way of representation, namely at the criminal legal aid rate.

Since the interim provisions have been in place, seven applications for legal aid have been received in connection with the potential use of sensitive records in criminal proceedings. Of those seven, five have received legal aid and the two other applications have been given in-principle agreement by the Scottish Legal Aid Board, with the checking of actual expenditure still to be undertaken.

The commitment to putting in place sustainable arrangements to protect the interests of individuals whose sensitive records and documents are requested in criminal court proceedings was set out in our programme for government for 2016-17, and these regulations seek to deliver on that.

The Convener: I thank the cabinet secretary for those remarks. I particularly welcome this statutory instrument, not least because over the past four years, on no fewer than six occasions, in three different pieces of legislation—the Victims and Witnesses (Scotland) Bill, the Criminal Justice (Scotland) Bill and the Abusive Behaviour and Sexual Harm (Scotland) Bill—I have lodged amendments on complainers' rights to oppose the release of their medical records, including psychological and psychiatric records.

The cabinet secretary will be aware that the last occasion was on 22 March 2016, during stage 3 of the Abusive Behaviour and Sexual Harm (Scotland) Bill, which followed Lord Glennie's 2016 ruling to the effect that, in domestic abuse cases, denying a complainer legal aid to oppose the use of her medical records went contrary to the Victims and Witnesses (Scotland) Act 2014. At that time, the cabinet secretary rejected my amendment on awareness raising of the ruling, stating:

"As I have indicated, the Scottish Government is happy to undertake work to ensure that awareness of Lord Glennie's judgment is raised."—[*Official Report*, 22 March 2016; c 86.]

I very much welcome the fact that there have been seven applications and that the spirit of the regulations has been recognised, with five of those applications being approved and the other two under consideration. However, can the cabinet secretary provide us with some comfort by outlining what has been done so far to raise awareness of Lord Glennie's ruling and judgment?

Michael Matheson: The interim arrangements have been put in place and that has been intimated to the relevant parties. My colleague Annabelle Ewing will write to the Law Society of Scotland and other parties to make them aware of the new regulations. You will also be aware that, in his ruling, Lord Glennie did not make any recommendation that there was a need for any rule changes or new primary legislation to be put in place. Instead, he referred to putting in place a process whereby the court would be required to intimate entitlement to any individual whose documents might be sought. That has been put in place, and I understand that it is being monitored by the Lord President's office.

The Convener: But nothing has happened to date to raise awareness specifically.

Michael Matheson: We have already written to various stakeholders to make them aware of the interim arrangements that were put in place last year. My colleague Annabelle Ewing will write to the interested parties to ensure that they are aware that arrangements are now in place and that new regulations have been put in place to make available a permanent arrangement for access to legal aid in these circumstances.

John Finnie (Highlands and Islands) (Green): I welcome the interim provisions that were put in place—that was a positive action.

The policy note, which we have in our papers, says:

"Rape Crisis Scotland, supported by Scottish Women's Aid, raised concerns with the reference to Article 8 rights, the use of the effective participation test and provision for appeals. These issues were addressed through separate correspondence and do not affect the content of these regulations."

Were the issues addressed to the satisfaction of Rape Crisis Scotland and Scottish Women's Aid?

Michael Matheson: I am not aware of our response being received but I can provide the committee with a copy of the letter that was sent to Scottish Women's Aid. Denise Swanson can tell you more, as she wrote the letter.

Denise Swanson (Scottish Government): As the cabinet secretary has said, we will send you a copy of the letter. Subsequently, I have met Sandy Brindley to discuss another issue, and the issue that we are discussing was not raised. We have not had any response from Rape Crisis Scotland to our letter, so I assume that there are no further issues that it wishes to raise on the matter. We continue to engage with Sandy Brindley, so we will confirm that with her.

The Convener: We now move to formal consideration of motion S5M-06068. The Delegated Powers and Law Reform Committee has considered and reported on the instrument and had no comment on it. I invite the cabinet

secretary to move the motion. There will be an opportunity for formal debate if necessary.

Motion moved,

That the Justice Committee recommends that the Advice and Assistance (Proceedings for Recovery of Documents (Scotland) Regulations 2017 [draft] be approved.

Motion agreed to.

The Convener: That concludes our consideration of the affirmative instrument. The committee's report will note and confirm the outcome of the debate. Is the committee content to delegate authority to me as convener to approve the final draft of the report?

Members *indicated agreement.*

The Convener: I thank the officials for attending. We will suspend briefly to allow for a change of officials.

10:14

Meeting suspended.

10:15

On resuming—

Domestic Abuse (Scotland) Bill: Stage 1

The Convener: Our next agenda item is our closing evidence session on the Domestic Abuse (Scotland) Bill. I welcome back the Cabinet Secretary for Justice and his officials Philip Lamont and Patrick Down, who are both members of the bill team, and Louise Miller, who is from the Scottish Government's directorate of legal services.

I refer members to meeting paper 2, which is a note by the clerk, and meeting paper 3, which is a private paper. Cabinet secretary, do you wish to make an opening statement?

Michael Matheson: We are grateful to the committee for its scrutiny of this important bill. The bill aims to address a fundamental gap between the current criminal law and our modern understanding of the true nature of domestic abuse in relationships between partners and ex-partners.

The bill was informed by an extensive process of consultation and engagement with a wide range of key stakeholders.

Ahead of the committee's questions, I want to set out the Scottish Government's position on two specific matters that have been raised during scrutiny of the bill. First, we know that the committee has heard from stakeholders who want a separate parallel offence of domestic abuse of a child to be created. It is intended that that would recognise that a child who is living in an environment in which their caregiver is being abused is himself or herself a victim of abuse. That is clearly an important issue, so I want to explain the Scottish Government's position on the matter.

Where abuse is directed at a child, criminal law can already be used. For example, abuse can be charged using the offence of child cruelty or neglect in section 12 of the Children and Young Persons (Scotland) Act 1937. We are very aware of concerns that the existing offence may not adequately deal with psychological abuse of a child, which is why the Minister for Childcare and Early Years announced to Parliament in March that the offence is being reviewed to consider whether it requires to be updated to reflect a modern understanding of what amounts to abuse of a child.

However, it appears that what is being proposed in respect of the bill is different. Our understanding of what seems to be being proposed, based on the

evidence that has been given to the committee, is that it should be possible to charge an accused person with two different offences in respect of a single course of abusive behaviour that has been directed against their partner or ex-partner. One offence would be the offence contained in the bill, when the partner or ex-partner is the victim of a course of conduct of abusive behaviour. Our understanding is that the separate offence would result from exactly the same conduct and would seek to criminalise the harm that occurred to the child of the partner or ex-partner through the abuse that had been directed at that partner or ex-partner.

We are absolutely clear that growing up in an environment in which domestic abuse is occurring harms children. However, we do not think that the way to address that is to create a mechanism through which a person can be charged with two separate offences for one course of behaviour. That is why we have included a statutory child aggravation in the bill. The aggravation is intended to capture the harm that is caused to a child by ensuring that the court formally takes account of it when making sentencing decisions in such cases, and by ensuring that it states how that has been taken account of in determining the sentence. That will ensure that no separate offence is needed in order for the child to be regarded as a victim and for the impact on that child to be recognised.

I would also like to comment on concerns that have been expressed about the threshold for when an offence has been committed. The view has been offered that the inclusion of "distress" in the definition of "psychological harm" that is contained in the offence risks setting the threshold for criminalisation too low. We are, of course, happy to consider views on that. However, we have included "distress" as part of the definition of "psychological harm" because we consider that merely referring to "fear" or "alarm" would mean that courses of conduct that should be criminal as a matter of policy would not be included in the scope of the offence.

The courts will interpret the word "distress", taking into account its dictionary definition. "Distress" is not synonymous with mere upset or annoyance, as some people might consider, or as might have been suggested in earlier evidence. The "Concise Oxford English Dictionary" defines "distress" as "extreme anxiety or suffering".

The committee has heard from a number of stakeholders, including the Crown Office and Procurator Fiscal Service and Scottish Women's Aid, that behaviour that gives rise to extreme anxiety or suffering should be included within the scope of the offence. Our position is that abusive behaviour that causes extreme anxiety or suffering ought to be covered by the offence, and the threshold has been set with that in mind. It is important to remember that the offence is committed only if all elements of the threefold test that is set out in the bill are met.

I am always happy to discuss and consider alternative ways of achieving policy goals in both the areas that I have mentioned, and that includes considering specific suggestions that the committee makes in its stage 1 report, or that stakeholders have suggested would improve the bill.

I am, of course, happy to take questions.

The Convener: Thank you for your opening statement. In particular, it is helpful to have on the public record that the definition of "distress" will be as it is in the "Concise Oxford English Dictionary"—namely, "extreme anxiety or suffering". I think that all members of the committee will welcome that.

You mentioned courses of behaviour and the effect on children. A course of behaviour does not have to involve two separate occasions, but I presume that it has to involve behaviour on at least two occasions. The provision has also been referred to as a safeguard against overcriminalisation. Does the bill adequately capture the concept of a course of behaviour involving domestic abuse, given that—for example—the two separate occasions may be in very close proximity to each other?

Michael Matheson: The important thing to recognise here is that it is not just about two random incidents; it has to be at least two incidents that are viewed as being a course of behaviour. If, for example, an incident took place five years ago and another incident took place recently, it would be for the court to determine, when those incidents were presented to it, whether it considered that to be a course of behaviour. It is important to recognise that the issue is not just about two incidents. It is about a course of behaviour, and there have to be at least two incidents that could be considered to be a course of behaviour.

The Convener: That is helpful. I will bring in Mairi Evans, to be followed by Mary Fee then Fulton MacGregor.

Mairi Evans (Angus North and Mearns) (SNP): The evidence that we have received over the past while has been broadly in support of the bill. Some people would like it to go further, but it has been identified that there is a gap that the bill will fill. Scottish Women's Aid mentioned in evidence that an emergency barring order is not included in the bill. Is that something that you would consider?

Michael Matheson: I am conscious that Scottish Women's Aid raised that matter with the committee. It was not raised in the consultation exercise. As things stand, we have exclusion orders, which can be used. For example, a victim of domestic abuse can seek an exclusion order for someone to be excluded from their home. However, I am happy to engage with Scottish Women's Aid to consider whether further measures need to be put in place to address its concerns.

An exclusion order has to be applied for by the person who has directly experienced the abuse; the police, for example, cannot apply for one. I am happy to consider whether that should be extended—in terms of who should be able to apply for exclusion orders and whom they should apply to. I am conscious that some people have suggested that, in certain circumstances, children should be able to apply. Again, we are happy to look at that.

Mairi Evans: Emergency barring orders are used in other countries, and there are other examples that we could look at.

Another important point that Scottish Women's Aid raised in its evidence was about training and public education campaigns. What do you envisage they will be like? How will you plan them? Marsha Scott made the point that we can have the best legislation, but everything else has to be put in place after it has been passed in order to ensure that our aim is achieved. What do you think public education, especially on coercive and controlling behaviour, will look like? What will the programme be when the bill has been passed? What training will need to be done?

Michael Matheson: Let me take those issues in two separate parts. One issue is the publicity on any new legislation and the other is the training requirement.

As we set out in the financial memorandum to the bill, as is the case with any new piece of legislation that we introduce, training will be required. Training will be required for procurators fiscal, the police and others. That will be taken into account as we look towards implementation of the bill, should Parliament approve it. That is not unusual; it happens with any new piece of legislation. For example, we have already started to implement provisions in the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, and training has been progressed as a result of that new legislation.

On the publicity that is associated with legislation, when a new offence is brought in the Government always runs a publicity campaign that highlights that offence. That is often carried out in partnership with other agencies, particularly third sector organisations. The new offence that is coming into force, its implications and what it is intended to tackle will be highlighted.

There will be a publicity campaign, but its nature and shape will be developed following the passage of the bill. That campaign will be to ensure that people are aware of the new provisions in the legislation and the implications that it could have for individuals. I give members an assurance that there will be a publicity campaign, but we have not considered its shape and nature.

Mairi Evans: A publicity campaign, especially on coercive and controlling behaviour, is vital. The victim might not necessarily be able to identify the change in their own behaviour that results from coercive and controlling behaviour, but people surrounding them could identify it.

My final point is about non-harassment orders, which we have heard quite a lot about in evidence. Many organisations would like the wording of the bill to be a bit stronger in terms of a presumption in favour of imposing non-harassment orders. What are your views on the evidence that we have heard?

Michael Matheson: We placed in the bill a requirement that the court consider, at the time of sentencing, whether a non-harassment order is required. We believe that that will ensure that the courts will have to consider the issue and set out their decision on whether a non-harassment order is required. The requirement places the obligation on the court—the sheriff or judge, in particular—to set that out in a way that is not currently required.

I am, of course, always content to consider whether there are ways in which we can strengthen the legislation, but we feel that the policy intention and the provision that we have put in the bill to ensure that our sentencers and courts consider those issues at the time of sentencing should effectively deliver that.

Mairi Evans: Another point that was raised was whether non-harassment orders in relation to children should be looked at, given that a non-harassment order could be in place for the victim of domestic abuse, but that abuse could continue through the children of the relationship if contact with them is awarded. What are your views on that evidence?

Michael Matheson: I would be happy to consider that, to see whether there is a way in which the issue that has been highlighted could be adequately addressed, when it comes to children. That is an issue that we are already considering.

Mary Fee: I wanted to cover public education and training, but Mairi Evans has covered most of that.

Do you remember that a few years ago there was a successful television advertisement about domestic violence? It was quite hard hitting and was a good way of raising awareness. It reached far more people than could probably ever be reached by written publicity. Is that something that may be considered as you consider how you will publicise the legislation?

10:30

Michael Matheson: There is a variety of media in which that can be achieved. I am conscious that social media now play a big part, in a way that may not have been the case five, six or seven years ago. We have not decided what the publicity campaign around the new legislation will be, but we will consider that.

Some of the provisions that have come in through the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 have been highlighted recently in the "I just froze" campaign by Rape Crisis Scotland, which we supported. It was, largely, a social media campaign.

We have also had social media campaigns that have targeted young people specifically, because we know that we can use social media as a way to target particular age groups, so there is a variety of things that are taken into account when we are looking at what the publicity campaign will be. Whether it will be TV adverts, radio adverts, social media or a combination of all those is something that we will consider when we are designing our publicity campaign.

I am conscious that the committee is looking to conclude its stage 1 report and that Parliament has still to decide whether it will approve the bill, so I do not want to pre-empt the decision of Parliament by telling you that we have already planned the publicity campaign before Parliament has approved the legislation. However, I can assure you that it is something that we will consider once the legislation is in place.

Mary Fee: That is helpful.

The offence in the bill is focused solely on abuse of partners or ex-partners, but we have heard evidence that it should be widened to cover domestic abuse of other family members. I am thinking specifically of elder abuse. Is that something that you have sympathy with, and do you understand why people might want that to be included in the bill? Why do you think that the bill is not the right place to do that?

Michael Matheson: The definition of the offence in the bill as being between partners or ex-partners is based on the long-standing definition that we have had for domestic abuse in our equally safe strategy. That was supported by the responses to the consultation exercise, so that is why the definition is rooted in our equally safe work about gender-based violence, and domestic violence in particular. There are other legal provisions available for issues around elder abuse and other forms of abuse that can take place within a family setting, so I do not believe that the bill is the appropriate place in which to address those issues further. It should be said, however, that if an elderly person is being abused by a partner or ex-partner, the offence can be applied in those circumstances if the criteria that are set out in the offence are met.

There are other pieces of legislation that address those issues. I am not aware of gaps in the legislation for dealing with those matters, as there were in respect of our seeking to modernise our approach to domestic abuse through the offence in the bill. However, if there are concerns about gaps in existing legislation that deals with elder abuse or other forms of abuse that can take place in a wider family network, I would be happy to address them, but I do not believe that the bill is the appropriate place to deal with such gaps.

Mary Fee: The reason why the issue was raised was that, because more and more elderly people are being cared for at home by their adult children, there is an issue of controlling and coercive behaviour towards older people and of older people being manipulated for financial gain. However, you are content that the issue can be dealt with in other ways.

Michael Matheson: There are adult protection arrangements for dealing with cases where someone is abusing their position in relation to an individual. For example, if that is to do with the individual's finances, there is legislation to deal with that. I suspect that the point might be more about people identifying such cases, being aware that abuse of that nature is taking place and reporting it to allow it to be investigated. That does not necessarily mean that there is a deficiency in the legislation; it means that there is a need to ensure that people are aware of such abuse and report it appropriately.

I do not want to digress too much but, with elder abuse relating to financial issues, part of the challenge can be the sharing of information between agencies such as banks or the police and the social work services that are trying to co-ordinate a case. The adult protection arrangements are in place to manage those types of issues, when abuse is reported.

Legislation is in place and social work services have processes in place to deal with adult or elder abuse through the normal adult protection processes. I am not aware of any gaps in the legislation. That is not to say that it could not be

improved, but I do not believe that the bill is the right place to seek to do that.

Fulton MacGregor (Coatbridge and Chryston) (SNP): In your opening statement, you mentioned the aggravation in relation to children. We talked about that last week and I questioned the witnesses about it. As things stand, if the police attend a domestic incident and make a report or charge someone, there is an automatic referral to social work and the children's reporter. That process is a way of ensuring the safety of the children. Consideration must also be given to whether child protection procedures should be initiated. Would you support similar procedures being put in place in relation to the offence in the bill, if it is passed, where there is police involvement?

Michael Matheson: If there is police involvement and there are concerns about the child's welfare and what the child may have been exposed to, I would expect that process to be used.

Fulton MacGregor: In the review of section 12 of the 1937 act, would you support an automatic referral to the children's reporter as a result of police involvement?

Michael Matheson: We need to allow that review to look at the issue. In principle, I would not be opposed to that, if it is the most appropriate way of dealing with issues. We are creating the aggravator in the bill. If the work that my colleague Mark McDonald is taking forward highlights the need to create some form of automatic referral in other instances, I would be content to look at that at the time. At this stage, however, we need to ensure that the aggravator is used effectively, should the bill be passed by Parliament. The wider work that Mark McDonald is doing could inform us on how we can strengthen the existing arrangements for protecting children who may have experienced domestic abuse.

Fulton MacGregor: On a slightly different note, I had a meeting in my office yesterday with the team from Monklands Women's Aid to speak about some of the work that they are involved in locally. Like their national counterparts, they are very supportive of the bill, and we talked at length about that. What role will third sector organisations such as Women's Aid have as prosecutors build a case to show a course of behaviour by an individual?

Michael Matheson: Women's Aid organisations right across the country do a fantastic job in supporting victims of domestic abuse. Very often, women will disclose information to those organisations before they disclose it to the police or someone whom they see as an authority figure. Women might be in contact with an organisation such as their local Women's Aid service over an extended period of time but not necessarily report matters to the police.

It depends on the circumstances in individual cases. It may be a matter of supporting the women to be confident enough to report the incident to the police in the first place; giving them reassurance and support in going through that process; helping to give them an understanding of what is involved once a matter has been reported to the police and of how it will then be investigated and taken forward; and giving them reassurance that someone will be there with them during the course of that process. For women who might not be ready to report the incident at that point, it could be a matter of continuing to work with them, supporting them and offering advice and assistance.

I hope that the bill will send out a signal that all forms of domestic abuse will not be tolerated. We know that there is a particular challenge to prosecuting coercive and controlling behaviour, which can go on for an extended period of time. The person may not have been subject to physical abuse, but they have been subject to psychological abuse. It is a matter of explaining to women who come for advice and support that the type of psychological or coercive and controlling behaviour that they have experienced can now be taken before the courts, and of explaining to them how the bill works in that regard.

It is a matter of helping and supporting women as victims and also advising them and giving them information about how the bill works, informing them in particular that the type of psychological abuse that they may have experienced can now effectively be prosecuted. Women's aid organisations have a key role in helping to support victims of domestic abuse before and after they have reported the matter to the police and it is taken forward by the procurator fiscal.

Fulton MacGregor: When I spoke to the manager of Monklands Women's Aid yesterday, she said exactly that—she hopes that the forthcoming legislation will allow more women to come forward. She said that there will actually be more need for the service there.

I appreciate that you might not be able to answer this question, but do you think that local authorities will need to review the funding arrangements for organisations such as local women's aid services, depending on how much more work they might be taking on as a result of the legislation?

Michael Matheson: It will be down to individual local authorities to determine how they wish to continue to fund women's aid projects within their areas. Over a number of years now, the

Government has put record levels of funding into tackling gender-based violence, including through our work with organisations such as Scottish Women's Aid and Rape Crisis Scotland. That has involved a combination of funding from equally safe work, alongside the £20 million that we have been investing over the past two and a half years through the justice portfolio in tackling gender-based violence.

We all have a part to play. I have no doubt that local authorities will want to look on these matters sympathetically, given the importance of the role of women's aid projects in their local areas. We will continue to see what we can do to support the work that they do at a national level, too.

Rona Mackay (Strathkelvin and Bearsden) (SNP): We know that Scottish Women's Aid is very supportive of the bill, but it has argued for the introduction of emergency banning orders, whereby it is the perpetrator of domestic abuse who leaves the family home, not the victim. Is that something that you might consider?

Michael Matheson: To respond to the point that your colleague raised earlier, that is an issue on which we are engaging with Scottish Women's Aid. We intend to write to representatives of Scottish Women's Aid to obtain more details about how they believe emergency banning orders could be more effective than what we have at present, or about whether what we have at present could be more effectively utilised. We are open to discussions with Scottish Women's Aid on that, and we will be contacting it shortly to pursue that further.

Rona Mackay: That is fine. It is generally perceived that it is usually the woman and children who leave the family home and that the perpetrator remains, so it would be helpful if that were discussed.

10:45

Ben Macpherson (Edinburgh Northern and Leith) (SNP): Good morning, cabinet secretary. I want to refer back to section 1 of the bill and the definition of the new offence. You touched on the concept of distress in your opening remarks, but I want you to pick up on the concept of recklessness and its inclusion in the bill.

In her evidence to the committee, Anne Marie Hicks said:

"It is important to note that it is not recklessness in the way that you or I might regard it in our ordinary lives—as a kind of carelessness. It is a criminal recklessness. It is a criminal disregard in which the person disregards the possible consequences. The courts are used to applying those tests, as are prosecutors. When we deal with a lot of different types of nuanced behaviour, as we will do under the bill, it will be useful to have the concept of recklessness. We have seen that with the stalking offence, which includes other types of behaviour that were perhaps not traditionally criminal. Recklessness has been a very important concept in that."—[*Official Report, Justice Committee,* 6 June 2017; c 7.]

However, we have also received evidence that expressed concerns about the inclusion of recklessness as part of the mental element of the offence in section 1(2)(b)(ii). What would be lost if the offence was one of intent only and did not include recklessness?

Michael Matheson: On your first point, it is important to recognise that recklessness is distinct from carelessness or negligence. Courts are familiar with applying the law in that regard, so interpreting such issues is not unfamiliar territory for them. Having regard to the reckless nature of someone's actions is appropriate for this offence.

For domestic abuse, when it comes to psychological abuse and coercive and controlling behaviour, it could be more difficult to demonstrate intent, which is why recklessness has been included in the bill. It will support the other elements that we have included to enable the coercive and controlling behaviour and psychological elements of the offence to be more effectively prosecuted. The reason why it is included is to support us in tackling the psychological element of abuse, which can be more difficult to demonstrate the intent of.

Ben Macpherson: Those who expressed concerns were concerned about potential overcriminalisation and the safeguards in the bill against that. Anne Marie Hicks specified different elements that would ensure that there was no overcriminalisation or miscarriage of justice, which included mens rea and the need for corroboration. Are you satisfied that there are enough safeguards and that the definitions are as tight as they need to be?

Michael Matheson: I believe that there are enough safeguards. There are the threefold criteria that have to be met before the offence can be engaged; the nature of the way in which we have framed the bill provides a safeguard; and there is the statutory defence in the bill, which can be utilised by an accused. We have sought to achieve a balance, and I believe that the balance is right, including in relation to the mens rea of the offence.

It is worth keeping in mind that a course of behaviour is an offence if it is "likely" to have had an impact on an individual. Particularly when it comes to psychological abuse, it could prove much more difficult to demonstrate beyond reasonable doubt that that has taken place, but we can see where a course of behaviour is likely to have resulted in psychological abuse. We have framed the legislation in such a way as to have more of a focus on the effects that the abusive

behaviour can have on the victim, to capture in particular the psychological abuse that we are focusing on as part of the offence.

Ben Macpherson: Thank you for that clarity.

Oliver Mundell (Dumfriesshire) (Con): Does the cabinet secretary think that it is right to talk about distinguishable "occasions" in the context of this type of behaviour, given what we know about its nature? For our information, why did the Scottish Government decide to pursue the approach of referring to "occasions" in defining the offence?

Michael Matheson: The purpose behind the approach is to enable identification of a course of behaviour to allow the courts to interpret what has happened. For example, the process starts with it having to be demonstrated that abusive behaviour has taken place, and there are further criteria within the offence that mean that consideration must be given to whether there is a course of conduct, which is a concept that is not unfamiliar to our courts. That concept is used in our stalking offence in considering the behaviour of an individual. Something that may seem to be incidental or an isolated occasion but which recurs over a period of time can cumulatively be considered to be a course of conduct that causes concern for an individual. In the case of the stalking offence, it could be that someone sees a person they have concerns about in a shop on one occasion and then, whenever they go to the shop, they find that that person is there again. If it happens on one occasion, people might think that it is okay, but if it happens regularly, it is a course of conduct. That is why we have sought to bring the behaviour together as a course of conduct. We know that that tends to be the way in which victims experience psychological abuse.

Oliver Mundell: Why was the decision taken to attach a number to the occurrences? I can imagine a situation whereby there may be one sustained incident and it is not possible to break it down into a number of different events; it could be one sustained incident that continues over a long period of time. As a result of the bill stipulating that the behaviour has to happen on two occasions, the type of situation that I describe would not be interpreted by the court as a pattern of behaviour.

Michael Matheson: If, for example, someone was subjected to some form of physical abuse on an occasion, that could still be prosecuted as well, so that could still be pursued. We have taken an approach based on a course of conduct because we know that, for many victims of domestic abuse, there may be a course of conduct that takes place over a period of time. That can sometimes involve physical violence, but it can also involve psychological abuse. Such abuse could involve, for example, restricting the times when someone can leave, requiring them to bring back receipts for everything that they purchase when they are out or limiting the time for which they are out. That might not all happen on one occasion, but it could happen over the course of a period of time—it could be over weeks, months or even years. It is for the courts to determine that there is a course of conduct, to view it as a form of abuse and to come to a determination on it.

It is about trying to pick up individual instances on their own that might not be considered to be abusive but, as a course of conduct alongside other factors, would be considered to be abusive behaviour. Therefore, we have sought to frame it in such way that that behaviour must happen on at least two occasions, so that a one-off occasion of abuse is not captured. However, behaviour that is viewed as being unintentional or that took place on a one-off occasion could still be prosecuted by other means. For this offence, the behaviour must happen on at least two occasions in order to establish that there is a course of conduct.

Oliver Mundell: If someone were to deny their partner access to their bank account or to finance and that continued for several weeks, a month or a year, that would not be captured by this offence—or would that be seen as multiple incidents?

Michael Matheson: That denial of access would take place on a number of occasions—it would not happen on just one occasion but would happen several times over time, so a course of behaviour would be demonstrated.

It is reasonable to say that many victims of such crimes do not experience just one form of abuse. Often, if they are being denied access to their bank account, they are also being denied access to a whole range of other things and being treated in an unacceptable way.

That would be one example of abusive behaviour, but it would be a course of behaviour that was played out over a number of occasions.

Oliver Mundell: That is helpful, and I take your point about the multiple types of incidents that occur.

You have talked at length about the three-stage test in establishing the offence. You seem fairly satisfied that that is sufficient, so why has the statutory defence of reasonableness been included in the bill?

Michael Matheson: The purpose behind its inclusion is that there might be rare occasions where "reasonableness" can explain some of the behaviour. The bill therefore provides that the statutory defence of reasonableness will be available for use on those occasions. It will be for the courts to determine whether it applies. The bill provides the safeguard that an accused can

employ that defence if they believe that they can explain that they had acted reasonably at the time.

Oliver Mundell: You do not consider that the opportunity to do that exists when the courts take evidence in considering whether a course of behaviour has been demonstrated. You consider that that defence is needed on top of that.

Michael Matheson: I am conscious that, if we did not have the provision in the bill, people would say that there was no safeguard for an accused to be able to say that they acted reasonably. Given how we have framed the offence and created the statutory defence that is available to an accused, I am confident that we have the balance right. Ultimately, however, it will be down to the courts to determine whether use of the statutory defence is appropriate and acceptable.

Oliver Mundell: The Scottish Government has no concerns whatsoever that the defence might be exploited by the accused in such cases, particularly as another way to slow things down or intimidate or undermine the victim.

Michael Matheson: There is no evidence to suggest that that would be the case. In order to provide greater safeguards for victims, the bill removes the ability of someone accused of the offence of abusive behaviour to precognosce the victim.

On our courts' performance in dealing with domestic abuse cases, it is fair to say that across the country they have, by and large, met the 10-week target that they were set. Therefore, the courts are dealing with such cases relatively quickly.

As I say, I am not aware of any evidence that suggests that, by creating the statutory defence of reasonableness, we would slow the process down. I imagine that many of those who are accused of abusive behaviour will want to put forward their own defence, which might be the statutory defence that is set out in the bill. As I say, that defence will be considered and determined by the courts.

11:00

John Finnie: I want to revisit an issue that has already been touched on. I raise it on the back of what are clearly heightened expectations about what the bill can deliver. The legislation will be quite challenging for the courts to interpret, and you have talked about the training that will go with it, if it is passed. We know that the complainer will be informed by an information campaign and will have the support of certain agencies. Police Scotland will do training; in any case it has a specialist department, as does the Crown Office and Procurator Fiscal Service. However, judicial training has always seemed to be a challenge. Can you guarantee that anyone deliberating on such cases will have specific training on the issues?

Michael Matheson: Training on domestic abuse is part of the induction programme for those who become sentencers. The rules on the continued training of sentencers are overseen by the Lord President through the Judicial Institute for Scotland, which is headed up by Sheriff Alistair Duff. The institute makes available on-going training for sentencers, but it is down to individual sentencers to determine what elements of training to pick up on. Not all of that training is face-to-face classroom-type training. A lot of it can be provided online; there is a suite of online training in the system. The on-going training of sentencers is a matter for the individuals, overseen by the Lord President.

John Finnie: I take no reassurance from that whatsoever. When we were dealing with the Limitation (Childhood Abuse) (Scotland) Bill recently, we were aware that discretion could be exercised to waive the time limit, but that it had been waived only once in 40 years. Judges are still seen as being very socially conservative. Some form of compulsion needs to be associated with the training of judges. The alternative is that we need a roll-out of domestic abuse courts, which I will ask about next. It is about all the issues—criminal and civil—and all the organisations coming together. Judges are still making some very intemperate comments about domestic issues—some wholly unacceptable comments were made last year.

Michael Matheson: There were a couple of different issues there. If training on domestic abuse is made compulsory, I have no doubt that people would say that training on X, Y and Z should also be made compulsory. I think that we need to recognise the opinions of the judiciary and the need to make sure that appropriate training is available to them, with the institute providing that opportunity, overseen by the Lord President.

I am open to considering whether there is a need for further mandatory training at various points in a sentencer's career to refresh their training. However, I am very conscious of the need to make sure that the Government does not direct that. John Finnie and the committee may wish to explore with the institute and the Lord President whether refresher training of sentencers should take place at a particular point. However, as I said, I am conscious that if we start to specify that they must do mandatory training on X, there will be those who will say that we have to provide mandatory training on other areas as well.

John Finnie also mentioned the domestic abuse courts that we have in a number of areas. In the

Highlands, the sheriff principal tries to operate the arrangements by clustering cases together in Inverness. However, sometimes the number of cases coming before the court is insufficient for an on-going standalone domestic abuse court.

John Finnie: But the domestic abuse court is a clustering. People have the perception that it is a building. We are talking about the administrative arrangements to support the process.

Michael Matheson: You have jumped ahead to the point that I was coming to. In Inverness, domestic abuse cases are clustered together because there are not enough such cases to have a domestic abuse court sitting on an on-going basis. In some rural areas, domestic abuse cases are brought together. Sheriffs principal are sensitive to the need to make sure that that happens as and when they can make those arrangements.

There is a line around the Government specifying the training for sentencers. That is not to say that I do not recognise the point that you make about the value of having sentencers who are properly trained so that domestic abuse issues are considered, but the decisions on how that should be progressed should be looked at by the institute and the Lord President, who has responsibility for overseeing the training of our sentencers.

John Finnie: Are there any plans to roll out domestic abuse courts, or the principle of clustering, in conjunction with the bill?

Michael Matheson: Sheriffs principal are doing that at the moment in different parts of the country. In places where an insufficient number of domestic abuse cases prevents a domestic abuse court from sitting on an on-going basis, a range of domestic abuse cases are being clustered together so that they can be dealt with over a period of a day or two or three days. That allows the relevant services to be planned.

In that sense, there are more domestic abuse courts; it is just that in some areas they do not sit on an on-going basis, because they do not have the volume of cases to justify that.

John Finnie: Are civil deliberations relating to those cases part of the clustering, or are they a standalone element?

Michael Matheson: I would have to check on how those civil matters are managed.

Mary Fee: I want to ask about contact. During our evidence taking, we heard about two completely different issues with contact. One of them arises when a child is used by a parent who is the abuser to continue coercive or controlling behaviour; the other arises when a child is denied contact with a parent who has been abused and is no longer resident in the home, with contact disrupted as a means of continuing the abuse. Are you aware of those two issues? Do you feel that the bill adequately tackles them?

Michael Matheson: The first thing to recognise is that the bill is not and was never intended to tackle those issues. I am aware of the concerns that have been raised about the ability of the civil courts to process some of the issues to do with child contact. That is why we have begun the process of reviewing the key legislation that deals with that, which is part 1 of the Children (Scotland) Act 1995. I understand that officials have recently written to key stakeholders such as Scottish Women's Aid to obtain their views on the issue. We intend to have a public consultation on the review of part 1 of the 1995 act as part of our family justice modernisation strategy, which is due to start early next year.

We are aware of the issues that you raise, but the Domestic Abuse (Scotland) Bill is not intended to address them. As part of the family justice modernisation strategy, we intend to have a consultation on how we can address some of the issues of concern in that area.

Mary Fee: That is very helpful.

The Convener: You have touched on training for sentencers, but some of the written submissions that the committee has received include comments on early intervention and the prevention of reoffending. On prevention, the National Society for the Prevention of Cruelty to Children said in its submission:

> "Professionals at the NSPCC expert forum were clear that perpetrator programmes/services are often working with people 'long after the effect': endeavouring to address behaviours that have become entrenched over many, many years."

However, during last week's meeting, the witness from Sacro indicated that the provision of rehabilitation programmes for perpetrators of domestic abuse might be patchy.

Are you satisfied that, across the country, there is sufficient provision of rehabilitation programmes for people who are convicted of domestic abuse?

Michael Matheson: A range of programmes is available. Someone who is given a community payback order can engage in a criminal justice social work programme to address their offending behaviour, and we also have the Caledonian programme, which we operate in a number of areas. We have provided some additional funding to the Caledonian programme so that we can consider how we can roll it out to other parts of the country—we have already commissioned work on how that can be achieved effectively. The Caledonian programme works over an extended period of time—about two years, if I recall

correctly—with perpetrators of domestic abuse, and uses an approach that is based on extensive research.

The Convener: Are you confident that those two approaches, taken together, are sufficient in terms of rehabilitation programmes?

Michael Matheson: Do we want to do more? Of course. Will people always say that we should do more? Of course. However, I am confident that we have a broad spread across the country. What we need to do is ensure that the programmes are effective in working with offenders to address their offending behaviour and have a good evidence base. The Caledonian programme has a strong evidence base that has been built up over a number of years. That is why we have commissioned a specific piece of work to see how we can roll it out to other parts of the country. If I recall correctly, that piece of work is due to report later this year, and it will inform our thinking about rolling the programme out further.

The Convener: On early intervention, the NSPCC talks about

"endeavouring to address behaviours that have become entrenched over many, many years"

and says:

"Earlier intervention to address coercive controlling behaviour/gender based violence within young people is critical and we would hugely welcome a commitment to funding appropriate prevention and early intervention programmes for young people with problematic behaviour in relation to gender based violence."

What is the Scottish Government doing to ensure that early intervention programmes, including voluntary ones, are available to help prevent domestic abuse?

Michael Matheson: The first thing that I should say is that the bill is not intended to deal with that particular issue; it is about creating a new offence. The equally safe strategy is the Government's strategy for tackling gender-based violence. A course of work is being taken forward in relation to that, led by my colleague Angela Constance, which involves a range of programmes to tackle gender-based violence, including awareness programmes that are designed to ensure that people have respectful relationships. For example, from a justice perspective, the stuff that we do around mentors and violence prevention—although it is not specifically related to the equally safe strategy—is about ensuring that young people have respectful relationships and that they address inappropriate behaviour in the school environment. That work is being done across most of the local authority areas in Scotland where the council has sought to participate in the programme.

The strategy that tackles gender-based violence is the equally safe strategy, which sets out the range of work that is being taken forward by Government. The implementation group, which has a range of stakeholders on it, is responsible for considering the various strands of work that come from the strategy.

The Convener: To a large extent, the issue has arisen as a result of the Scottish Police Federation's response, which stated:

"As a general observation ... Almost unlike any other crime the ... policy approach to domestic abuse is one geared almost exclusively towards punishment. We find this at variance with diversionary and educational activities in most other crimes. We simply ask whether a long term strategy that seems built on prosecutorial activities is likely to bring about the attitudinal changes that are necessary to help eradicate domestic abuse."

I suppose that the federation is looking for some hint or cognisance in the bill that the two go hand in hand if the proposed legislation is to be effective in eradicating this pretty vexing and horrific offence.

11:15

Michael Matheson: I think that we are confusing two different things. The first is the issue of prevention programmes and tackling gender-based violence. That is the aim of the equally safe strategy, which sets out a course of work to tackle gender-based violence that the Government will take forward with the other agencies.

The issue that I think you are touching on is the policy on the prosecution of offences, which is a different matter. It is up to the Lord Advocate to determine how prosecutors deal with domestic violence cases and whether they put them to the court or offer some alternative to or diversion from prosecution. I am conscious that some believe that there are domestic violence cases going to court that should be dealt with by other means, but any decision on changing prosecution policy would be a matter for the Lord Advocate. We are therefore talking about two different issues, although they are related in some ways.

Just to be clear, are you suggesting that there should be a change in prosecution policy and that you believe that certain cases that are presently being referred to the courts should not be?

The Convener: No. I am picking up on the federation's comments about the policy being too rigidly applied and no other options being looked at although they might be more effective in individual circumstances. After all, as was made quite clear in some of the evidence that we took, this is all about individual circumstances. An inane comment in one set of circumstances might be exactly that—something harmless—while in other

circumstances it might be really threatening and a classic example of coercive behaviour.

It might be helpful to tease this out. Although the bill is welcome, the issue should always be looked at in terms of whether there might be a better way of dealing with the circumstances in question and whether those circumstances tick the box for the behaviour that the bill is supposed to address. You have rightly said that, at the end of the day, it is a prosecutorial decision and a decision for the judge.

Michael Matheson: There is absolutely no doubt that the way in which the police have been dealing with domestic abuse has changed dramatically over the past 20 years. I remember as a member of the justice committee in the first session of the Parliament—that is nearly 18 years ago now—taking evidence from the police that suggested that they still considered some aspects of domestic abuse to be private matters. You would never hear that nowadays.

Moreover, prosecutors are taking more of these cases to court, largely because more such cases are being reported to them. Some people have suggested that they should have more flexibility in determining which cases should go before the courts and which should be put forward for alternatives. If the committee is suggesting that, for the Parliament to support the bill, our prosecutors should reflect on their existing prosecution policy, that is a matter for the committee; however, such a determination would be for the Lord Advocate to consider once any new legislation was in place. The bill does not deal with that matter, and I am not aware of any plans for prosecutors to change their policy on domestic abuse matters. It is for the committee to reflect on the evidence that it has received and to highlight any need to reconsider the present prosecutorial arrangements for dealing with these cases and any changes that need to be made. At this stage, I am not aware of any plans by the Crown Office to do that.

The Convener: As you will know, the Crown Office and Procurator Fiscal Service expressed concern about the rigidity with which the provisions would be applied, although they would be applied robustly. It has been good to tease that out.

The Finance and Constitution Committee has provided us with a summary of the evidence that has been submitted on the bill's financial memorandum, indicating the high level of uncertainty that is highlighted in a number of submissions with regard to the provision of exact estimates of the cost of introducing the proposed offence. What reassurance can you provide that adequate resources will be made available to support the bill's effective implementation?

Michael Matheson: Whenever a new offence is introduced, it can be difficult to quantify its exact financial implications. As a result, we have looked at what we consider to be the most reasonable financial consequences arising from the bill. For example, we have used a central estimate of 6 per cent, which is based on the impact that we know the legislation has had in England and Wales. The estimate in the financial memorandum goes from 2 per cent up to 10 per cent, and we have taken 6 per cent as a broad figure that we believe reflects the overall financial implications.

Of course, if the bill is approved by the Parliament, its provisions will be introduced in stages. We intend to introduce the first elements in 2018-19 and the remaining elements in 2019-20. As we get closer to the bill's implementation, we will look at refining the financial information and at the financial support that is necessary to ensure that the legislation is effectively resourced and implemented.

The Convener: As members have no further questions, that concludes our oral evidence taking on the bill. The committee will consider its draft stage 1 report in September.

I thank the cabinet secretary and his officials for attending. Our next meeting will be on Tuesday 5 September 2017.

11:22

Meeting continued in private until 12:05.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba